Appeal No. UKEAT/0009/14/DM

# EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 23 July 2014
Judgment handed down on 21 November 2014

**Before**

**THE HONOURABLE MR JUSTICE LANGSTAFF**

**SITTING ALONE**

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MR AFZAAL KIANI — APPELLANT

SECRETARY OF STATE FOR THE HOME DEPARTMENT — RESPONDENT

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JUDGMENT

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**APPEARANCES**

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| For the Appellant | MR HUGH SOUTHEY QC<br>(of Counsel)<br>MR PAUL TROOP<br>(of Counsel)<br>Instructed by<br>Messrs Bindmans LLP<br>236 Grays Inn Road<br>London<br>WC1X 8HB |
| For the Respondent | MR CHARLES BOURNE QC<br>(of Counsel)<br>Instructed by<br>Treasury Solicitors Department<br>Employment Group E1<br>One Kemble Street<br>London<br>WC2B 4TS |

**SUMMARY**

**NATIONAL SECURITY**

An immigration officer ("C") employed by the Home Office was suspended, his security clearance withdrawn, and then dismissed, all without any reason being given to him. He claimed it was because of discrimination against him on the grounds of race/religion. Rule 54 (National Security) was held to apply, and C was excluded from participation in closed proceedings, though there was a Special Advocate appointed on his behalf. C's application for orders to address the lack of substantive disclosure to him was rejected. He appealed, contending that since the Supreme Court decision in **Tariq v Home Office** the CJEU had decided in **ZZ** that at the very least a minimum gist of the case against C should have been disclosed openly. That submission was rejected: the authority of **Tariq** was unaffected by **ZZ** since the factual contexts within which each decision was made were very different, as the Court of Appeal decision made when **ZZ** resumed for hearing before it made clear. The EJ had (contrary to C's submissions) considered the particular facts of the case before striking the balance he did between the public interest in national security and the private interest of C in obtaining the means to fight his case effectively. He was not (contrary to C's submissions) required to apply a principle that it might be preferable to strike the claim out rather than provide for a necessarily inadequately fair hearing, nor in error in failing to provide for all the issues relating to the admissibility of evidence, closed or open, to be resolved prior to the substantive hearing.

The appeal was dismissed.

**THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)**

1. The Claimant is a British Pakistani Muslim. He was employed as an immigration officer working for the Respondent ("the Home Office"). On 18th March 2008 the Home Office suspended him from work. No reasons were given. He required security clearance for his work. That was withdrawn on 27th June 2008. No reasons were given. He appealed. The appeal was dismissed, again without reasons. In December 2009 he was told that the Home Office proposed to dismiss him. Dismissal occurred on 27th July 2010. Again, there were no reasons. An appeal was dismissed in August 2010. There were no reasons for this decision either.

2. Supposing that the unexplained treatment of him by the Respondent was due to unlawful discrimination against him on the grounds of race and/or religion, and in order to complain of his unfair dismissal, the Claimant brought two claims (December 2009, before his dismissal and 20th October 2010, after it).

3. Rule 54 of the **Employment Tribunals Rules of Procedure 2004,** which then applied to the claims, makes provision for the conduct of proceedings in private and the exclusion of the Claimant and his representative from all or part of those proceedings where it is considered expedient in the interests of national security. No information is to be disclosed if to do so would be contrary to the interests of national security (Rule 54(4)).

4. Pursuant to those powers, Regional Employment Judge Potter ordered on 10th February 2012, amongst other matters, that the Claimant and his representatives should be excluded from parts of interlocutory hearings which would be regarded as "closed"; that it was appropriate to appoint a special advocate; and that secret material must not be disclosed to the Claimant by

such a special advocate. A special advocate was duly appointed. Since no substantive information concerning the allegations against the Claimant had been provided, he had little opportunity of any value to take instructions from the Claimant in respect of the claim. Once he had himself seen secret material he was precluded from meeting with the Claimant thereafter in order to take instructions. Few meaningful instructions could therefore be given.

5. In October 2012, a closed case management discussion took place. The Claimant later discovered, when an open order recording the result of closed proceedings was copied to his solicitors, that the special advocate had made applications for "further gisting" and for disclosure, but that these had been rejected.

6. The reference to "*further* gisting" might have been a reference to disclosure further to that given to the Claimant pursuant to a direction made by the Security Vetting Appeals Panel ("SVAP") on 27th July 2012, before whom parallel proceedings were taken. That disclosed that his wife was known to work for a company called Global Immigration Management Ltd, which specialised in the provision of advice on immigration matters including work permits, British Citizenship and immigration appeals. There were concerns that Mr Kiani might abuse his position as an immigration officer to assist his wife in her immigration business.

7. On 14th September 2012 the Claimant made an application to the Tribunal:

> **"…to determine what orders need to be made to address the lack of substantive disclosure by the Respondent. This application is made pursuant to Section 10 of the Employment Tribunals' (Constitution and Rules of Procedure) Regulation 2004 (sic)"**

8. The reference to "section" 10 is probably to the power in Rule 10 of the 2004 Tribunal Rules (as distinct from the Employment Tribunals (National Security) Rules of Procedure, in which Rule 10 says nothing of relevance). This is a general case management power. It

permits ordering a party to provide additional information, or to disclose documents or information, in addition to those orders of which specific examples are given in Rule 10(2). The Claimant sought the exercise of the general power to order that the Respondent choose whether to disclose evidence, or a gist of it, or to withdraw reliance upon that evidence, and an order which in addition or alternatively permitted the Special Advocate to meet with and take instructions from the Claimant. The Judge was not invited specifically to consider making an order permitting the Special Advocate to meet with and take instructions from the Claimants' solicitors.

The Argument before the Employment Tribunal

9. The Claimant argued that European Union authority was in keeping with the jurisprudence of the European Court of Human Rights (paragraph 11): any derogation from a fair process in adversarial court proceedings could be tolerated only when "strictly necessary", and even then would require counterbalancing measures so far as they could be adopted to offset the disadvantage to an individual resulting from any derogation.

10. In essence, the Claimant submitted that the closed material procedure was inappropriate in circumstances where there was a satisfactory alternative. As to that, Employment Judge Snelson, sitting at London Central Employment Tribunal said in written reasons sent out on 23rd August 2013 that:-

> **"In the end the only alternative pressed before me was to revoke the Rule 54 Order and leave it to the Respondents to apply for a Public Interest Immunity "PII" Certificate. In my judgment, that is no solution, for the simple reason given by Mr Bourne[1]. PII serves to exclude evidence. If the Minister grants a PII Certificate the relevant material is excluded from the proceedings and no use can be made of it. Here, the closed material is the very essence of the case. It (and nothing else) is relied on as explaining the Respondent's extraordinary**

[1] Counsel for the Home Office, who appeared before me on the appeal having now become Mr. Bourne QC.

> **treatment of the Claimant. To exclude it would leave the Respondent unable to demonstrate what actuated the behaviour of which the Claimant complains. It would be an obvious denial of justice to the Respondent to exclude that material. Nor would it lead to justice to the Claimant. It would make the proceedings untriable and leave him with no sustainable route to a successful outcome."**

The Judge also rejected the further suggestion that if the Rule 54 Order were revoked, the Home Office could choose not to rely upon the closed material to the extent that disclosure would genuinely prejudice national security. He thought that, too, would be grossly unfair to the Home Office, for the reasons he had expressed in respect of PII at paragraph 15.

11. He also rejected the submission that the prospect of an unfair trial might be worse than being denied a trial at all, in the event of proceedings being struck out as untriable: this being a submission made by reference to the case of **Carnduff v Rock** [2001] 1WLR 1786 (C.A.) about which more below. The Judge, not accepting that approach, commented:-

> **"Of course it must be for the Claimant to decide how to proceed in the awkward circumstances of this case. He is entitled to elect not to pursue his claims if the closed material procedure is followed throughout and he feels so disadvantaged by it that it serves no purpose to continue. On the other hand, he may reflect that, as Mr Bourne pointed out, the Special Advocate may be able to land significant blows on his behalf. In any event what cannot be said is that the Tribunal should now bring about a state of affairs in which any trial is impossible and precipitate a *Carnduff* striking-out order. That makes no sense. It will always be for the Claimant to withdraw. For so long as the litigation continues, the Tribunal must proceed on the basis that justice (albeit imperfect justice) is possible through the compromise which the closed procedure necessarily involves."**

Quite what the Employment Judge meant by the reference in the pre-penultimate sentence to "bringing about a state of affairs in which a trial is impossible…" is opaque: but I floated with Counsel that it might well be a reference to the suggestion that the Tribunal could, by ordering revocation of the Rule 54 Order, render it impossible (either by exclusion of evidence through PII, or the Home Office then choosing not to rely upon evidence which it was thought would genuinely prejudice national security) for there to be a fair trial between the parties, thus

leading to a striking out of the case on a **Carnduff** basis. There was no better suggestion, and I have read it in that sense.

12. Finally, the Judge concluded, at paragraph 18:

> **"For the reasons stated, I am satisfied that the closed material procedure is appropriate and compatible with the Claimant's Article 6 Rights. I reject the argument that PII represents a workable alternative. Other possibilities canvassed in the application of 14 September 2012 and in Mr Troop's skeleton argument were not pursued. I consider that he was realistic in not pursuing them. In my judgment, this case has a great deal in common with Tariq and the solution approval by the Supreme Court in that case is manifestly the appropriate one here."**

13. The reference to **Tariq** was to **Tariq v Home Office** [2011] ICR38; 2012 1 A.C. 452. The status of this case is of central importance to the appeal. It is necessary to set it in context, since much of the submission on appeal before me, advanced by Mr Southey QC and Mr Troop on behalf of the Claimant, was devoted to showing that the subsequent decision of the Court of Justice of the European Union in **ZZ (France) v Secretary of State for the Home Department** [2013] QB 1136 had the effect that as a matter of European Union Law the fundamental right to an effective legal remedy would be infringed if a judicial decision were to be founded on facts and documents which the parties themselves, or one of the parties, had not had an opportunity to examine, and on which they had been unable to state their views: and that in the exceptional case where national security was involved the person concerned must be informed, in any event, of the essence of the grounds held against him. It is said, therefore, that in every case in which a right within the material scope of European Union law is asserted the combined effect of Articles 47 and 52 of the Treaty for the European Union ("TFEU") (Lisbon) is that at least a minimum material gist must be provided. In formal terms, this constituted ground 6 of the grounds of appeal, but in reality it was the central argument before me.

14. The factual context in which **Tariq v Home Office** was decided was that of a claim for discrimination on the grounds of race and religious belief by an immigration officer of Asian origin, who was Muslim, and was employed by the Home Office. Close family members were arrested in the course of an investigation into suspected terrorism. His security clearance was withdrawn. Orders under rule 54 were made for the proceedings before the Employment Tribunal to be conducted in private, for the Claimant and his advisers to be excluded when closed evidence was given or closed documents were considered, and for a special advocate to be appointed. A challenge to that procedure was rejected by the Tribunal, but although the EAT dismissed an appeal against that decision it declared that the Claimant was entitled to be provided with details of the allegations against him sufficient to enable him to make an effective challenge to them. The Court of Appeal upheld that decision.

15. The Supreme Court, on further appeal against the declaration, and cross-appeal against the decision, dismissed the cross-appeal and allowed the appeal. It held that there was no absolute requirement that Tariq personally or his legal representatives should be provided with sufficient detail of the allegations made against him to enable him to give instructions to them: see paragraph 69 of the judgment of Lord Mance:

> **"I would therefore allow the Home Office's appeal, and set aside the declaration made below to the effect that there exists an absolute requirement that Mr Tariq personally or his legal representatives be provided with sufficient detail of the allegations made against him to enable him to give instructions to his legal representatives on them. As I have indicated, both Mr Tariq and his legal representatives already know of the general nature of the Home Office's case. The Employment Tribunal will, with the assistance of the special advocate, keep under review and will be able to determine whether any and what further degree of gisting of the Home Office's case, or of disclosure regarding the detail of allegations made in support of it, is required, having regard to (a) the nature of the relevant allegations and of the national security interest in their non-disclosure and in the light of its best judgment as to (b) the significance of such allegations for the Home Office's defence and (c) the significance for Mr Tariq's claim of the disclosure or non-disclosure of such allegations to him"**

16. One thrust of the submissions of Mr. Southey QC and Mr. Troop before me was that **Tariq** should be seen as a fact-specific decision, and should not be applied without detailed consideration of the available facts by the relevant court or tribunal.

17. As the word "therefore" in the paragraph of Lord Mance's judgment which I have just cited shows, the statement of principle in the first paragraph flows from what preceded it. In particular, at paragraph 68 Lord Mance recognised a "clear line of jurisprudence culminating in the Court's decision in **Kennedy v United Kingdom** (2010) 52 EHRR 207" to that effect.

18. Where fact was relevant, however, was in respect of the particular circumstances of a particular case, for (paragraph 67) to keep the case against a party secret from him was a very significant inroad into conventional judicial procedure, such that:

> **"..it is an inroad which should only ever be contemplated or permitted by a court, if satisfied after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case; and this should be kept under review throughout the proceedings."**

19. Although it might appear from my description of the essential facts of **Tariq** that they were on all fours with those in the present case, so far as I know them, there may be significant points of difference. The Home Office had spelt out the nature of the case against him in arguably greater detail than here – that he had a close association with individuals suspected of involvement in plans to mount terrorist attacks, such that he might be "vulnerable to attempts to exert undue influence on [him] to abuse his position"; and that he could be "vulnerable to an approach to determine if terrorist suspects had been flagged to the authorities or to smuggle prohibited items airside" (paragraph 5, judgment). The general nature of the Home Office case had been communicated to him (paragraph 63). Lord Mance thought that he "must" have been able to meet this case on a general basis, and moreover had some indication from the questions

he had been asked in interview as to mount a sufficiently arguable case of discrimination such as to avoid any application to strike out his claim.

20. Lord Hope specifically referred to the relevant context within Tariq's plea for gisting to be considered. Thus, in paragraph 81 he said:

> **"Here again the context for the argument is what matters. This is an entirely different case from *Secretary of State for the Home Department v AF (No 3).* There the fundamental rights of the individual were being severely restricted by the actions of the executive. Where issues such as that are at stake, the rule of law requires that the individual be given sufficient material to enable him to answer the case that is made against him by the state. In this case the individual is not faced with criminal proceedings against him or with severe restrictions on personal liberty. This is a civil claim and the question is whether Mr Tariq is entitled to damages. He is entitled to a fair hearing of his claim before an independent and impartial tribunal. But the Home Office says that it cannot defend the claim in open proceedings as, for understandable reasons, it cannot reveal how the security vetting was done in his case. That conclusion is unavoidable, given the nature of the work Mr Tariq was employed to do.**
>
> **82. How then is the balance to be struck here? Mr Tariq will be at a disadvantage if the closed procedure is adopted. But the disadvantage to the Home Office is greater, as unless the closed procedure is adopted it will have to concede the claim. There is no way that the disadvantage to the Home Office can be minimised. It will simply be unable to defend itself. It will be unable to obtain a judicial ruling on the point at all. That would plainly be a denial of justice. The disadvantage to Mr Tariq, on the other hand, is less clear cut. He is not entirely without information, as the general nature of the Home Office's case has been disclosed to him. He will have the services of the special advocate, with all that that involves – second best by far, no doubt, but at least the special advocate will be there. His claim will be judicially determined by an independent and impartial tribunal, which can be expected to take full account of the fact that the details of the case for the Home Office have had to be kept closed. If inferences have to be drawn because of the quality or nature of the evidence for the Home Office, they will have to be drawn in Mr Tariq's favour and not against him. And throughout the process the need for the evidence to be kept closed will be kept under review as rule 54 of Schedule 1 to the Regulations requires, with the assistance of the special advocate.**
>
> **83. There cannot, after all, be an absolute rule that gisting must always be resorted to whatever the circumstances. There are no hard edged rules in this area of the law. As I said at the beginning, the principles that lie at the heart of the case pull in different directions. It must be a question of degree, balancing the considerations on one side against those on the other, as to how much weight is to be given to each of them. I would hold that, given the nature of the case, the fact that the disadvantage to Mr Tariq that the closed procedure will**

> **give rise to can to some extent be minimised and the paramount need to protect the integrity of the security vetting process, the balance is in favour of the Home Office."**

21. Lord Dyson at paragraph 147 added that the nature of a discrimination claim was such that the special advocate and judge could indeed test the evidence as to the decision making process without the input of the Claimant. In such a case, the presence of an independent court and special advocate would be likely to "go a long way to making up for the fact that Mr. Tariq will be unable fully to participate in the proceedings" (paragraph 147).

22. The principle expressed in **Tariq** might be thought to be conclusive of the present appeal, for it would deny an absolute obligation to provide a gist such as the Claimant seeks. However, it has not been the last word. In **ZZ (France) v Secretary of State for the Home Department** [2013] QB 1136 the CJEU considered the case of a European Union citizen with dual French and Algerian nationality, who had been granted the right to permanent residence in the United Kingdom. On his return from a trip to Algeria in 2005, the Home Secretary refused him re-admission and excluded him from the United Kingdom, on the grounds which included those of national security, under national legislation implementing article 27 of Council Directive 2004/38/EC 1. Pursuant to article 31 of the Directive, Member States were obliged to provide him with access to an appeal against any decision restricting his right to move and reside freely within the Union on such grounds. By way of derogation, article 30(2) of the Directive permitted Member States to limit the information given to the person concerned in relation to the grounds upon which an article 27 decision was taken. At a private hearing the Special Immigration Appeals Commission ("SIAC") determined the extent to which disclosure to the Applicant and his personal legal advisers of certain "closed evidence", relied on by the Home Secretary, would be contrary to the public interest. Accordingly, the proceedings before the SIAC were held in both open and closed hearings. The closed hearings were held in the

absence of the Applicant and his lawyers, but in the presence of two special advocates, appointed by the Attorney General, who made submissions on his behalf. The appeal was dismissed on the ground that the exclusion decision was justified by overriding considerations of national security. In an open judgment SIAC held that little of the case against the Applicant had been disclosed to him, but that it was satisfied, for reasons explained in the closed judgment, that the conduct of the Applicant represented a genuine and serious threat affecting public security which outweighed his and his family's right to enjoy family life in the United Kingdom. On appeal the Court of Appeal made a reference seeking a preliminary ruling on the question whether, and to what extent, less than full and precise disclosure of the public security grounds on which a decision refusing an Union citizen entry taken under article 27 of the Directive was based, was permitted by articles 30(2) and 31 of Parliament and Council Directive 2004/38/EC, read in the light of article 47 of the Charter of Fundamental Rights of the European Union, which guaranteed the right to an effective remedy before a national authority and the right to a fair trial.

23. The Court of Justice noted (at paragraph 49) that it was only by way of derogation that article 30(2) of Directive 2004/38 permitted member states to limit the information sent to the person concerned in the interests of state security. It thus had to be "interpreted strictly, but without depriving it of its effectiveness". It thought that in deciding the extent to which it was permissible not to disclose grounds precisely and in full:

> **"51. ……In particular, it should be taken into account that, whilst article 52(1) of the Charter admittedly allows limitations on the exercise of the rights enshrined by the Charter, it nevertheless lays down that any limitation must in particular respect the essence of the fundamental right in question and requires, in addition, that, subject to the principle of proportionality, the limitation must be necessary and genuinely meet objectives of general interest recognised by the European Union…** (and that) ..
>
> **52. Therefore, the interpretation of articles 30(2) and 31 of Directive 2004/38 , read in the light of article 47 of the Charter, cannot have the effect of failing to meet the level of protection that is guaranteed in the manner described in the preceding paragraph of the present judgment"**

24. Since the "…fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views" (paragraph 56), it was incumbent on member states which opposed precise and full disclosure of the grounds on the grounds of national security to lay down rules which enabled a court to examine all the grounds and the related evidence on the basis of which the decision was taken. If (paragraph 63) state security did not stand in the way of disclosure, then the authorities could reveal the missing grounds and evidence to the person concerned; if however it did, then (at 64):

> **"judicial review ... of the legality of a decision taken under article 27 … must … be carried out in a procedure which strikes an appropriate balance between the requirements flowing from state security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary."**

25. That led to the passage upon which, centrally, Mr. Southey places reliance:

> **"65. In this connection, first, in the light of the need to comply with article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under article 27 of Directive 2004/38 is based, as the necessary protection of state security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in article 31 of that Directive ineffective."**

This was reiterated at paragraph 68:

> **"…it is incumbent on the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him."**

26. Whereas Mr. Southey QC points to this decision, which post-dates that in **Tariq,** as obliging at least a minimum disclosure of the essence of the grounds for the decision, Mr. Bourne QC emphasises the importance of placing such a decision in context, and for his part seeks assistance from the decision of the Court of Appeal to which the **ZZ** case returned for further consideration. It ordered that the essence of the grounds for the Applicant's exclusion from the UK had to be disclosed, but did so, he submits, in terms which show that the principles in **Tariq** remain unaffected by the decision of the CJEU.

27. In its decision, reported at [2014] Q.B. 820, Richards LJ (with whom Lord Dyson MR and Christopher Clarke LJ agreed) set out his understanding of the effect of the decision in **ZZ**. At paragraph 18 he said:

> **"In my view that judgment lays down with reasonable clarity that the essence of the grounds on which the decision was based must always be disclosed to the person concerned. That is a minimum requirement which cannot yield to the demands of national security. Nor is there anything particularly surprising about such a result in the context of restrictions on the fundamental rights of free movement and residence of Union citizens under European Union law."**

Mr. Bourne QC emphasised the closing words, emphasising the context of the case.

28. He drew attention to the fact that the Court of Appeal did not accept the broad submission made to it by Mr. Southey QC (who appeared in **ZZ** as he does in the case before me) to the effect that what applied was the approach of the Grand Chamber in **A v United Kingdom** (2009) 49 EHRR 625 , which in turn led to Lord Phillips of Worth Matravers in **Secretary of State for the Home Department v AF (No. 3)** [2010] 2 AC 269, expressing himself satisfied that the Grand Chamber "has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him".

29. As to this, Richards LJ said at paragraph 32 and following:

**" 32. Mr Southey's argument is that this approach has been carried through by the Court of Justice into the present case, even though the Court of Justice makes no mention of *A v United Kingdom* in its judgment (by contrast with the Advocate General, who goes to some lengths to distinguish it). I certainly accept that *A v United Kingdom* 49 EHRR 625 is consistent with my reading of the judgment in the *ZZ* case [2013] QB 1136 but I do not think that it can be relied on as providing positive support for that reading. That is not because of any material difference between the Court of Justice and the Strasbourg court in terms of basic approach in this general field: Lord Mance JSC observed in *Tariq v Home Office (JUSTICE intervening)* [2012] 1 AC 452, para 23 that a national court faced with an issue of effective legal protection "can be confident that both European courts, Luxembourg and Strasbourg, will have the same values and will expect and accept similar procedures". The fact is, however, that the context of the two cases is very different. The present case concerns the application of article 47 of the Charter in an immigration context where article 6 of the Convention on Human Rights does not apply; but even where article 6 does apply, the extent to which non-disclosure of allegations or evidence may be justified on grounds of national security is heavily dependent on context. This point, too, was made in *Tariq v Home Office*, for example by Lord Dyson JSC, at para 145:**

**"But it is clear from para 203 of *A v United Kingdom* itself that article 6 does not require a uniform approach to be adopted in all classes of case. In *Kennedy v United Kingdom* (2010) 52 EHRR 207 the ECtHR said that the entitlement to disclosure of relevant evidence is not an 'absolute right' (para 187); the character of the proceedings may justify dispensing with an oral hearing (para 188); and the extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case: para 189."**

**33 Accordingly, although the approach laid down by the Court of Justice in the *ZZ* case is much the same as that laid down by the Strasbourg court in *A v United Kingdom*, the difference in context and the fact that the Court of Justice makes no mention of *A v United Kingdom* in its judgment lead me to the view that the Court of Justice's judgment should be interpreted independently of the decision in *A v United Kingdom.***

**34 For much the same reasons I have gained no real assistance from the authorities cited to us by Mr Southey in relation to article 8 of the Convention or from the various domestic and Strasbourg authorities relied on by Mr Eicke, including the actual decisions in *Kennedy v United Kingdom* (2010) 52 EHRR 207 and in *Tariq v Home Office* [2012] 1 AC 452."**

30. Thus, Richards LJ rejected the submission that the judgment in **Tariq** gave any assistance, not because it was inconsistent with **ZZ** but because it was a decision made in a very different factual context.

Grounds of Appeal

31. Much of the territory covered by the grounds of appeal has been crossed in the above discussion of the case-law of central relevance: it remains necessary to set them out, with such further explanation as is necessary.

32. There were six grounds of appeal. The first was that the Judge had failed to provide adequate reasons for the order made. It was said that there is little evidence that the Tribunal considered material given to it in secret and if so how and to what extent. The Tribunal only appeared to refer to factors which had been referred to by Lord Dyson in **Tariq**. It did not record further factors such as that which was at stake for the Respondent was of limited consequence. A reader could not be satisfied that the Tribunal had conducted a proper balancing exercise between the right to disclosure on the one hand, and the interests of national security on the other.

33. Second, the Claimant argued that the Tribunal wrongly identified the ratio in **Tariq**, apparently concluding that the Supreme Court had already conducted the necessary balancing exercise. It should, rather, have recognised that the Supreme Court was not offering guidance as to how that exercise should be assessed in an individual case, which is a highly fact specific matter particular to the case concerned. In saying, in paragraph 18 that

> **"…in my judgment this case has a great deal in common with Tariq and the solution approved by the Supreme Court in that case is manifestly the appropriate one here…"**

the Judge relied upon the head notes to reports of **Tariq** in the ICR and IRLR series, which had not been canvassed with the parties. The ICR head note contained a portion which implied that it was inevitably the case that there was no requirement for disclosure to Tariq himself on the

facts, when this was a misunderstanding of the decision – the issue of law was whether there was an ***absolute*** requirement that at least the essence of allegations, details of which would be disclosed in normal litigation, should be disclosed in those cases where the normal approach could not be followed because the interest of national security required secrecy. It did not determine that it followed that non-disclosure was appropriate on the facts of the particular case before it. The balancing exercise in **Tariq** was in fact conducted by another Employment Tribunal after the case had been remitted back to the Employment Tribunal for determination.

34. Third, the Tribunal failed to conduct a judicial assessment of all the issues. Despite the Claimant's representatives making it clear that there were a number of issues which were likely to be relevant when conducting the balancing exercise, in accordance with **Tariq**, the Tribunal confined its attention to the only issue which those representing the Claimant were able to address on the limited information provided to them, namely the relevance of PII. It also wrongly regarded submissions directed to whether there should be additional gisting as suggesting that there should be an alternative to a closed procedure involving a special advocate. They did not, but were rather arguing that additional steps should be taken to ensure greater fairness if a closed procedure were to be undertaken.

35. Fourth, the Tribunal failed to accept that no trial of an issue might be preferable to an unfair trial of an issue. The Respondent had submitted that as a matter of principle trial of an issue in secret would always be preferable to there being no trial of such an issue. To the contrary, the Claimant submitted that there might be circumstances in which no trial would be preferable to a secret one. In **Carnduff v Rock** [2001] 1 WLR 1786, the Court ruled that a fair trial was not possible in the circumstances of the case and therefore no trial should take place. The principle recognised in that case was that where insistence upon a fully fair hearing for a Claimant would deny the Defendant (or where it was not a party, the State) the protection of

those vital interests that the law should recognise, then a truly fair proceeding was not possible and the trial should be halted at the outset. Lord Kerr, though in the minority in **Tariq**, had observed (at paragraph 110 of that case) that this was not an option which the law should readily contemplate, but nonetheless observed:

> **"…it seems to me to be a plainly more palatable course than to permit a proceeding in which one party knows nothing of the case made against him and which, by definition, cannot be subject to properly informed challenge."**

At least in a **Carnduff** situation both parties are excluded from the judgment seat. In **Al Rawi v Security Services** [2012] 1 AC 531 Lord Mance noted that there was no member of the Supreme Court who doubted that the approach in **Carnduff v Rock** was a possibility. At paragraph 116 he saw no reason why the Court should not be prepared to offer a Claimant a choice whether he or she wished to pursue a claim by closed material procedure during which his or her interests would be represented by a special advocate, or no trial at all. The Claimant submitted that a judge had first to go through the exercise of determining whether or not a fair trial were possible, and that the meaning of a "fair trial" should not be distorted beyond recognition. In that narrow range of cases where no fair trial was possible, an employment tribunal should not be frightened to grasp the nettle and determine that to be the case – it was not appropriate to defer the decision to an individual who would not have the means of knowing whether he should make it or not. The Tribunal should have recognised that it was obliged to determine whether a fair trial should take place.

36. Fifth, it was argued that the Tribunal should have recognised an obligation to determine the balancing exercise in advance of the substantive merits hearing. This was an obligation distinct from keeping the fairness of non-disclosure under review. It might be, for instance, that evidence should be excluded because it would be unfair for a tribunal to consider it. That

should be determined beforehand, for otherwise a tribunal would be in the invidious position of trying to put the evidence out of its mind or having to recuse itself from hearing the case.

37. Sixth, and finally, the Claimant argued that which formed the core of the submissions he advanced – that the Tribunal was wrong in thinking that EU Law did not require a core minimum of disclosure in all cases involving national security. That approach was inconsistent with **ZZ** and wrong.

Discussion

38. The shadow boxing required of a party who is denied knowledge even of the rudiments of the case he has to meet is an affront to justice unless there is a very powerful consideration which is capable of out-balancing it. It is difficult to contemplate that even as little as a broad statement of the essence of the grounds of the case (far removed from the precise and full description of the evidence called for by the European authorities in the absence of any derogation from the basic right) could be outweighed by considerations even of such importance to all citizens as is national security: but the facts of an individual case may be such that a judgment to that effect, though not easily reached, may nonetheless be permissible. Provided that a court has considered the material, and correctly addressed and applied the tests identified in the authorities, the question is whether in the light of **Tariq** on the one hand and **ZZ** on the other it is permissible in the context of the present case: that of an individual, who seeks to vindicate his right not be discriminated against, in a situation where he has lost his employment, who suspects it may be because of discrimination against him, but is denied the means of proving this directly.

39. Mr. Southey QC argues that the rejection of the admissibility of the complaints by the ECtHR in **IR v United Kingdom** (2014) 58 EHRR SE14 (which held – see in particular

paragraph 63 of the decision - that the procedures adopted in domestic law, under which the Applicants were excluded from part of the proceedings before SIAC, could not be held to be a violation of their Article 8 and/or Article 13 rights under the European Convention of Human Rights) does not sit easily with the statement of principle by the CJEU in **ZZ.** He argues that it is that latter which is in play in the present case, since the right not to be discriminated against falls within the material scope of European Union law, and Article 47 of the TFEU applies.

40. Though I accept Article 47 applies, I do not accept his categorisation of the statement in **ZZ** as being one of fundamental principle, if by "fundamental" he means (as I understand him to submit) that which must apply across the board, and can in no circumstances be departed from; nor do I accept his submission that the CJEU was adopting a more rigorous standard than was the ECtHR, such that Lord Mance was wrong to reason as he did in **Tariq**. I accept instead Mr. Bourne QC's submissions that the statement of principle in **ZZ** was, to the contrary, related to the particular context - that of restrictions on the fundamental rights of free movement and residence of Union citizens under European Union law – and did not indicate the adoption of a more demanding standard in all contexts.

41. It was the particular context to which the Court of Appeal drew attention when the hearing of **ZZ** resumed before it, notably in the closing words of paragraph 18. It can only have been the very different context within which **ZZ** fell which led the Court of Appeal to regard (on the one hand) **A v United Kingdom** and on the other **Kennedy v UK** and **Tariq** as all being of no real assistance in determining whether, in such a case as **ZZ**, there should as a minimum be disclosure of the essence or gist of the case against the Claimant. The converse of the fact that this led **Tariq** to be of no assistance in determining the decision in **ZZ** is that the statement of principle in **ZZ** does not affect the statement of principle in **Tariq**. Accordingly, the Employment Judge remained bound to apply the principles as stated by the Supreme Court.

So too do I. Those principles do not provide that there is an absolute minimum content to disclosure in cases within the same context as that in which **Tariq** fell.

42. I accept, too, Mr. Bourne QC's argument that it has been authoritatively recognised that the question whether there has been an infringement of rights by non-disclosure depends on the "specific circumstances of each particular case" - see paragraph 102 of the decision of the CJEU (Grand Chamber) in **European Commission v Kadi** [2014] 1 CMLR 24 which supports the approach taken by Richards LJ in **ZZ.**

43. The application of the principles set out in **Tariq** means accepting that the regrettably limited disclosure in the present case may be permissible in law, although (as Mr. Southey QC points out) the particular facts of the specific case still have to be evaluated and the relevant interests of national security balanced against the inevitable incursion into the litigant's rights.

44. Accordingly, I reject the principal thrust of the appeal: the Judge was entitled to choose not to order the disclosure sought, provided he addressed the balancing exercise on the particular facts of the case before him. Whether he did so permissibly was the subject of the first two grounds, to which I now turn.

45. The first and second grounds fail because the Judge showed in his judgment that he had considered the closed material before him before reaching his decision. Although the broad statements of principle he expressed in paragraph 14 are applicable, it is their application to the particular facts of a case which determines the outcome. Mr. Southey QC points out that the decision of the Supreme Court did not make it inevitable that there would be no gisting even in **Tariq** itself. However, the Judge recognised in the judgment directly under appeal, at paragraph 18, that the case had a "great deal in common" with **Tariq** and thereby used a turn

of phrase which recognised that there were some factual differences between them. No doubt it was in the light of all the material before him, open and closed, that he felt able to say that the "solution proposed by the Supreme Court in that case is manifestly the appropriate one here". That suggests an assessment, taking into account the facts of the particular case before him. That he actually did take close account of the closed material is demonstrated by his judgment (promulgated later, but giving edited reasons for decisions made on the same occasion and relating to the closed proceedings), by which the Judge rejected an application made by the special advocate for disclosure of the gist of an allegation made in a particular memo (identified by the sender, recipient and date). He held that such an application had already been decided (by REJ Potter) and should not be revisited. Significantly for present purposes, however, he also said that had he been faced with deciding the application afresh he would have come to the same decision as had she. This demonstrated he had assessed the particular facts, balancing the interests of the Claimant against the interests of the State. He did not simply say that because a decision had been reached in near identical material circumstances in **Tariq** the same decision should apply to the present case, without need to have regard to its precise facts.

46. I also accept Mr. Bourne's submission that by referring to the closed material being "the very essence of the case" (at paragraph 15) the Judge was indicating that he had considered it, and that there is no basis for concluding that he did not assess the significance to the Respondent of revealing the gist of the closed material, as an alternative to conceding the case.

47. Though the reasons in paragraph 18 for agreeing that, on the particular facts of the present case, the balance should be struck as it was are almost inevitably sparse, since those facts emerge in large part from a consideration of closed material, I accept Mr. Bourne's submissions that they are in this case sufficient to show that the Judge reached a balanced decision taking them into account.

48. The third ground is duplicative of the first.

49. The fourth ground argues that it was an error of law not to consider whether the "principle" in **Carnduff** applied. It is submitted that the Tribunal shirked its obligation to determine whether a fair trial was still possible, and passed on the obligation to the Claimant to decide whether or not he wished to proceed, in circumstances where he was in no position to choose.

50. Though I can see the applicability of this argument generally to cases in which an application is made, or a court or tribunal takes it on itself, to dismiss or decline to hear a case because it is impossible for a fair trial to be held, I have some difficulty in understanding the relevance of it to the application made in the present case, which was to revoke or vary those orders which had previously been made under rule 54 of the Employment Tribunals Rules of Procedure 2004. Moreover, the applications were made with a view to the issues between the parties being resolved by the Court: to strike out the claim, as would be the order made if the Court were to consider the case one to which the principle in **Carnduff** applied, would appear to be the antithesis of this.

51. In any event, attempts to take steps which permitted a trial such as the use of the Special Advocate procedure, were not in play in **Carnduff**. The rules of procedure in employment tribunals provide for a special advocate procedure in a way in which the civil procedure rules considered in **Carnduff** did not. In **Tariq** Lord Mance, at paragraph 40, thought the law should not readily contemplate holding that a case was not justiciable at all and should for that reason be struck out; rather he thought that:

> **"The rule of law must, so far as possible, stand for the objective resolution of civil disputes on their merits by a tribunal or court which has before it material enabling it to do this. In considering how this may be achieved, if a defendant can only defend itself by relying on material the disclosure of which would damage national security, a balance may have to be struck between the interests of claimant and defendant in a civil context."**

52. The Judge acted in accordance with that statement of principle in saying, at paragraph 17, that the Tribunal must proceed on the basis that justice (albeit imperfect justice) was possible through the compromise which the closed procedure necessarily involved. He was entitled (and in my view correct) to take that view. Moreover, it should not be forgotten that proceedings before an employment tribunal are adversarial. If it becomes clear to one party that, by application of permissible principles of law, he will if he continues with his case have to fight with (as it were) one hand tied behind his back evidentially, the choice must in the first place be for him to make. Though a court will have keen regard to, and must serve, the interests of the system of justice it does not make, nor run, a litigant's case for him. I do not consider Employment Judge Snelson to have been in error in saying as he did: what he said was consistent with what Lord Mance said paragraph 116 of **Al Rawi v Security Services** (see above).

53. Finally, though I accept that, as **Carnduff** demonstrates, where a fair trial is thought to be impossible a claim may be struck out, I do not accept that the consequence of this is a principle of general application, binding upon the way in which Employment Tribunals proceed, that "no trial of an issue may be preferable". So expressed, the principle is more an observation that there may be a choice as to that which better serves justice, than it is a demand for particular actions to be taken by the Tribunal, or for it to be obliged to consider the exercise of its discretion. I would prefer to express the true principle as being permissive: that in circumstances in which a fair trial cannot be held because the evidence which is needed to prove or defend the case cannot for valid reason be tendered, a tribunal may strike the claim

out. However, I would observe that unless a party, aware that there are evidential deficiencies, even if he does not know precisely what they are, asks it to strike out the claim it should shrink from taking that step for itself.

54. Turning to the fifth ground, the Judge recognised (at paragraph 19) that the relevant matters had to be kept under review. This is no error of law. Insofar as the argument was that a tribunal should determine questions of admissibility of evidence in advance of a hearing, and that a distinct tribunal should hear the substantive case, to avoid the risk that some closed evidence which the former thought inadmissible did not taint the latter's decision, I would hope that such decisions could be made so far as possible prior to the hearing, but expect, as I would in any case, that a tribunal would act as judges do day in and day out, by holding some evidence inadmissible and thereafter ensuring that it does not affect their decisions. I would also expect that if it felt at any time unable to continue to do so, it would recuse itself on that basis from acting further. Moreover, it is unrealistic to imagine that all questions of admissibility or disclosure can be determined in advance of a trial. It is precisely for that reason that the obligation to continue to keep matters under review applies no less to the Tribunal conducting a substantive hearing as it does to one dealing with preliminary issues in advance. I reject the fifth ground.

55. Finally, the possibility of a reference to the CJEU was floated. As I have said, I accept that Article 47 of the European Union Charter is applicable. However, the statements of principle which are dispositive come from the Supreme Court in **Tariq**, which (as I read the decision of the Court of Appeal on the resumed hearing in **ZZ**) are unaffected by the decision of the European Court in **ZZ**. Given the authoritative nature of these decisions, binding as to principle upon me, a reference is not appropriate and I decline to make one.

## Summary

56. In summary, the central ground is that numbered 6. Once the question of law which it poses is answered to hold (as I do) that in the present case, on its particular facts so far as I know them, there was no absolute requirement to provide at least a gist of the evidence held against the Claimant, the appeal as a whole must be dismissed, for none of the other grounds shows that the Employment Judge erred in law in the decisions he took in applying those principles to the facts of the case before him.

57. Since passing this judgment in draft to the parties, Mr.Southey QC has notified me of the decision of Collins J. in **Bank Mellat v HM Treasury** [2014] EWHC 3631. In paragraph 15 he expressed the view that **ZZ** applied whenever EU law was concerned. Mr. Bourne QC responds that there is no ground here for me to revise my judgment. Having read the judgment, I agree with Mr. Bourne QC, for it seems to me it does not affect my central reasoning, nor give rise to a need to make a reference. However, I have concluded that in case it may be thought (and argued in subsequent cases) that two first instance judges have interpreted **ZZ** to different effect I should grant permission to appeal to the Court of Appeal against my judgment.