OPEN JUDGMENT

Neutral Citation Number: [2025] EAT 75

Case No: EA-2024-001383-LA-RN (OPEN)

EMPLOYMENT APPEAL TRIBUNAL

Field House
15-25 Breams Buildings, London, EC4A 1DZ

Date: 29 May 2025

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

HOME OFFICE

Appellant

- and -

Mr MOHAMMED SHAH

Respondent

- -
- -

Mr Adam Tolley KC and **Mr Tom Kirk** (instructed by Government Legal Department) appeared on behalf of the **Respondent.**
Ms Jennifer Carter-Manning KC and **Mr Dominic Lewis** (instructed by the Special Advocates' Support Office) appeared as **Special Advocates.**

Hearing date: 6 February 2025

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JUDGMENT

SUMMARY

National Security

The claimant was employed as an Immigration Officer. He lost his job after his security clearance was withdrawn. He claimed that this was because of sex discrimination. The respondent denied that and asserted that there were national security reasons, which were not shared with the claimant. The tribunal ordered the closed procedure to apply, and Special Advocates were appointed for him.

At a subsequent hearing, at which the Special Advocates appeared, the tribunal ruled that the claimant should be provided with a proposed gist of the respondent's defence. It erred in so doing. This decision considers the correct legal test and approach to be applied by the tribunal to such an application in a case of this type.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This matter is ongoing in the employment tribunal at London Central. I will refer to the parties as they are in the tribunal, as claimant and respondent. This is the respondent's appeal against an order made by EJ Snelson at a closed preliminary hearing in July 2024. The background is as follows.

2. From March 2002 the claimant was employed by the respondent as an Immigration Officer. In June 2017 his Counter-Terrorist Check security clearance was withdrawn, and his application for renewed Security Check clearance was refused on national security grounds. I will call those the "clearance decisions". He exercised a right of internal appeal against the clearance decisions, but was unsuccessful. In May 2018, he further appealed the clearance decisions to the Security Vetting Appeals Panel (SVAP). In due course, there was a hearing before the SVAP followed by a decision dismissing that appeal.

3. In the meantime, the claimant had been suspended and was later given notice of dismissal. Following that, in December 2018, he began an employment tribunal claim complaining that the clearance decisions and dismissal amounted to discrimination on grounds of race, religion and/or sex. However, reliance on race and religion was subsequently withdrawn. The sole live complaint is of direct sex discrimination.

4. In summary, in his claim form the claimant contended that the clearance decisions, and consequential dismissal, were materially influenced by stereotypical assumptions made about him as a Muslim Asian male. He relied upon his Muslim Asian sister, Rehan (also a public employee) as a comparator. He contended that the clearance decisions were predicated upon his relationship with another sister, Monwara (a barrister) and her husband (a solicitor), and their work. He contended

that, by contrast with his own treatment, Rehan's relationship with Monwara did not have any adverse effect on her own security clearance.

5. The respondent's OPEN grounds of resistance denied that the clearance decisions and dismissal were influenced by the claimant's sex, or had anything to do with his relationship with Monwara and/or her husband. However, they did not set out its positive case as to the true substantive national security reasons for those decisions.

6. At a hearing in December 2022 EJ Spencer made an order under rule 94 **Employment Tribunals Rules of Procedure 2013** excluding the claimant and his representative from parts of the proceedings, in particular concerning the reasons for the clearance decisions. Her order provided for the Attorney General to appoint a Special Advocate (SA). Jenny Carter-Manning KC and Dominic Lewis of counsel were thereafter instructed as joint SAs.

7. Subsequently CLOSED grounds of resistance were served (which were therefore seen by the SAs but not by the claimant), advancing the respondent's positive case as to the true national security reasons for the clearance decisions.

8. At a case management hearing in 2023, at which the SAs appeared for the claimant, directions were given. There followed a CLOSED preliminary hearing before EJ Snelson on 1 July 2024 at which they appeared and at which the respondent was represented by Tom Kirk of counsel. In a decision given orally at that hearing, the tribunal granted the SAs' application for an order requiring the respondent to provide to the claimant a so-called "gist" of its defence to the complaint of sex discrimination in a form proposed by the SAs. I will call that the "gisting order". That is the decision against which the respondent appeals.

9. The gisting order was subsequently recorded in an OPEN written order dated 22 October 2024. It was accompanied by a few paragraphs of what the judge described as commentary,

including a short paragraph which indicated that he considered that his order achieved a proper balance between the parties' competing rights or interests, citing pertinent authorities. But the order did not reveal the substance of the terms of the gist to which it related; and the judge directed that the substantive reasons for the order be kept secret. Full written reasons were provided separately in CLOSED form only.

10. As the respondent had intimated its intention to appeal, the gisting order was directed to take effect only 28 days after the provision of the CLOSED written reasons, or final determination of any appeal against it, whichever should be the later. Following the oral decision, representations had been received with regard to the consequential implications of the gisting order for disclosure, and in the OPEN commentary on the written order EJ Snelson indicated that there was substantial agreement about that. However, that aspect is also in abeyance in view of the respondent's appeal against the gisting order.

11. The respondent appealed the gisting order, setting out CLOSED grounds of appeal in a separate document. HHJ Tayler directed that they proceed to a full appeal hearing, but (pursuant to rule 30A **Employment Appeal Tribunal Rules 1993** (as amended)) that such hearing be in private and CLOSED, in respect of the CLOSED grounds of appeal. In the run- up to the hearing, it was agreed that ground 1 need not be kept CLOSED, but it was in any event withdrawn. I dismissed it upon withdrawal in an OPEN order.

12. The respondent and the SAs tabled CLOSED skeleton arguments. There was also an OPEN skeleton argument from the respondent, which was shared with the claimant. The claimant and his lay representative had indicated that they would not be attending the hearing, but, having considered the respondent's OPEN skeleton argument, the claimant's representative had also sent in an email raising certain points.

13. At the hearing Adam Tolley KC appeared for the respondent, leading Mr Kirk. The joint SAs, Ms Carter-Manning KC leading Mr Lewis, appeared for the claimant. With no disrespect to the learned juniors, who co-authored the skeletons, I will, for convenience, refer to the submissions of the KCs, who argued the appeal orally before me.

14. It was common ground that, in view of the non-attendance of the claimant or his lay representative, and in view of all the live grounds now being CLOSED grounds, the whole hearing before me should proceed in CLOSED session, and I so ordered. However, I indicated that I was minded to produce my written reserved decision in both OPEN and CLOSED forms.

15. In these OPEN reasons, I am able to address the law generally, and to consider the tribunal's decision and the challenge to it by this appeal, so far as it is possible to do so without any reference to the factual features of the respondent's substantive case. Matters relating to the tribunal's reasoning and conclusions, as applied to the substantive facts of this case, will be addressed in a separate annex which will form part of my CLOSED reasons only.

The Legal Framework

16. The Rules of Procedure that were current at the relevant time were set out in schedules to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, being **The Employment Tribunals Rules** of Procedure, in schedule 1, and additional rules specifically relating to national security proceedings in schedule 2. The predecessor rules of 2004, to which some of the authorities refer, were in substantially the same terms (as indeed are the successor rules of 2024).

17. Rule 2 of the 2013 **Employment Tribunals Rules of Procedure**, concerning the overriding objective, provided as follows:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as is practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

18. Rule 94(2) provided as follows:

"(2) Where the Tribunal considers it expedient in the interests of national security, it may order

(a) in relation to particular proceedings (including Crown employment proceedings) anything which can be required to be done under paragraph (1);

(b) a person not to disclose any document (or the contents of any document), where provided for the purposes of the proceedings, to any other person (save for any specified person).

Any order made must be kept under review by the Tribunal."

19. Matters that such an order may direct, as set out in rule 94(1), included that all or part of the proceedings be conducted in private and that a person be excluded from them.

20. Rule 94(10) provided:

"The Tribunal must ensure that, in exercising its functions, information is not disclosed contrary to the interests of national security."

21. The additional rules in schedule 2 applied where an order has been given under rule 94. They included provision for the appointment of a SA, for written reasons to be sent to the Minister in advance of promulgation, for the tribunal, where it considers it expedient in the interests of national security, to direct that part or all of its reasons be kept secret, and for the Minister, where they consider it so expedient, to direct non-disclosure or editing of the reasons.

22. The provisions of schedule 1 rule 4 prohibited the SA from communicating with an excluded person about the proceedings following the receipt of CLOSED material, save as provided. There was, however, power for the SA to seek, and the tribunal to grant, permission to do so, subject to the Minister having the opportunity to object to the request being granted.

23. The concept of "gisting" is not found in the rules. It was discussed in Tariq v Home Office [2011] UKSC 35; [2012] 1 AC 452. The claimant in that case was an immigration officer whose security clearance was withdrawn, on national security grounds, leading to his suspension. He brought complaints of discrimination on grounds of race and religious belief. CLOSED material proceedings and the appointment of a SA were subsequently directed.

24. The claimant contended that the use of a CLOSED hearing and the SA procedure was incompatible with his Article 6 Convention rights and European Union law. The EAT disagreed, but made a declaration that he was entitled to be provided with sufficient details of the allegations against him to enable him to make an effective challenge to them - a gisting direction. That decision was upheld by the Court of Appeal. The Supreme Court dismissed an appeal by the claimant and affirmed the compatibility of the CLOSED hearing and SA procedure with Convention rights and European Union law. Further, by seven to one (Lord Kerr of Tonaghmore JSC dissenting) it allowed the Home Office's appeal in respect of the gisting direction.

25. In the course of his speech Lord Mance JSC conducted an extensive review of the authorities. In Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269 the House of Lords had applied the reasoning of the ECHR in A v United Kingdom (2009) 49 EHRR 625 when concluding that the CLOSED material/SA procedure could be legitimate in the context of the imposition of a control order on a suspected terrorist "so long as the case was not based solely or to a decisive extent on closed material" [26]. However, in R (AHK) v SSHD [2009] 1 WLR 2049, a claim concerning the refusal of a citizenship application, the Court of Appeal distinguished A v UK on the ground that

it was focussing on detention. Lord Mance considered that it had been right to do so. He explained [27]:

> "An applicant for British citizenship has, of course, an important interest in the appropriate outcome of his or her application. Mr Tariq also has an important interest in not being discriminated against which is entitled to appropriate protection; and this is so although success in establishing discrimination would be measured in damages, rather than by way of restoration of his security clearance (now definitively withdrawn) or of his position as an immigration officer. But the balancing exercise called for in para 217 of the judgment in A v United Kingdom depends on the nature and weight of the circumstances on each side, and cases where the state is seeking to impose on the individual actual or virtual imprisonment are in a different category to the present, where an individual is seeking to pursue a civil claim for discrimination against the state which is seeking to defend itself."

26. He went on to consider other decisions of the European Commission and Court of Human Rights which confirmed that "the outcome of the balancing exercise may differ with the circumstances" [28ff]. He concluded at [36] that they supported the conclusion that:

> "... the demands of national security may necessitate and under European Convention law justify a system for handling and determining complaints under which an applicant is, for reasons of national security, unable to know the secret material by reference to which his complaint is determined."

27. At [38] - [41], Lord Mance rejected an argument for the employee, that the solution to the problem was that, even if the disclosure sought might potentially damage national security, it would be open to the court, weighing the interests of justice, to conclude that the state could choose not to make the disclosure, and to withdraw its reliance on the material.

28. Lord Mance went on to conclude that, in light of the authorities he had considered, it was impossible to say that it is an absolute requirement that the claimant himself know the allegations relied upon by the defence in sufficient detail to be able to give instructions to his legal team to challenge such allegations effectively.

29. Lord Hope of Craighead DPSC, in the course of a concurring speech, said this [75]:

> "No one doubts Mr Tariq's right not to be discriminated against on grounds of his race or his religion. But it was his own choice to seek employment in a post for which, in the

> interests of national security, security clearance was required. He was a volunteer, not a conscript. This is not a case where he is the victim of action taken against him by the state which deprived him of his fundamental rights. Furthermore, as I have already indicated, security vetting is a highly sensitive area. Its intensity will no doubt vary from case to case, but common to them all is the need to preserve the integrity of sources of information and the methods of obtaining it. That must always be the paramount consideration, whatever the nature of the proceedings in which the issue arises. It ensures that the national interest is protected when people are appointed to posts where security clearance is required. Issues of employment and discrimination law raised by people appointed to those posts may require access to the way this process has been carried out. It was no doubt for that reason that the use of the closed procedure and the appointment of special advocates was expressly authorised by the statute."

30. At [82] he said:

> "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 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."

31. He went on to conclude at [83] that there "cannot be an absolute rule that gisting must always be resorted to whatever the circumstances." The question was one of degree "balancing the considerations on one side against those on the other."

32. Lord Brown of Eaton-under-Heywood gave a short concurring speech. Lord Dyson JSC, in the course of a concurring speech, said this [147]:

> "In deciding how to strike the balance between the rights of the individual and other competing interests, the court must consider whether scrutiny by an independent court and the use of special advocates are sufficient to counterbalance the limitations on the individual's article 6 rights. In many cases, an individual's case can be effectively prosecuted without his knowing the sensitive information which public interest considerations make it impossible to disclose to him. For example, in a discrimination

> claim such as that of Mr Tariq, the central issue may well not be whether the underlying security concerns are well founded, but rather whether the decision-making process was infected by discrimination. As Mr Eadie points out, Mr Tariq's appeal is not against the assessments or conclusions of the Home Office as to the withdrawal of his security clearance. SVAP provides the expert forum for considering such issues. It was not for the employment tribunal to determine whether, for example, it believed or did not believe Mr Tariq's assertions about the nature of his relationships with persons involved in or associated with terrorist activities. Thus, in the conduct of a discrimination claim, the special advocate and indeed the judge can to a considerable extent test the case of the alleged discriminator without the input of the claimant."

33. At [158] he said:

> "The cases show, in particular, that there is no right to be given the gist of relevant information if and to the extent that this would jeopardise the efficacy of the surveillance or security vetting regime."

34. At [159] he concurred with Lord Hope's point about the claimant being a "volunteer".

35. In the course of his conclusions at [161] Lord Dyson JSC said this was an area where in the nature of exercise, outcomes may sometimes be difficult to predict. But that was not a reason for striving to devise hard and fast rules and rigid classifications.

> "It is, however, at least possible to say that, in principle, article 6 requires as much disclosure as possible. It is very easy for the state to play the security card. The court should always be astute to examine critically any claim to withhold information on public interest grounds."

36. The three other JSCs concurred with Lords Hope, Brown, Mance and Dyson.

37. **Kiani v Secretary of State for the Home Department** [2015] EWCA Civ 776; [2016] QB 595 also involved an immigration officer who was dismissed following withdrawal of his security clearance, and who then brought discrimination claims in respect of which CLOSED procedure/SA directions were made. The principal contention considered by the Court of Appeal was that European Union law required the disclosure of a gist, even though Convention rights law did not. That contention was rejected.

38. In the course of his judgment Lord Dyson, now the Master of the Rolls (with whom Richards

and Lewison LJJ agreed), considered **Tariq** and cited in particular from his own speech in that case. At [23] he concluded:

> "In summary, therefore, the requirements of article 6 depend on context and all the circumstances of the case. The particular circumstances in **Tariq's** case [2012] 1 AC 452 included the facts that (i) it did not involve the liberty of the subject; (ii) the claimant had been provided with a degree of information as to the basis for the decision to withdraw his security vetting: he was not completely in the dark; (iii) there was real scope for the special advocate to test the issue of discrimination without obtaining instructions on the facts from the claimant; and (iv) this was a security vetting case and it was clearly established in the Strasbourg jurisprudence that an individual was not entitled to full article 6 rights if to accord him such rights would jeopardise the efficacy of the vetting regime itself: para 159."

39. It is certainly clear, therefore, that neither Convention rights nor European Union law required, or require, a gist to be provided in every case. Further, while the decision whether or not to direct a closed procedure, or a gist, involves the striking of a balance between the conflicting interests of a claimant and the state, how that balance is to be struck in the given case is fact and context specific. A number of further points may be drawn out in this regard.

40. First, on the state's side of the scales is the harm, or risk of harm, to national security. As Underhill P put it in **AB v Defence Secretary** [2010] ICR 54 at [19(3)], where the interests of national security are genuinely engaged "the stakes are high: they will involve real risks to the national interest generally, and, typically, real risks (of a more or less direct nature) to the lives of members of the armed forces or the security services or others."

41. Although in that case the issue was about whether to hold a closed hearing, not about the withholding of information from the claimant, the point about the inherent nature of national security interests is obviously of general application. A similar point can be detected, for example, in Lord Hope's references in **Tariq** at [75] and [83] to the "paramount" need to protect the integrity of the security vetting process and Lord Dyson JSC's observation at [158] that there is no right even to a gist, to the extent that this would "jeopardise the efficacy of the surveillance or security vetting

regime". These observations do not mean that the risk to national security interests must necessarily always outweigh or trump the countervailing risks or harms to a claimant's ability to prosecute his claim. But they do point up the heavy weighting in the scales that must be accorded to the harm or risk of harm to national security.

42. Secondly, on a claimant's side of the scales, it is clear that, where what is at stake is the right to a civil remedy by way of damages for discrimination, this will weigh less heavily than a case where what is at stake is, for example, the liberty of the subject. That is not to denigrate the importance of a claimant's Article 6 rights in such a case, nor to say that the harm or risk of harm to them could never be found to outweigh the harm or risk on the state's side of the scales. However, once again, the matter is one of relative weighting.

43. A different question concerns what approach the tribunal should take to the scrutiny of an assertion by the state that national security risks are indeed in play in the given case, and as to the nature of those risks. Mr Tolley KC did not contend that the tribunal must automatically in every case accept the state's assertion to that effect without question or scrutiny at all. But he argued that an employment tribunal must be cognisant of the fact that it is not equipped to evaluate the security risks. Further, he submitted, it cannot go behind that state's good faith evaluation of such a risk. Alternatively, at most, the tribunal could only intervene if it could confidently say, applying a *Wednesbury* or perversity-type test, that the state could not reasonably have adopted the stance that it did.

44. Ms Carter-Manning KC, for her part, accepted that in a case where national security is invoked the employment tribunal does not have the same ability or freedom to evaluate and objectively weigh the competing interests of the parties for itself as it would in another type of case. She also accepted that the tribunal could not, and should not, purport to substitute its own assessment of the national security harm or risk for that of the state; but she did not agree that it was limited to applying a "good

faith" check. Rather, she contended, it could and should scrutinise the state's case by applying a perversity or *Wednesbury*-type approach.

45. My conclusions on this aspect are these.

46. First, I do not think that the tribunal is bound, automatically, as it were, to throw its hand in, when the state, as Lord Dyson JSC put it in **Tariq** at [161] "plays the security card". It has some role to play in examining critically that claim.

47. Secondly, however, as Lord Hoffman put it **Home Secretary v Rehman** [2003] 1 UKHL 47; [2003] 1 AC 153 at [50], the determination of whether something is or is not in the interests of national security is in principle a task entrusted to the executive, not the judiciary. That did not mean that, in a deportation case, such as that was, the whole decision was to be surrendered to the Home Secretary, with no role for the Special Immigration Appeals Commission (SIAC). In particular, as he said at [54], SIAC may consider whether there was a factual basis for the Home Secretary's opinion and whether it is one which no reasonable minister could in the circumstances have reasonably held.

48. But SIAC is also a specialist court, which may, in a given case, be in a position in light of the materials put before it, to make pertinent findings of fact. However, even SIAC must act within the limits imposed by **Rehman** (**U3 v SSHD** [2023] KB 433 at [171, 175, 178]); and in questions involving an evaluation of risk it allows "a considerable margin, and real respect to the minister's assessment, and cannot use its findings of fact as a platform for substituting its view of the risk" for that of the Secretary of State (**Begum v Home Secretary** [2024] EWCA Civ 152; [2024] 1 WLR 1469; at [10(iv) and (v)]).

49. Thirdly, Employment Tribunals are less well-equipped to make such evaluations than a body like SIAC. As Underhill P put it in **AB** (at [19(3)]):

> "The tribunal needs to be aware that the risks in question will often be of a kind which it is not well placed to assess - even if, which will itself often be disproportionate or unrealistic, appropriate direct evidence relating to the risk could be adduced before it. Tribunals therefore need to approach the task of assessing the risk with a clear understanding of the inherent limitations in their ability to do so."

50. A further question arises, in relation to employment tribunals, concerning the provision in rule 94(10) that the tribunal must "ensure that in exercising its functions, information is not disclosed contrary to the interests of national security." On its face, in isolation, that might be read as meaning that, once it is accepted that national security interests or risks are in play, the duty of the tribunal is absolute and there is no room for a balancing exercise at all.

51. Do the authorities cast any light on this question? In **Tariq**, in the course of [44], Lord Mance referred to the predecessor of this provision, when describing a submission (for the claimant) that such provision (and the exercise of the discretion to direct a closed material procedure) must be subject to the overriding objective and the duty to interpret legislation compatibly with Convention rights. However, this specific provision is not, so far as I can see, otherwise discussed by him or the other Justices in **Tariq**, not by Lord Dyson MR in **Kiani**.

The Tribunal's Application of the Law and the Grounds of Appeal

52. As I have noted, there were originally four numbered grounds of appeal, but ground 1 is no longer live. By the time of this hearing the respondent had also applied to amend to add a new ground 5. The SAs did not oppose the application to amend, as such, but opposed that ground on its merits. Within the confines of what can be said in an OPEN decision I can say the following about the grounds of appeal and the tribunal's approach to the law in its decision.

53. In the section setting out the applicable law generally, the tribunal cited the relevant rules and, in some detail, passages from **Rehman**, **Tariq** and **Kiani**. The judge identified at [33] that it was common ground that the latter two authorities indicate that the tribunal must strike a balance. But he

rejected the suggestion that once the state asserts the existence of a risk to national security by the provision of a gist, the tribunal must resolve the balancing exercise in favour of the respondent. "If that were right, the reference in *Kiani* and *Tariq* to a balance would be illusory." The tribunal would be reduced to a rubber-stamping function.

54. The judge continued:

> "In my judgment, looking at the risk to national security, it is necessary for the Tribunal (with considerable deference to the view of the Executive) to consider both the probability or not that the action contemplated might cause any harm and the degree of harm which is likely to arise."

55. Ground 2(a) asserts that in this passage the tribunal erred because it failed to apply the relevant consideration that it is for the Executive to assess the existence and degree of risk in the first place (relying on Lord Hoffinan in **Rehman** at [50]).

56. In light of the discussion in **Tariq** and **Kiani**, I consider that the judge was not wrong to reject the suggestion that it was enough for the state *merely* to assert that provision of the proposed gist would give rise to a risk to national security to win the day. Further, he did refer to the need to show "considerable deference" to the view of the Executive. However, the suggestion that it is *necessary* for the tribunal (with that deference) to consider both whether the provision of the gist might cause any harm and, if so the degree of harm, gives the impression of the tribunal assuming an evaluative role itself which would not comport with it confining its scrutiny to a *Wednesbury*-type approach, nor a recognition of the limits of the employment tribunal's ability to engage in its own evaluation of the state's case in any event.

57. To the extent that this passage is ambiguous as to the approach that the present tribunal took to the underlying principles governing its task, I have concluded, for reasons I expand upon in my CLOSED reasons, that the tribunal did overstep the mark in this regard in its substantive reasoning.

58. Ground 2(b) contends that the tribunal erred by failing to take sufficient consideration of the

protection of the SA procedure and the ability of the SA to test the case of the alleged discriminator without the need for the input of the claimant (relying on **Tariq** at [147]). This ground turns upon a critique of the judge's reasoning relating to the particular explanation advanced by the respondent for the clearance decisions, which I cannot discuss in these OPEN reasons. But, for reasons set out in my CLOSED decision, I have concluded that the judge's reasoning in this regard was, on the facts of this case, also flawed.

59. Ground 3 contends that the judge erred by failing to consider whether to order the provision of the gist would contravene rule 94(10). As to that, the general statement of the law in the tribunal's reasons includes a citation of rule 94(10), but it is not considered in the section in which the tribunal sets out its substantive reasoning and conclusions.

60. As I have noted, the question of how rule 94(10) sits with, or within, the balancing exercise approach, and the guidance as to how a tribunal should conduct that exercise, given in **Tariq**, **Kiani** and the other authorities, is not something that is substantively addressed in those authorities. Mr Tolley KC did not really develop his argument beyond the proposition that the judge had failed to reach any conclusion in relation to whether rule 94(10) would be contravened. Ms Carter-Manning KC submitted that the judge *had* in any event in substance concluded that there would be *no* risk to national security in the provision of the gist, at all.

61. It appears to me that the judge was indeed of that view (again I cannot expand on this in these OPEN reasons, save that I note that he concluded that provision of the gist would be "in-keeping with the interests of national security"), so that, had he specifically addressed rule 94(10), it would not, in any event, have altered his reasoning. Given that, and that I have concluded that the judge in any event erred with respect to the balancing exercise, the outcome of this appeal does not turn on ground 3, and I do not need to ponder further the significance of rule 94(10) for the balancing exercise approach.

62. At [34] the judge said, with regard to the respondent's stated security concerns:

> "I have no evidence whatsoever of those stated concerns. I have no statement (signed or otherwise). The Executive's case amounts to mere assertion, some of it speculative assertion (for example the suggestion that if the application was granted the Respondent might feel compelled to concede the claim)."

63. Ground 4 contends that this was an error for a number of reasons. First, evidence had been presented at the CLOSED hearing at which EJ Spencer decided to grant the section 94 order. Secondly, witness evidence had not been specifically directed for the purposes of the hearing to determine the gist application. Thirdly, *documentary* evidence *was* referred to at that hearing, as supporting the respondent's case that the provision of the gist would pose a risk to national security, as well as the respondent's case being set out in its written submissions. Mr Tolley KC noted that the materials before the tribunal included a signed letter from a relevant individual explaining the basis of the respondent's concerns, a copy of a document prepared for the SVAP proceedings which explained why there was concern that providing the gist would be damaging to national security in a number of ways, and the CLOSED SVAP decision, which referred to various material that was before it. The employment tribunal did not refer to any of this in its decision.

64. Ms Carter-Manning KC noted that the rule 94 part of the hearing before EJ Spencer was conducted in the absence of the claimant, and her rule 94 order did not preclude the possibility of a gist being provided. To determine that question evidence *specifically* directed to the contents of the proposed gist was required. She also questioned the significance of the letter referred to by Mr Tolley KC and submitted that the fact of the SVAP proceedings did not assist. In any event they would not have engaged Article 6 or required a balancing exercise.

65. My conclusions on this ground are these. Firstly, in principle, where the SA applies for a gist to be permitted, and the respondent is opposed to that, the case in opposition ought to be supported by some kind of statement emanating from a relevant person or persons, and/or documentary

material, rather than purely being advanced in counsel's submissions. Secondly, however, account must be taken of the realistic practicalities as to the extent to which hard evidence of risk could be adduced or detailed before the employment tribunal (see AB at [19(3)]. I add that I do not think anything much turns, in this forum, on whether such a statement comes in the form of a letter or a witness statement.

66. Thirdly, particularly against that background, I cannot see any principled reason why a respondent might not seek to rely upon a prior decision on a rule 94 order, which may refer to evidence put before the judge who made that order, or a decision in SVAP proceedings, which may refer to evidence before the SVAP panel. That would not preclude submissions being made about how such material should be weighed and evaluated, including having regard to what was at issue, what was decided, or the process followed, on those earlier occasions.

67. In this case, however, no reference at all is made in the tribunal's decision to these materials that were put before it. Having regard to that, and to the fact that, as a matter of fact, no direction had been given for the production of witness evidence for the purposes of the gist- application hearing, I conclude that the judge erred in his emphatic reliance on the proposition that there was no evidence before him to support the respondent's case.

68. I therefore uphold ground 4.

69. Ground 5 raises an issue peculiar to the particular facts of this case that cannot be explored in these OPEN reasons. I have concluded, for reasons I explain in the CLOSED reasons, that it does not materially add to the other grounds which I have upheld.

Outcome

70. For the foregoing reasons, and the further reasons I have given in the CLOSED annex to this decision, I have concluded that the appeal should be allowed. I will invite further written submissions

as to whether I should remit the application for a gist for fresh consideration by the tribunal, or whether I can, and should, substitute my own decision on that application.