Neutral Citation Number: [2010] EWCA Civ 482

Case No: T3/2009/2581,2584,2680 & 2682

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)
Mr Justice Silber
2009 EWHC 2959 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2010

Before :

MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE SULLIVAN

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Between :

(1) Bisher Al Rawi	**Appellants**
(2) Jamil El Banna	
(3) Richard Belmar	
(4) Omar Deghayes	
(5) Binyam Mohamed	
(6) Martin Mubanga	
- and -	
(1) The Security Service	**Respondent**
(2) The Secret Intelligence Service	
(3) The Attorney General	
(4) The Foreign & Commonwealth Office	
(5) The Home Office	

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Dinah Rose QC, Richard Hermer QC and Charlotte Kilroy (instructed by Birnberg Peirce & Co) for the 1st to 4th Appellants
Leigh Day & Co for the **5th Appellant**
Michael Fordham QC and Naina Patel (instructed by **Christian Khan Solicitors**) for the 6th Appellant
Jonathan Crow QC, Rory Phillips QC, Daniel Beard and **Karen Steyn (**instructed by **The Treasury Solicitor)** for the **Respondents**
John Howell QCand Jessica Boyd on behalf of the Intervenors **Liberty and Justice**
Guy Vassall-Adams on behalf of the **Media Intervenors**

Hearing dates : 8 & 9 March 2010

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Judgment

Lord Neuberger MR:

This is the judgment of the court, to which all members have contributed.

The issue to be resolved

1. The issue on this appeal is whether Silber J was right to conclude, as the defendants contend, that it is open to a court in England and Wales, in the absence of statutory authority, to order a closed material procedure for part (or, conceivably, even the whole) of the trial of a civil claim for damages in tort and breach of statutory duty.

2. A closed material procedure has been defined by agreement between the parties, at least for present purposes, as being:

> "A procedure in which:-
>
> (a) a party is permitted
>
> (i) to comply with his obligations for disclosure of documents, and (ii) to rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties
>
> if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'); and
>
> (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and
>
> (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest.
>
> For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

3. The "party" referred to in that definition will almost always be the Crown or some arm or emanation of the Government. A special advocate is a lawyer with rights of audience, who has been cleared by the Government to see closed material, and who is appointed by the Attorney General in a case where closed material is involved. The special advocate's role was succinctly described by Sedley LJ in *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, paragraph 17, as being "to test by cross-examination, evidence and argument the strength of the case for non-disclosure", and, if the case for non-disclosure is made out, "to do what he or she can to protect the interests of [the other party], a task which has to be carried out without taking any instructions [from the other party or his lawyers] on any aspect of the closed material". Thus, although the special advocate is engaged to protect the

interests of the other party in the litigation, he or she does not actually act for, and cannot normally take instructions from, that other party.

4. The issue is raised as one of general principle. However, perhaps unsurprisingly, Ms Rose QC and Mr Fordham QC, for the claimants, and Mr Crow QC for the defendants, have relied in the course of their submissions on the facts of the instant case as an example of why the issue should be resolved in the way that they respectively contend. A very brief summary of the factual background to this appeal is therefore appropriate.

The factual background

5. The six claimants are individuals who were detained at various locations, including the United States detention facility in Guantanamo Bay. Although their claims are, of course, not identical, it is sufficient for present purposes to say that they each contend that, as a result of their respective detention and alleged mistreatment while detained, they have valid claims under at least some of the following heads, namely, false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office, and breach of the Human Rights Act 1998. The claimants brought their claims by issuing claim forms, together with fully pleaded Particulars of Claim, in the Queen's Bench Division of the High Court. The defendants to the claims are the Security Service, the Secret Intelligence Service, the Foreign and Commonwealth Office, the Home Office, and (in a representative capacity) the Attorney General ("the defendants"). The claims are based on the contention that, to put it in broad terms, each of the defendants caused or contributed towards the alleged detention, rendition and ill treatment of each of the claimants.

6. The defendants then filed an "Open Defence", in which, while admitting that each of the claimants was detained and transferred, the defendants put in issue any mistreatment which the claimants allege, and, in any event, denied any liability in respect of any of the claimants' detention or alleged mistreatment. Paragraph 1 of the Open Defence explains that "there is material not pleaded in this Open Defence which [the defendants] wish to contend that the court should consider but which cannot be included without causing real harm to the public interest." In paragraph 3, it is stated that there is a "Defence", which "pleads more fully to the Particulars of Claim and includes material the disclosure of which the defendants consider would cause real harm to the public interest". Paragraph 3 goes on to explain that "[w]here a paragraph of the Particulars of Claim is not pleaded to in this Open Defence, it will have been the subject of pleading in the Defence" and that "some of the pleadings in this Open Defence are more fully pleaded to [sic] or qualified by statements in the Defence."

7. The Open Defence makes it clear that the defendants wish the case to proceed throughout on the basis that it includes what may be characterised as a closed element. Thus, at least on the face of it, during the period prior to trial, there would be parallel open and closed pleadings, parallel open and closed disclosure and inspection, parallel open and closed witness statements, and parallel open and closed directions hearings. Similarly, at the trial, the hearing would be in part open and in part closed, no doubt with some documents and witnesses being seen and heard in the open hearing and others in the closed hearing (and some witnesses conceivably giving evidence at both hearings). After trial, there would be a closed judgment and an open judgment, which would be in substantially the same terms save that those passages in

the closed judgment which referred to or relied on closed material would be excluded from the open judgment. In relation to the open elements of the proceedings, the claimants would be represented by their solicitors and counsel in the normal way; however, in relation to the closed elements, their interests would, in effect, be protected by special advocates.

8. The claimants object to the course proposed by the defendants, contending for the normal approach in cases where the Crown or Government emanations are parties and consider that they have relevant documents in respect of which public interest immunity ("PII") might be claimed, and where the defendants could call relevant oral evidence which might not be able to be given on public interest grounds.

9. The defendants accept that the PII procedure is well established, but they contend that the course which they favour is permissible in any civil case, at least before a judge sitting without a jury, and that it may well be appropriate in this case, where there is a very substantial amount of potentially relevant material which may be subject to PII. The evidence filed on behalf of the defendants suggests that there may be as many as 250,000 potentially relevant documents, and that PII may have to be at least considered in respect of as many as 140,000 of them. It is also said by the defendants that the PII exercise may take three years before the relevant Ministers can conscientiously decide in respect of which documents PII can properly be claimed. The effort, cost, and delay involved in such an exercise, argue the defendants, may well justify a different approach, such as that presaged by the Open Defence.

10. The issue came before Silber J, and he decided that, as a matter of principle, it was open to the court to order a closed material procedure in relation to a civil claim for damages – [2009] EWHC 2959 (QB). The claimants' appeal is supported by Justice and Liberty, represented by Mr Howell QC, and by Guardian News and Media Ltd, Times Newspapers Ltd, and the BBC, for whom Mr Vassall-Adams appears.

Summary of conclusion

11. We have concluded that we should allow this appeal, and that we should say firmly and unambiguously that it is not open to a court in England and Wales, in the absence of statutory power to do so or (arguably) agreement between the parties that the action should proceed on such a basis, to order a closed material procedure in relation to the trial of an ordinary civil claim, such as a claim for damages for tort or breach of statutory duty.

12. The primary reason for our conclusion is that, by acceding to the defendants' argument, the court, while purportedly developing the common law, would in fact be undermining one of its most fundamental principles. In addition, even if it would otherwise be a legitimate development of the common law, it would be neither permissible in the light of the Civil Procedure Rules ("CPR") nor practical, in terms of effective case management or costs management, to adopt the defendants' proposals.

13. We propose to develop these points in turn, and then to deal with the cases on which the Judge relied to justify the contrary conclusion. However, before doing so, it is convenient to identify some relevant basic principles of common law, to expand a

little on the well established practice and procedure involved when PII is claimed by the Crown, and to explain the basis for the more recent closed material procedure.

Principles which are involved in this case

14. Under the common law, a trial is conducted on the basis that each party and his lawyer, sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or *audi alterem partem*, the other rule being the rule against bias or *nemo iudex in causa sua*). As the Privy Council said in the context of a hearing which resulted in the dismissal of a police officer, "[i]f the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them" - *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337.

15. More recently, in *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128, paragraph 5, Lord Bingham of Cornhill traced the history of the common law "right to be confronted by one's accusers". He explained how this right, having been abrogated during the 16th century by the Court of the Star Chamber, had been effectively established during the 17th century. He relied in particular on a civil case, *Duke of Dorset v Girdler* (1720) Prec Ch 531, 532. In the following paragraph, he identified a couple of common law exceptions to the right, namely "dying declarations and statements part of the *res gestae*", and certain statutory exceptions. He then explained that the right was one which was enshrined in the Constitutions of various common law jurisdictions, including the United States and New Zealand. Turning to the specific issue before the House, Lord Bingham said that, although he appreciated the strong practical case for granting anonymity to prosecution witnesses in certain cases - [2008] 1 AC 1128, paragraphs 26-27 - he rejected the contention that the courts should sanction such a course, emphasising "that the right to be confronted by one's accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the defendant" - *ibid*. paragraph 34.

16. Another fundamental principle of our law is that a party to litigation should know the reasons why he won or lost, so that a judge's decision will be liable to be set aside if it contains no, or even insufficient, reasons. As Lord Phillips MR explained in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, paragraph 16, "justice will not be done if it is not apparent to the parties why one has won and the other has lost."

17. A further fundamental common law principle is that trials should be conducted in public, and that judgments should be given in public. The importance of the requirement for open justice was emphasised by the House of Lords in *Scott v Scott* [1913] AC 417 and *Attorney General v Leveller Magazine* [1979] AC 440, 449H-450B. It was recently discussed by Lord Judge CJ in *R(Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, paragraphs 38-39, where he made two points. First, "[t]he public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law." Secondly, that "[i]n litigation, particularly

litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself."

18. Connected to these fundamental principles are two other rules developed by the common law. First, a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments for trial. Secondly, a party in civil litigation should be informed of the relevant documents in the control of his opponent, through the medium of what is now called disclosure; this helps ensure that neither party is unfairly taken by surprise, and that the court reaches the right result, as neither party is able to rely on a selection of documents which presents the court with a misleading picture.

19. Rules of court have always given the court a measure of discretion in relation to matters such as the extent of disclosure and late evidence, but such discretions have to be exercised so as to ensure the trial process is fair (which, at least following the introduction of the CPR, includes the need for proportionality). As Lord Salmon said in *Science Research Council v Nasse* [1980] AC 1028, 1071e-f, if a tribunal "is satisfied that it is necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then ... the law requires that such an order should be made."

20. The rules are now enshrined in the CPR. Thus, CPR Parts 15 and 16 contain the rules relating to the filing of a defendant's defence, requiring it to set out his case. CPR Part 32, which is a more recent development, requires the service of witness statements containing the evidence of any witnesses who are to give evidence, and CPR Part 31 contains the rules with regard to disclosure and inspection of documents.

21. At least in the case of some of these principles, the common law has long accepted that there can be exceptions. Thus, in *Scott* [1913] AC 417, Viscount Haldane LC, while affirming, and applying, the open justice principle, made it clear that a court could sit in private where "justice could not be done at all if it had to be done in public", immediately went on to say, the court considering the issue "must treat it as one of principle, and as turning, not on convenience, but on necessity" – [1913] AC 417, 437-438. (see too per Lord Diplock in *Leveller* [1979] AC 440, 450B-F).

Public interest immunity

22. Similarly, in relation to disclosure, the courts have long recognised that some documents, while relevant, even crucial, to the issues between the parties, may be immune from disclosure on various public interest grounds. Thus, there is legal professional privilege (based on the public interest of people being able to seek legal advice) and "without prejudice" privilege (based on the public interest in parties settling their disputes), and, as already mentioned and particularly relevant for present purposes, there is PII.

23. The development of the law relating to PII can be traced from *Duncan v Cammell Laird and Co Ltd* [1942] AC 624 (which contains a summary of the previous cases on

the topic in the speech of Viscount Simon LC at [1942] AC 624, 629-636), through *Conway v Rimmer* [1968] AC 910, to *R v Chief Constable, West Midlands ex p Wiley* [1995] 1 AC 274. PII has become particularly significant since section 28 of the Crown Proceedings Act 1947 removed the Crown's exemption from discovery in civil proceedings, while expressly recognising PII. The disclosure exercise where PII may be involved potentially involves three stages, before the court is involved.

24. First, the relevant Minister (or his lawyers) must decide whether the documentary material in question is relevant to the proceedings in question – i.e. that the material should, in the absence of PII considerations, be disclosed in the normal way. Secondly, the Minister must consider whether there is a real risk that it would harm the national interest if the material was placed in the public domain. The third step is for the Minister to balance the public interests for and against disclosure. If the decision is, that the balance comes down against disclosure, then the Minister states, in a PII certificate, that it is in the public interest that the material be withheld.

25. As decided in *Conway* [1968] AC 910 and explained in *Wiley* [1995] 1 AC 274, it is then for the court to weigh, as Lord Simon of Glaisdale put it, "the public interest which demands that the evidence be withheld ... against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material", and if "the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted" – *R v Lewes Justices ex p Secretary of State for the Home Department* [1973] AC 388, 407. On the other hand, if the court concludes that the latter public interest prevails, then the document must be disclosed, unless the Government concedes the issue to which it relates – see per Lord Hoffmann in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, paragraph 51. As Lord Woolf said in *Wiley* [1995] AC 274, 306H-307B, even where material cannot be disclosed, it may be possible, and therefore appropriate, to summarise the relevant effect of the material, to produce relevant extracts, or even to produce the material "on a restricted basis".

26. When conducting the balancing exercise between the two competing aspects of the public interest, the court may, in an appropriate case, inspect the material before reaching a conclusion on the issue. In such a case, it has become accepted practice, at least where it is appropriate and fair to do so, for special advocates to be appointed to assist the court on the issue of whether the Crown's claim for PII should be upheld. As Lord Bingham of Cornhill explained in the criminal case of *R v H* [2004] UKHL 3, [2004] 2 AC 134, paragraph 22, even though there is "little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate" in such a case, "novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure the protection of a criminal defendant's right to a fair trial."

The closed material procedure

27. In relation to certain classes of case, the legislature has made further encroachments into these principles. Private hearings and judgments are statutorily mandated in many family and Court of Protection proceedings, as recently discussed in *A v Independent News and Media Ltd* [2010] EWCA Civ 343. More relevantly for present purposes, statute has mandated what has come to be known as a closed material procedure in

certain specified circumstances. Two well known examples are to be found in schedule 1 to the Terrorism Act 2005, which deals with control orders, and schedule 7 to the Counter-Terrorism Act 2008, which is concerned with financial restriction proceedings (the latter of which is considered in our judgments in *Bank Mellat v HM Treasury* [2010] EWCA Civ 483, which we are handing down today).

28. Paragraph 4 of schedule 1 to the 2005 Act requires rules of court to be made to deal with control order proceedings. By virtue of paragraph 4(2)(b) of schedule 1 to the 2005 Act, such rules may make provision for proceedings to be conducted "in the absence of any person, including a relevant party to the proceedings or his legal representative". This has resulted in CPR Part 76, which contains detailed provisions dealing, for instance, with "Hearings in private", "Appointment of a special advocate", "Modification of the general rules of evidence and disclosure", "Closed material" and "Judgments" (CPR 76.22, 76.23, 76.26, 76.28 and 76.32 respectively). CPR 76.2 provides that "the overriding objective [in CPR 1.1] and, so far as relevant, any other rule, must be read and modified and given effect in a way which is compatible with the duty" imposed on the court to "ensure that information is not disclosed contrary to the public interest". Similar, but not identical, rules are to be found in CPR Part 79, which was mandated by Part 7 of the 2008 Act.

29. Closed material procedures are also mandated in other tribunals by legislation. Thus, there is rule 6 of the Parole Board Rules 2004, which specifically enables the Board to consider material which should be "withheld from the prisoner on the ground that its disclosure would adversely affect national security, the prevention of disorder or crime, or the health or welfare of the prisoner", as discussed in *R(Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, paragraph 55. Also, rule 54(2) of the Employment Tribunals Regulations permits a tribunal, if it considers it to be expedient in the interests of national security, to order, inter alia, that the whole or part of any proceedings before it are conducted in private, that the claimant is excluded from the whole or part of the proceedings and that all or part of the tribunal's reasoning is kept secret (and which we consider in our judgments handed down today in *Tariq v The Home Office* [2010] EWCA Civ 462.

The objection to the closed material procedure in principle

30. In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, a litigant's right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial.

31. A private hearing in an individual case, with all litigants and their legal representatives present, cannot be said to involve a denial of justice in that case. It is contrary to the public interest that trials should be conducted in private, but, at least absent special circumstances, it could not normally be suggested that any litigant risks suffering an injustice in the conduct or outcome of a particular case simply because

the trial takes place in private, although he may of course have cause for complaint if he cannot publicise the contents of the evidence, argument or judgment in the case.

32. A litigant's right to disclosure of documents is not a fundamental right in the same way as the right to know the evidence and argument presented to the judge and the reasons for the judge's decision. Quite apart from this, if PII, legal professional privilege or "without prejudice" privilege is claimed in respect of a relevant document, the trial process itself is not impugned, as it is still fair: all parties are in the same position in that none of them can rely on the document. That cannot be said where the trial is conducted partly, let alone wholly, through a closed material procedure.

33. Different considerations may apply where the proceedings do not only concern the interests of the parties to the litigation, but they also have a significant effect on a vulnerable third party, or where a wider public interest is engaged. Thus, where the case directly impinges on the interests of a child, it may be justifiable for the court to see a document which is not seen by the parties to the proceedings. In *re K (Infants), Official Solicitor to the Supreme Court v K* [1965] AC 201, 240-241, Lord Devlin said "[w]here the judge sits purely as an arbiter and relies on the parties for information, the parties have a correlative right that he should act only on information which they have had the opportunity of testing. Where the judge is not sitting purely, or primarily, as an arbiter, but is charged with the paramount duty of protecting one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail."

34. More recently, the point was expressed in these terms by Baroness Hale of Richmond in *Secretary of State for the Home Department v MB* [2008] 1 AC 440, paragraph 58: "If ... the whole object of the proceedings is to protect and promote the best interests of the child, there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise."

35. Similarly, in *Roberts* [2005] 2 AC 738, paragraph 48, Lord Woolf CJ referred to the Parole Board having "a triangulation of interests: the Board's obligations to the prisoner and its obligation to protect society and, as part of the latter obligation, its obligation to protect third parties so far as it is practical to do so … ." As a result, even without statutory rules which permitted a closed material procedure, such a procedure would, he implied, have been permissible, because of the public interest to which the board had to have regard. At [2005] 2 AC 738, paragraph 56, Lord Woolf said, to similar effect, that the board should have the power to consider documents which were not seen by the relevant prisoner "to enable the board to perform its statutory duty to protect the public."

36. In our view, such considerations cannot apply to proceedings such as those in the present case. While they may well raise points of some interest and importance to the public and in the eyes of the media, the present proceedings involve claims for damages in tort and breach of statutory duty by a number of claimants against a number of defendants (it is true that all those defendants are emanations of the Crown, but that does not alter the nature or characterisation of the proceedings). They are proceedings in which a judge will in due course be called upon to sit "purely … as an

arbiter" between the claimants and the defendants and no "triangulation of interests" will be involved.

37. We accept, of course, that the court has inherent jurisdiction to develop the common law so far as its procedures are concerned. However, as Sir Jack Jacob put it in his Hamlyn lectures on *The Inherent Jurisdiction of the Court* (1970) Current Legal Problems 23, 24, that jurisdiction "is part of the procedural law, both civil and criminal, and not of substantive law". Lord Denning MR said in *re Grosvenor Hotel, London (No 2)* [1965] 1 Ch 1210, 1243C that "the Rule Committee can make rules for regulating and prescribing the procedure and practice of the court, but they cannot alter the rules of evidence, or the ordinary law of the land". It is true that, by virtue of paragraph 4 of schedule 1 to the Civil Procedure Act 1997, the Civil Procedure Rule Committee can now "modify the rules of evidence as they apply to any proceedings" where the CPR apply. However, in our opinion, the course proposed by the defendants in this case would involve not merely altering the rules of evidence: it would involve altering what Lord Denning called "the ordinary law, of the land", namely (for the reasons already explained) fundamental principles of the law of England and Wales.

38. We would respectfully echo Lord Bingham's approval of, and reliance on, two observations of Lord Shaw of Dunfermline in *Scott* [1913] AC 417, 477-478 and 485, cited in *Davis* [2008] 1 AC 1128, paragraph 28. Lord Shaw said that "[t]here is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of the judges themselves", and that "[t]he policy of widening the area of secrecy is always a serious one, but this is for Parliament, and those to whom the subject has been consigned by Parliament to consider". Those observations were made by Lord Shaw in relation to hearings held in private, and cited by Lord Bingham in relation to concealing from a party (but not from his legal advisers) the identity of witnesses giving evidence in public. They surely apply with even greater force to the suggestion that the common law should permit ordinary civil claims not merely to be conducted in private, but in the absence of a party and his legal advisers. As Lord Brown of Eaton-under-Heywood ringingly observed in *Davis* [2008] 1 AC 1128, paragraph 66, "It is the integrity of the judicial process which is at stake here. This must be safeguarded and vindicated whatever the cost."

39. Lord Bingham said in *Roberts* [2005] 2 AC 738, paragraph 30, that if Parliament "intends that a tribunal shall have power to depart from, ordinary rules of procedural fairness, it legislates to confer such power in clear and express terms and it requires that subordinate legislation regulating such departures should be the subject of Parliamentary control. It follows this practice even where the security of the nation is potentially at stake". In relation to tribunals which have to take into account third party interests or the public interest, it may be that the majority of the opinions in that case suggest that this observation is arguably too broadly expressed, but we can see no support from those opinions for the notion that the observation is not applicable to ordinary common law litigation where the judge is acting as an "arbiter" between the parties.

40. The fact that a closed material procedure is adopted when the court is considering whether or not to give effect to a PII certificate, even where the issue arises in ordinary civil litigation (or in criminal proceedings), is nothing to the point. The issue

at such a hearing is essentially *ex parte*: it is whether the material in question is immune from disclosure and inspection on the ground that the public interest would be harmed by its release into the public sphere. Further, the issue at such a hearing necessarily concerns material which at least arguably should not be shown to the other party, so that material is the very subject matter of the hearing: that is not true in a case where the material may be relevant, even very important, to the issue or subject matter of the hearing. Even more importantly for present purposes, the hearing is not the trial of the action (or the prosecution): it is merely concerned with an interlocutory matter ahead of the trial, and is bound to result in the material either being available for use in the litigation (or at the criminal trial) by both parties or by neither party.

The effect of the Civil Procedure Rules

41. Even if it was, as a matter of principle, open to the court to adopt a closed material procedure in an ordinary civil claim in the absence of all parties consenting, it seems to us that, in the light of the existence and terms of the CPR, there would be no jurisdiction to do so. This conclusion is reinforced when one turns to consider the existence and terms of the legislation which permits the court to adopt a closed material procedure.

42. In *Raja v Van Hoogstraaten (No 9)* [2008] EWCA Civ 1444, [2009] 1 WLR 1143, paragraph 74, this court agreed with Sir Jack Jacob's statement in his Hamlyn lectures (*op. cit.*), at 50-51, that the court's inherent powers "are complementary to its powers under rules of court; one set of powers supplements and reinforces the other". The Court of Appeal then went on to approve a later statement by Professor Martin Dockray in *The Inherent Jurisdiction to Regulate Civil Proceedings* (1997) 113 LQR 120, 128 that "the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid rule of the Supreme Court". At [2009] 1 WLR 1134, paragraphs 78-79, the court confirmed that this applied in relation to the CPR in the same way that it applied when the previous rules, the RSC, were in force.

43. In our judgment, the defendants face very serious difficulties in their contention that the closed material procedure is compatible with the CPR. The provisions regarding the preparation and service of a defence, and in particular CPR 16.5 which requires a defendant to state which allegations he admits and denies, his reasons, and his alternative case (if any), are inconsistent with the notion of a closed defence as contemplated in the defendants' "Open Defence" in this case. The fact that the court can, under CPR 6.28, dispense with the service of any document does not seem to be an answer to this point, as it is concerned with the service rather than the contents, of a document, and it does not undermine the obvious point that its contents should be communicated to the other parties to the litigation (unless, for instance, they cannot be found or are evading service).

44. As already mentioned, the extent of any disclosure ordered by the court is a matter of discretion (CPR 31.5). However, in our view, the discretion is to be exercised in a manner which accords with what Lord Salmon said in *Nasse* [1980] AC 1028, 1071e-f, namely, if the court "is satisfied that it is necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then ... the law requires that such an order should be made." This is reinforced by CPR 1.1, the

overriding objective, which requires the court to deal with cases "fairly" and to ensure, as far as possible, "that the parties are on an equal footing".

45. We would make the same points about CPR 32.2 which states that "the general rule" is that evidence is to be given orally at trial, or, if not at trial, in writing, and CPR 32.4 and 32.5 which provides that witness statements (or, failing that, witness summaries), i.e. statements containing the substance of the evidence to be given by witnesses, should be served on the other parties.

46. It is also germane to note that CPR 39.2(1) provides that "the general rule is that a hearing is to be in public" and CPR 39.2(3) sets out the exceptions, which in paragraphs (b) and (c) includes cases involving "matters relating to national security" and "confidential information ... and publicity would damage that confidentiality". There are no such qualifications in relation to the general provisions of the CPR relating to statements of case, disclosure, inspection or witness statements, let alone to evidence and argument being given and heard in the presence of all parties.

47. The notion that a closed material procedure is incompatible with the general provisions of the CPR is confirmed by the provisions of CPR Parts 76 and 79. In particular, they both effectively acknowledge that such a procedure would, at the very least, not be reconcilable with the overriding objective as set out in CPR 1.1(see e.g. CPR 76.2). Further, there is the apparent acceptance that the general rules about evidence and disclosure have to be modified (see e.g. CPR 76.26).

48. Again, there may be necessary exceptions where the very subject matter of the hearing is material which should, or arguably should, not be shown to the other party, as in the PII procedure itself. In such a case, it is, as a matter of inevitability, necessary to have a closed material procedure. It is not a question of desirability or convenience: the hearing simply could not occur, as a matter of inevitable logic, other than on a closed basis. In an ordinary civil claim, that is not the position. In any event, and crucially, the closed procedure would not be in connection with, let alone part of, the trial, but would be part of the disclosure process.

Practical considerations

49. Although we are asked to determine the preliminary issue as a matter of principle, rather than determining whether a closed material procedure could be adopted in this case, it is helpful to consider what are said by the defendants to be the potential advantages of adopting a closed material procedure. Mr Crow submits that there would be two potential advantages. The first is that, in an appropriate case, such a procedure would be more likely to achieve a fair result, because the court would be able to rely at trial on relevant material whose disclosure would, if the PII procedure was adopted, be excluded from the trial process altogether. The second advantage is said to be that, at least in cases such as the present, the PII procedure would be unmanageable in practice, and adopting a closed material procedure would be the only way of bringing the case to trial economically and expeditiously.

50. There is obvious attraction in the submission that the court should have power to order a closed material procedure hearing in a case in which it is satisfied that justice would be more likely to be served by adopting such a procedure. However, even putting to one side the objections in principle to the closed material procedure, the

submission begs the important practical question as to how the court would be able to satisfy itself that adopting such a procedure would be more likely to achieve a fair result.

51. It is possible to envisage a procedure which required the court to be satisfied, after having first carried out the balancing exercise laid down in *Wiley* [1995] 1 AC 274, that:

- disclosure of certain material would result in a real risk of harm to an important public interest;
- the only alternative to excluding the material altogether would be to consider it in a closed material procedure;
- adopting a closed material procedure would better enable the court to deal justly with the case in accordance with the overriding objective, than would excluding the material.

52. When deciding whether adopting a closed material procedure would better enable it to deal justly with the case, the court would have to consider a wide range of factors, and not simply the desirability of taking account of as much relevant evidence as possible. Thus, weight would have to be given to factors such as the significance of the material that would otherwise have to be excluded, the extent to which the party excluded from the closed hearing would be able to respond to the material, the degree to which the special advocate might be able to mitigate the disadvantage to the excluded party, and the desirability of justice being seen to be done in an open procedure. Subject to these considerations, such a closed material procedure would be capable of providing the first of the claimed advantages; i.e. it would be more likely to achieve a fair result.

53. However, such a closed material procedure would not avoid the need to carry out the "unmanageable" PII exercise, and that is why it is not the closed material procedure as defined in the preliminary issue. It is only because the closed material procedure as defined avoids the need to carry out the PII exercise that it is said to be capable of achieving the second advantage: making the procedure "manageable", and thereby enabling a trial within a reasonable time.

54. There is thus an inherent conflict between the two claimed advantages of the defendants' proposed closed material procedure. If the court has to decide whether the trial is more likely to be fair because the judge will be able to rely on relevant material which would be excluded from the trial process altogether under the PII procedure, then the defendants' proposals would be more expensive and time consuming, as the exercise of deciding whether to have a closed material procedure would be an add-on to the PII procedure. If, on the other hand, the defendants are suggesting that the closed material procedure is to be adopted without first carrying out the PII procedure, it may be potentially less expensive and time consuming in some cases, but it would mean that material which would not be excluded from the trial process on a traditional PII procedure will not be disclosed to the claimants, but will be considered by the court in closed session, which would be to the claimant's obvious disadvantage.

55. The preliminary issue is silent as to the role of the special advocate, but it raises the same conundrum for the defendants' case. In those closed material procedures

authorised by statutes such as the 2005 Act, the special advocate's most valuable function is often at the disclosure stage – i.e. in assisting the court in deciding whether there is any material for which PII is claimed which should in fact be released into the open proceedings. If, under the defendants' proposals, the special advocate's first task will be to help the court to ascertain whether PII has properly been claimed in respect of any document, there will be no reduction in the "unmanageable" workload, but an increase in his work and a partial shifting of the burden onto the special advocate and the court. On the other hand, if the workload is to be reduced, because the special advocate's duties will not include considering whether PII has properly been claimed, then documents which would have been disclosed to the claimants on a PII procedure will remain closed. The special advocate, unable to take a claimant's instructions, would, in dealing with such material in a closed hearing, be a particularly poor substitute for the claimant's own advocate in an open hearing.

56. While considering practical considerations, it is helpful to stand back and consider not merely whether justice is being done, but whether justice is being seen to be done. If the court was to conclude after a hearing, much of which had been in closed session, attended by the defendants, but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants, but not the claimants or the public, that the claims should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants, whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater.

57. The contention that the defendants' proposed procedure should not be adopted is reinforced by recent observations of the Joint Committee on Human Rights on *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation* (HL Paper 64 HC 395). In paragraph 15 of the report, the Committee referred to the fact they had previously "maintained an open mind" as to whether "the control orders regime can be made to operate in a way which is compatible with the requirements of basic fairness which are inherent in both the common law and Article 6 ECHR", and then said that its "assessment now, in the light of five years' experience of the operation of the system, is that the current regime is not capable of ensuring the substantial measure of procedural justice that is required." It is fair to add that the Committee went on to suggest that "fundamental reforms" were needed, which suggests that the closed material procedure might be made to work more fairly. It is also right to add that, subject to its inherent limitations, the special advocate system enjoys a high degree of confidence among the judiciary, as Maurice Kay LJ says in *Tariq* [2010] EWCA Civ 462, paragraph 32. However, it seems to us that if a regime, which is statutorily authorised in certain classes of case, has been litigated and considered in many cases and is subject to detailed statutory rules, but cannot be guaranteed to ensure procedural justice, that is another reason why the common law should refuse to adopt such a regime.

The authorities relied on by the Judge

58. Silber J relied on a number of cases to justify the conclusion that, in an ordinary civil claim, the court had jurisdiction which it could exercise to order a closed material procedure.

59. First, there was *Secretary of State for the Home Department v Rehman* [2001] UKHL [2003] 1 AC 153, where, at paragraph 31, Lord Woolf MR stated that, albeit "in the most extreme circumstances", the Court of Appeal could "hear submissions in the absence of [a party] and his counsel, under the inherent jurisdiction of the court", on the basis that the party's interests would be protected by a special advocate. We are unconvinced that this is an observation which assists the defendants here. First, there is no suggestion that the contrary was argued (and the list of authorities cited strongly suggests that it was not). Secondly, it was a plainly obiter observation, as the procedure was not, in the event, adopted on that appeal. Thirdly, as the tribunal from which the appeal in question was brought, the Special Immigration Appeals Commission ("SIAC") had statutory power to adopt a closed material procedure, it seems clear that the Court of Appeal did also – quite apart form common sense, see section 15(3) of the Senior Courts Act 1981. Finally, and arguably, *Rehman* [2003] 1 AC 153 was not a case where the court was simply an arbiter: there was, at least arguably, a public interest dimension in the issue involved.

60. In *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 the House of Lords was concerned with a preparatory hearing in relation to a prosecution of a defendant charged with unauthorised disclosure of material under the Official Secrets Act 1989. The relevant issue arose rather obliquely. The point was made against him that, if the defendant had asked for permission to disclose the material and it had been refused, the refusal would have been subject to judicial review; in response, the defendant argued that, if he had taken that course, he may not have been able to show the material to his lawyers. At [2003] 1 AC 247, paragraph 34, Lord Bingham said that, following what was said by Lord Woolf in *Rehman* [2003] 1 AC 153, in the unlikely event of the court having to consider material which could not be disclosed to the defendant's lawyer, a special advocate could be appointed.

61. There would, however, have been no question of the defendant himself being in ignorance of the material (*ex hypothesi*) or of his being excluded from the hearing where it was considered. Anyway, such judicial review proceedings would have been like a PII hearing, in that the very subject matter of the proceedings would have been material which should not be released (see paragraphs 40 and 48 above). Further, the contemplated judicial review proceedings would have been a very long way from a normal civil claim: they would have involved the public interest dimension as the central issue. In any event, particularly if one looks at the record of the arguments before the House, it seems doubtful to what extent the principles to which the issue gives rise were ventilated in argument.

62. Another House of Lords case relied on by the Judge was *R v H* [2004] 2 AC 134, especially the observations of Lord Bingham at paragraphs 20 and 22. Apart from citing *Rehman* [2003] 1 AC 153 and *Shayler* [2003] 1 AC 247, those observations were concerned with the preliminary PII process in criminal proceedings (discussed in paragraphs 40 and 48 above).

63. The Judge also relied on *Roberts* [2005] 2 AC 738, which we have already discussed. We do not consider that Lord Woolf's observations in that case support the contention that a closed material procedure can be ordered by the court in an ordinary civil claim. His obiter observations as to the powers of the Parole Board were expressly made in the light of its duty to take into account the public interest. The Board was not sitting purely, or even mainly, as an arbiter, as in ordinary civil proceedings, as discussed by

Lord Devlin in *re K* [1965] AC 201, 240-241. Further, the Boardit had express power to withhold material which was before it from the prisoner under the Rules, so the closed material procedure was purely a protective measure for the prisoners' benefit (see per Lord Carswell at [2005] 2 AC 738, paragraph 132).

64. In *Malik v Manchester Crown Court* [2008] EWHC 1362 (Admin), [2008] 4 All ER 403, the Crown Court had ordered, under schedule 5 of the Terrorism Act 2000, the claimant to produce certain material following hearings held partly in the presence of the claimant and his lawyers and partly in their absence. Silber J relied on what Dyson LJ, giving the judgment of the Divisional Court, said about the use of special advocates at [2008] 4 All ER 403, paragraphs 96-102, where he cited a number of the cases to which reference has been made in this judgment. However, it is clear from the summary of the arguments raised on behalf of the claimant and Dyson LJ's reasoning at [2008] 4 All ER 403, paragraphs 30 and 104-105, that it was not submitted that the Crown Court had no power to hold the hearing partly in the absence of the claimant or his lawyers: the sole question on this aspect of the case was whether the Crown Court should have appointed a special advocate of its own motion. Indeed, it would seem that the claimant, through the lawyers then acting for him, had effectively consented to the Crown Court conducting closed hearings. Again, there was, at least arguably, a strong public interest dimension in the hearing.

65. Silber J also cited *A & Others v HM Treasury* [2009] 3 WLR 25, paragraphs 58 and 60 where giving the majority judgment of the Court of Appeal, Sir Anthony Clarke MR, said in a judgment that has now been reversed (see [2010] UKSC 2) that "in an appropriate case the court would have power to appoint a special advocate ... even where it was not sanctioned by Parliament", albeit "only ... in an exceptional case and as a last resort". However, as in other cases, there does not appear to have been any argument as to whether the court had had power to order a closed material procedure in the first place. Once again, this was, in any event, a case where there was, at least arguably, a substantial public interest dimension, and it cannot be relied on as justifying a closed material procedure in an ordinary civil claim.

66. Finally, there is another decision of this court, *AHK v the Secretary of State for the Home Department* [2009] EWCA Civ 287, [2009] 1 WLR 2049, where, at paragraphs 37-38, guidance was given as to the circumstances in which a special advocate should be appointed. Once again, there was no consideration as to whether the court could order a closed material procedure, it apparently having been assumed on all sides that it could. Once again there was, at least arguably, a substantial public interest dimension in the proceedings. We also consider that there is force in the point that it is unclear how far it was envisaged the closed material procedure would go: it may well have been limited to the interlocutory stages, and in particular to the issue of what the Home Secretary should disclose – i.e. the classic PII exercise discussed in paragraphs 40 and 48 above.

67. One can readily understand why Silber J considered that the cases we have been considering provided support for the defendants' contention that a closed material procedure can be adopted in civil proceedings, even relating to claims in tort and breach of statutory duty. However, on analysis, we do not consider that any of those cases gives any strong or reliable support for that contention. First, it does not appear to have been argued (and in many of the cases, it could not have been argued) that, unless authorised by statute or agreed by all parties, a closed material procedure at

trial was impermissible as a matter of principle. Secondly, it does not appear to have been argued that the terms of the CPR excluded the court from relying on its inherent jurisdiction to order a closed material procedure at trial (and in some of the cases it could not have been argued, as the CPR were not in point). Thirdly, no consideration was given in any of these cases to the practical aspects discussed above, and in the great majority of the cases it would not really have been in point. Fourthly, in many of these cases the court was apparently dealing with a PII hearing, or a hearing which concerned the material which arguably should not be released. Fifthly, in at least the great majority of these cases, there was, at least arguably, a substantial public interest dimension, such that the judge who determined the issues at trial was not simply acting as an arbiter between the competing private law arguments of the parties to the litigation.

Concluding remarks

68. We are conscious that in some cases, where evidence which is relevant, or even vital, to the interests of one of the parties (often the Crown, but sometimes not), limiting the procedure to the classic PII exercise can lead to unfairness, and can even result in what may appear to most people to be the wrong outcome, because the exercise will often result in important evidence being withheld. However, as explained by Lord Woolf in *Wiley* [1995] AC 274, 306H-307B, even where a PII claim is upheld in respect of material, the effect can often be mitigated by summarising its relevant effect, producing relevant extracts, or even producing it "on a restricted basis". More generally, the evidential rules of exclusion, for instance in relation to material which attracts legal professional privilege or "without prejudice" privilege, will often be to increase the risk of a "wrong" outcome. But that is a risk inherent in any legal system with rules, and indeed it is inevitable in any system with human involvement. The risk of a "wrong" outcome can be said to be increased if a party is prevented from relying on oral or documentary evidence for failing to comply with court orders or rules, or if a party cannot take a point because it was not raised in his statement of case, or even because it did not occur to his legal advisers.

69. It is nonetheless tempting to accept that there may be the odd exceptional ordinary civil claim, where the closed material procedure would be appropriate. "Never say never" is often an appropriate catchphrase for a judge to have in mind, particularly in the context of common law, which is so open to practical considerations, and in relation to civil procedure, where experience suggests that unpredictability is one of the few dependable features. However, this is one of those cases where it is right for the court to take a clear stand, at least in relation to ordinary civil proceedings. Quite apart from the fact that the issue is one of principle, it is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it `is applicable only in exceptional circumstances nonetheless often becomes common practice.

70. The importance of civil trials being fair, the procedures of the court being simple, and the rules of court being clear are all of cardinal importance. It would, in our view, be wrong for judges to introduce into ordinary civil trials a procedure which (a) cuts across absolutely fundamental principles (the right to a fair trial and the right to know the reasons for the outcome), initially hard fought for and now well established for over three centuries, (b) is hard, indeed impossible, to reconcile satisfactorily with the current procedural rules, the CPR, (c) is for the legislature to consider and introduce,

as it has done in certain specific classes of case, where it considers it appropriate to do so, (d) complicates a well-established procedure for dealing with the problem in question, namely the PII procedure, and (e) is likely to add to the uncertainty, cost, complication and delay in the initial and interlocutory stages of proceedings, the trial, the judgment, and any appeal.

71. We leave open the question of whether a closed material procedure can properly be adopted, in the absence of statutory sanction, in an ordinary civil claim, such as the present, where all the parties agree, or in a civil claim involving a substantial public interest dimension (i.e. where the judge is not simply sitting as an arbiter as between the parties). Both principle and the authorities relied on below seem to us to suggest that a different conclusion may well be justified in such cases, albeit only in exceptional circumstances, but that is an issue which should be considered as and when it arises.

72. For these reasons, we would allow the claimants' appeal.