

Neutral Citation Number: [2026] EAT 52

Case No: EA-2024-000015-RN and others

**EMPLOYMENT APPEAL TRIBUNAL**

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

Date: 15 April 2026

**Before:**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between :**

**National Crime Agency**

**Appellant/Respondent**

**- and -**

**DP and others**

**Respondents/Cross Appellants/Appellant**

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**Tom Kirk and Mark Green**  
(instructed by Government Legal Department) for the NCA  
**David Lemer,**  
**Special Advocate** instructed by SASO  
**Philip Rule KC**  
(instructed by JFH Law) for **DP and others**

Hearing date: 15 and 16 October 2025

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**OPEN JUDGMENT**

**SUMMARY****Practice and Procedure**

This judgment considers the proper construction and application of Section 56 **Investigatory Powers Act 2016** in an employment law context. In particular, whether there can be an OPEN hearing of a claim brought by a person who was employed in a role where, for the sake of argument, it is assumed that the employee dealt with material obtained as a result of lawful interception of communications; that being neither accepted nor denied to be factually correct.

## HIS HONOUR JUDGE JAMES TAYLER

### The issue

1. The issue determined in this judgment is the correct interpretation of Section 56 **Investigatory Powers Act 2016** (“IPA”) in an employment law context. The issue arises in four appeals. In subsequent linked judgments I shall consider, after further oral and/or written submissions, the outcome in the individual appeals, including the extent to which reasons can be given in OPEN and/or CLOSED judgments. I am currently minded to extend the time within which any application for permission to appeal should be made until 21 days after the provision of the final judgments.
2. The parties will be referred to as the claimants and respondent as they were before the Employment Tribunal.
3. For the purposes of this judgment the applicability of Section 56 **IPA** to the facts of the cases is neither confirmed nor denied. The “neither confirm nor deny” approach was approved, in somewhat different circumstances, by Mummery LJ, in **Coles v Barracks**:

45 The police mention RIPA as a statutory example of a case in which the disclosure of information connected to the interception of communications is prohibited in the broadest possible terms. The police neither confirm nor deny that RIPA provided the actual legal basis for their inability to make the disclosure ordered by the employment tribunal. The disclosure hearing before Judge Ansell was not an acceptance by the police (or by the Employment Appeal Tribunal) that RIPA applied. **The submissions on RIPA are, in my view, correctly made on the basis that their application to this case can neither be confirmed nor denied. They have to be received by this court on that basis for the time being.**

46 **This is an orthodox and tenable position**, of which judicial notice has been taken, in relation to security and intelligence matters generally. Operations in those areas can only be effectively conducted in secret. It would be self defeating to make disclosure either by confirming or by denying that intelligence gathering activities had taken place in a particular instance.

4. The **IPA** generally makes the interception of communications unlawful, but also provides a regime under which the interception of communications is permitted in closely prescribed circumstances.

5. The question raised in this appeal is whether there can be an OPEN hearing of a claim brought by a person who was employed in a role where, for the sake of argument, it is assumed that the employee dealt with material obtained as a result of lawful interception of communications; that being neither accepted nor denied to be factually correct.

6. What may seem like pussyfooting around the issue, results from the apparently very broad terms in which Section 56 IPA is drafted. The parties were prepared to adopt the “neither confirm nor deny” approach, at least prior to the final determination of the issue (including any appeal), which assists in the point of principle being decided in an OPEN judgment.

7. A CLOSED hearing is one from which the claimant and any representative is excluded, but at which the claimant’s interests may be represented by a Special Advocate. An OPEN hearing is one which the claimant and any representative is entitled to attend. An OPEN hearing **may be held in private** or be subject to other exceptions to the open justice principle where justified. OPEN and CLOSED are terms specific to national security cases and do not mean the same thing as hearings that are held in public or private.

8. Section 56 IPA provides:

**56 Exclusion of matters from legal proceedings etc.**

(1) No **evidence** may be **adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with** any legal proceedings or Inquiries Act proceedings which (in any manner)—

(a) **discloses, in circumstances from which its origin in interception-related conduct may be inferred—**

(i) any **content of an intercepted communication**, or

(ii) any **secondary data** obtained from a communication, or

(b) **tends to suggest that any interception-related conduct** has or may have occurred or may be going to occur.

This is **subject to Schedule 3 (exceptions)**.

(2) **“Interception-related conduct”** means—

(a) conduct by a person within subsection (3) that is, or in the absence of any lawful authority would be, an offence under section 3(1) (offence of unlawful interception);

(3) The persons referred to in subsection (2)(a) are—

(a) any person who is an **intercepting authority** (see section 18); ...

(5) In this section— ...

**“intercepted communication”** means any communication intercepted in the course of its transmission by means of a **postal service** or **telecommunication system**. [emphasis added]

9. It is helpful to break Section 56 **IPA** into its component parts. Section 56 **IPA** prevents parties undertaking certain excluded acts in litigation. The excluded acts are broadly defined by Section 56(1) **IPA**. Where Section 56 **IPA** applies no **“evidence”** may be adduced; no **“question”** can be asked; no **“assertion”** can be made; no **“disclosure”** can be made; and no **“other thing”** can be done for the **“purposes of”** or in **“connection with”** any legal proceedings which in **“any manner”** shows any of the conduct that falls within Section 56 **IPA**. It is hard to imagine a more broadly defined exclusion.

10. Section 56(5) **IPA** defines an “intercepted communication” as any communication “intercepted in the course of its transmission by means of a postal service or telecommunication system”. Accordingly, Section 56(5) **IPA** does not apply to every type of interception of communications.

11. Section 56(2) **IPA** defines “interception-related conduct”, so far as is relevant to this appeal, as conduct by an intercepting authority that is, or in the absence of any lawful authority would be, an offence of unlawful interception. Interception-related conduct includes lawful interception of communications. That is likely to be the main area of applicability of section 56(2) **IPA** in cases of the nature considered in this appeal.

12. It is important to note the distinction between the two types of excluded acts referred to in Section 56(1)(a) and (b) **IPA**. Section 56(1)(a) **IPA** refers to the disclosure of “any **content** of an intercepted communication” and “any secondary data obtained from a communication” in

circumstances “**from which its origin in interception-related conduct may be inferred**”. The importance of the content or secondary data of the communication is that it might be inferred that it results from interception-related conduct.

13. Section 56(1)(b) IPA refers to excluded act that “**tends to suggest that any interception-related conduct has or may have occurred or may be going to occur**”. This is the provision that is of particular importance in the determination of this appeal.

14. Section 56(1) IPA states that there are exceptions to the application of Section 56 IPA provided for by Schedule 3 IPA.

15. Paragraph 2(1) of Schedule 3 IPA provides:

2(1) Section 56(1)(a) **does not prohibit the disclosure of any content of a communication**, or any secondary data obtained from a communication, **if the interception of that communication was lawful** by virtue of any of the following provisions—

(a) sections 6(1)(c) and 44 to 52; ... [emphasis added]

16. Paragraph 2(1) of Schedule 3 IPA applies only to Section 56(1)(a) IPA which relates to the content or secondary data from a communication where the interception of the communication was lawful. Paragraph 2(1) of Schedule 3 IPA does not apply to Section 56(1)(b) IPA that refers to conduct that “tends to suggest that any interception-related conduct has or may have occurred or may be going to occur”. Accordingly, the provision is not of assistance to the claimants, other than by demonstrating that Section 56 IPA does not apply in all circumstances.

17. Paragraph 14(1) of Schedule 3 IPA provides:

14(1) **Section 56(1) does not apply in relation to any proceedings before an employment tribunal where the applicant, or the applicant’s representatives, are excluded for all or part of the proceedings** pursuant to—

(a) a direction to the tribunal by virtue of section 10(5)(b) or (c) of the Employment Tribunals Act 1996 (exclusion from Crown employment proceedings by direction of Minister in interests of national security), or

(b) a determination of the tribunal by virtue of section 10(6) of that Act (determination by tribunal in interests of national security). [emphasis added]

18. Paragraph 15 of Schedule 3 **IPA** provides:

**15 But paragraph 14 does not permit the disclosure of anything to—**

**(a) the person who is or was the applicant** in the proceedings before the employment or industrial tribunal, or

**(b) any person who—**

**(i) represents that person** for the purposes of any proceedings within paragraph 14, and

**(ii) does so otherwise than by virtue of appointment as a special advocate.** [emphasis added]

19. Thus, Section 56 **IPA** does not apply where there are CLOSED proceedings. If the respondent is correct in their interpretation of Section 56 **IPA** a claim brought by a person who has worked in a role that involves dealing with intercepted communications would have to be conducted in CLOSED (as permitted by Paragraph 14 of Schedule 3 **IPA**) with the consequence that the employee would be excluded and nothing about the evidence in the proceedings could be disclosed to the employee (because of Paragraph 15 of Schedule 3 **IPA**).

20. Paragraph 16 of Schedule 3 **IPA** provides:

**16 Section 56(1) does not prohibit anything done** in, for the purposes of, or in connection with, **so much of any legal proceedings as relates to the fairness or unfairness of a dismissal on the following grounds—**

**(a) any conduct constituting an offence** under section 3(1), 43(7), 59 or 155;

21. This provision is not directly relevant to the issue in this appeal, but demonstrates there is a situation in which an employee may attend an Employment Tribunal hearing from which, but for that provision, the employee would be precluded from attending, by operation of Section 56 **IPA**, because the hearing would have to be held in CLOSED. The respondent's construction would have the rather surprising consequence that an employee who is alleged to have committed an offence by unlawfully intercepting a communication can attend the hearing of their claim in the Employment Tribunal; whereas an employee who has blamelessly undertaken a job dealing with material from the lawful interception of communications, cannot.

22. Many employees who deal with confidential material related to national security have employment rights. The Employment Tribunal has a range of tools at its disposal to ensure that the hearing of their claims does not endanger national security. Section 10 of the **Employment Tribunals Act 1996** (“**ETA**”) allows an Employment Tribunal where necessary to sit in private, exclude the applicant, exclude the applicant’s representatives, conceal the identity of a particular witness and keep secret all or part of the reasons for its determinations.

23. At the relevant time, Rule 94 of the **Employment Tribunals Rules of Procedure** (Sched 1, to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**) (“**ETR 2013**”), now Rule 93 of the **Employment Tribunal Procedure Rules 2024** (“**ETR**”), permitted an Employment Tribunal to conduct all or part of the proceedings in private; exclude a person from all or part of the proceedings and to take steps to conceal the identity of a witness in the proceedings.

24. Because such orders may have serious consequences for the fairness of hearings the rule requires the Employment Tribunal to keep such orders “under review”.

25. The **Employment Tribunals (National Security) Rules of Procedure** at Schedule 2 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** (Now Schedule 1 **ETR**) set out further details of the protections that can be applied in national security cases.

26. In addition to the tools provided by the national security provisions there are general powers that permit derogation from the open justice principle in appropriate circumstances. At the relevant time Rule 50 **ETR 2013** (now Rule 49 **ETR**) allowed an Employment Tribunal where it is in the interests of justice to make an order that a hearing that would otherwise be in public be conducted in private; order that the identities of people should not be disclosed to the public; prevent witnesses at a public hearing being identifiable by members of the public; and/or make a restricted reporting order. But in doing so the Employment Tribunal must give full weight to the principle of open justice and the Convention right of freedom of expression.

27. At the relevant time Rule 94 **ETR 2013** (now Rule 93 **ETR**) provided that:

(10) **The Tribunal must ensure** that in exercising its functions, **information is not disclosed contrary to the interests of national security**. [emphasis added]

28. The analysis of the effect of Section 56 **IPA** in Employment Tribunal proceedings is to be undertaken in the context of the range of tools available to the Employment Tribunal to ensure that national security is protected. In this judgment I am specifically determining the interpretation of Section 56 **IPA** in the employment law context, taking account of the powers available to the Employment Tribunal to protect the interests of national security. The same analysis would not necessarily apply in all other types of legal proceedings, which I have not considered.

29. There are similar provisions designed to protect national security in the Employment Appeal Tribunal: Rule 30A and 31A of the **Employment Appeal Tribunal Rules 1993** (as amended).

30. The specific issue that arises in this appeal has not previously been considered at an appellate level as far as the researches of Counsel, all of whom have very considerable experience in this area, could establish.

31. The paradigm application of Section 56 **IPA** is where there is evidence, unknown to a party to the proceedings, the disclosure of which would fall within its provisions.

32. In criminal proceedings, dealing with the admissibility of EnchroChat material, the Court of Appeal considered the meaning of Section 56 **IPA** in **Palmer and others v NCA** [2024] EWCA Civ 1095:

30. Section 56 is headed ‘Exclusion of matters from legal proceedings’. **The effect of section 56(1), subject to the exceptions in Schedule 3 to the IPA, is to make evidence which has the effects described in section 56(2) and (3) inadmissible in any legal proceedings.** Those effects are the disclosure in any circumstances from which its origin in interception-related conduct may be inferred, of any content of an intercepted communication or any secondary data obtained from it, or of tending to suggest that any interception-related conduct has or may have occurred or may be going to occur. ‘Interception-related conduct’, a term which might be thought to have a potentially wide meaning, is defined in relatively narrow terms (in section 56(2)). It includes a breach of sections 3, and of the prohibitions in sections 9 and 10 of the IPA. Paragraph 2(1) of Schedule 3 to the IPA provides that section 56(1) does not prohibit the disclosure of any content of a communication, or any related secondary data if the interception of the communication was lawful under section 6(1)(c) (among other provisions). [emphasis added]

33. Similar issues can arise in Employment Tribunal claims where there is evidence, unknown to an employee, that was relied on to dismiss, or subject the employee to some other detriment. Information could be obtained from the lawful interception of a communication that necessitates the dismissal of an employee, the disclosure of which, or any consideration of its origin, could endanger national security.

34. That is not the scenario that has been assumed for the purposes of this appeal. The assumption is not that there is evidence unknown to employees, the disclosure of which would fall foul of Section 56 **IPA**. The respondent contends that any mention that an employee may have dealt with material from intercepted communications is within the Section 56 **IPA** prohibition because it “tends to suggest that any interception-related conduct has or may have occurred or may be going to occur”. If that is correct, no “evidence” may be adduced; no “question” can be asked; no “assertion” can be made; no “disclosure” can be made; and no “other thing” can be done for the “purposes of” or in “connection with” any legal proceedings which in “any manner” shows anything that falls within Section 56 **IPA**. The proceedings could only proceed if the employee was excluded from the entire hearing and not informed of any of the evidence presented at the hearing, notwithstanding the fact that the presumed interception related conduct is known to the employee, and the employer is an organisation that can lawfully intercept communications, being defined as an intercepting authority by the **IPA**.

35. Determining the issue involves important competing factors: particularly, the requirement on the Employment Tribunal to avoid disclosure of material that is contrary to the interests of national security; the open justice principle; and the claimants’ Article 6 fair trial rights. I am not persuaded that the possible application of Article 8 adds to the analysis.

36. Section 3 of the **Human Rights Act 1998** (“**HRA**”) provides:

**(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.**  
[emphasis added]

37. In **Mercer v Alternative Future Group Ltd and another** [2024] UKSC 12, [2024] ICR 814 the Supreme Court, Lady Simler JSC, considered the extent of the interpretative obligation provided for by Section 3 HRA:

92. Section 3 requires that, **so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with rights guaranteed under the Convention.** In other words, **the courts are required to interpret primary legislation to comply with Convention rights unless the legislation itself makes it impossible to do so.**

93. The approach to section 3 is well established and not controversial on this appeal. As it was described by Lord Reed PSC (with whom Lords Hodge, Lloyd-Jones, Sales and Stephens JJSC agreed) in *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] 1 WLR 5106, at paras 25 and 26 :

“25. Section 3 of the Human Rights Act was interpreted in *Ghaidan v Godin-Mendoza* as **imposing a remarkably powerful interpretative obligation, which goes well beyond the normal canons of statutory construction.** The nature of the obligation was explained by Lord Nicholls of Birkenhead at para 30: **‘the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear.** In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.’ Lord Nicholls added at para 32: ‘the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary and secondary legislation.’

“26. The House of Lords accordingly held that **section 3 required, where necessary, that the courts, and other public authorities, should give to provisions in statutes, including statutes enacted subsequent to the Human Rights Act , a meaning and effect that conflicted with the legislative intention of the Parliaments enacting those statutes ...”**

94. **Nonetheless, there are limits to its use and not all provisions in primary legislation can be rendered Convention-compliant** by the application of section 3(1) of the HRA . While this section gives the court a powerful tool with which to interpret legislation, **it does not enable the court to change the substance of a provision from one where it says one thing into one that says the opposite;** or as Lord Nicholls of Birkenhead explained at para 33 in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 , to

“adopt a meaning inconsistent with a fundamental feature of legislation”. Further, as Lord Rodger of Earlsferry observed at para 115,

“difficult questions may also arise where, even if the proposed interpretation does not run counter to any underlying principle of the legislation, it would involve reading into the statute powers or duties with far-reaching practical repercussions ...”

95. In *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, at para 28, Lord Bingham of Cornhill referred to the cases of *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 and *Bellinger v Bellinger* [2003] 2 AC 467 as illustrating the limit beyond which a Convention-compliant interpretation is not possible and said:

“In explaining why a Convention-compliant interpretation may not be possible, **members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation** (paras 33, 49, 110–113, 116). **All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act : ‘So far as it is possible to do so ...’** While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify.” [emphasis added]

38. I shall use as shorthand for this analysis: the “Section 3 **HRA** interpretative obligation”; that while very wide, does not permit an “impossible interpretation”.

39. In **AB v Sect. of State for Defence** [2010] ICR 54 Lord Justice Underhill stated of exceptions to the open justice principle, in the national security context:

19 What is in any event clear from the numerous authorities cited to me is that they contain no explicit consideration of the correct approach to be taken where a party asks the court to make an exception to the rule of open justice in the interests of national security. For the reasons that I have given there is a limit to the useful guidance that can be given. However, I think that it is possible to say the following.

(1) **Any exception to the rule of open justice has to be justified.** It is, as emphasised in all the cases to which I have referred, **a strong rule and any justification has accordingly to be cogent.**

(2) It is uncontroversial that the interests of national security are capable of justifying such an exception. But, as a matter of principle, in any case where the exception is invoked, and specifically in the case of an application under rule 54(2), the court or tribunal must make a judicial assessment of whether they do so in the particular case. That **will in principle involve striking a balance between, on the one hand, the seriousness of the prejudice to national security which is asserted, and the degree of risk that**

that prejudice may occur if the exception sought is not made; and, on the other, the extent of the infringement of the principle of open justice embodied in the rule and the risk of prejudice to the public interest or the interests of the individual in the particular case. On ordinary principles, the more serious the infringement of the principle the greater the prejudice, or risk of prejudice to national security, needed to justify it: thus it will be easier to justify, say, the anonymisation of witnesses or the redaction of documents than the conducting of an entire hearing in private.

(3) Thus far the exercise would appear to be an application of the principle of proportionality of a conventional kind; and one where, because of the importance of the principle of open justice, there is a heavy burden on the party seeking the restriction. But that is not the whole picture. **“The interests of national security” constitute a factor of a rather particular nature. Where those interests are indeed 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 of others. An established risk of such outcomes must of its nature weigh heavily in the opposite balance against the principle of open justice, important though that is. Of course sometimes it will not be self-evident that any such asserted risk is indeed present or is serious. In such a case, however, 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.**

(4) Those cautionary observations do not mean that the proportionality exercise is unnecessary or that it can only have one outcome whenever an application for measures under rule 54(2) is made. **Tribunals can and should not abdicate their responsibilities to make the necessary assessment whenever national security is invoked. But they do mean that it will be necessary for tribunals to approach any such application with a recognition of the weight which must necessarily be accorded to any real risk to the interests of national security and of the limits to the assessment of that risk which it may realistically be possible to carry out. It may be that it was with these points in mind that the draftsmen chose the word “expedient” rather than “necessary”.** But, whether that is so or not, I believe that the question whether an order under rule 54(2) should be made should be approached in accordance with the foregoing guidance. [emphasis added]

40. In *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, the Supreme Court considered the compatibility of the Special Advocate procedure with Convention rights. Lord Mance stated:

27. Mr Allen submits that the fundamental nature of equality rights makes it just as critical that Mr Tariq should receive the fullest procedural rights in this case .... **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. ...**

36. These three cases— *Leander* , *Esbester* and *Kennedy* —establish 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 or her complaint is determined. The critical questions under the Convention are whether the system is necessary and whether it contains sufficient safeguards. But, subject to satisfactory answers on these questions, national security considerations may justify a closed material procedure, closed evidence (even without use of a special advocate) and, furthermore, (as in *Kennedy* itself) a blanket decision leaving the precise basis of determination unclear.**

44. ... it means that, even if disclosure of material to the person concerned might involve some potential damage to national security, an employment tribunal or court might, weighing the interests of justice, conclude that either the state should make such disclosure, not merely to the special advocate but also to the person concerned, or it should withdraw any reliance on the material. Likewise, in relation to the third concern, it is a matter of discretion how far such contact is permitted, and **the tribunal or judge can and should exercise such discretion flexibly and after balancing the competing interests.** ....

62. It follows that I would hold that the use of a closed material procedure before the employment tribunal was and is lawful in the present case, and dismiss Mr Tariq’s appeal accordingly. [emphasis added]

41. Lord Hope held:

71. **At the heart of both the appeal and the cross-appeal are two principles of great importance. They pull in different directions. On the one hand there is the principle of fair and open justice.** As O’Connor J declared in *Hamdi v Rumsfeld* (2004) 542 US 507, 533 , parties whose rights are to be affected are entitled to be heard and in order that they may enjoy that right they must first be notified. **In European Convention terms, this is the principle of equality of arms which is part of the wider concept of a fair trial: *Kennedy v United Kingdom* (2010) 52 EHRR 207 , para 184.** On the other there is **the principle that gives weight to the interests of national security.** This is one of the legitimate aims referred to in articles 8(2), 10(2) and 11(2) of the Convention. **The extent of the discretion that must be accorded to the national authorities in this field was recognised in *Leander v Sweden* (1987) 9 EHHR 433 , para 59.** National security was described as a strong countervailing public interest in *Kennedy* , para 184. **But it must be weighed against the fundamental right to a fair trial.**

72. **The context will always be crucial to a resolution of questions as to where and how this balance is to be struck. ...**

74. **By section 10(6) of the Employment Tribunals Act 1996 it is provided that the employment tribunal procedure regulations may enable a tribunal, if it considers it expedient in the interests of national security, to adopt a closed procedure.** Section 10(7) provides that the procedure regulations may make provision in that event for the appointment by the Attorney General of a special advocate to represent the interests of

the claimant. ...

**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. ....**

76. The question then is whether the difficulties that Mr Tariq faces in making good his discrimination claim are sufficiently counterbalanced by the procedures that the Home Office wishes the employment tribunal to adopt. First, there is the use of the closed procedure for the consideration of the material on which the Home Office wishes to rely in its defence. Is the procedure that the Regulations have prescribed for use in national security cases compatible with European Union law? This is the point raised by Mr Tariq's cross-appeal. Second, if the use of the closed procedure is lawful, how is it to be applied in this case? Is the Home Office obliged to give sufficient detail of the material on which it relies to enable Mr Tariq to give detailed instructions to his special advocate to enable that material to be challenged effectively? This is the point raised by its appeal. The Court of Appeal [2010] ICR 1034, para 50 held that the principle illustrated by *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 must apply. This was despite the fact that this would put the Home Office in the invidious position of having to make decisions as to whether, and if so how, the claim was to be defended.

77. I have found the second issue more troublesome than the first. As to the first, which is the issue raised in Mr Tariq's cross-appeal, **the question is whether the use of the closed procedure in cases of this type impairs the very essence of his right to a fair trial.** The right to a fair trial itself is an absolute right, but rights that are to be implied from article 6 of the European Convention are not: *Brown v Stott* [2003] 1 AC 681, 719. Their purpose is to give effect, in a practical way, to the fundamental right. The right to a fair hearing must ordinarily carry with it the right to have proceedings conducted in open court, with full disclosure by both sides. But, for the reasons already mentioned, the use of an open procedure where details of the security vetting process are in issue cannot be resorted to without risk to the integrity of the system which in the national interest must be preserved. The observations of the Court of Justice in *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225, para 344 indicate that **European Union law is willing to accept a closed material procedure in the interests of national security so long as the individual is accorded a sufficient measure of procedural justice. That this is the position that the Strasbourg court too has adopted is amply demonstrated by its decisions in *Kennedy v United Kingdom* 52 EHR 207, paras 184–190.** Parliament has expressed a clear democratic judgment that the tribunal may in its discretion make use of the closed procedure with the assistance of a special advocate.

78. As for the procedure that the 2004 Regulations provide for, several features indicate that the balance has been struck in the right place. First, there is the fact that, under the procedure provided for by rule 54(2) of Schedule 1 to the Regulations, **the decision as to whether closed procedure should be resorted to rests with the tribunal or the employment judge.** The fact that the decision is taken by a judicial officer is important. It ensures that it is taken by someone who is both impartial and independent of the executive. Second, there is the fact that, as this is a judicial decision, it will not be taken without hearing argument in open court from both sides. It will be an informed decision, not one taken without proper regard to the interests of the individual. Third, it opens the

door to the use of the special advocate. Fourth, it is a decision that can and should be kept under review as the case proceeds: see the last sentence of rule 54(2). Fifth, the special advocate can and should be heard as the process of keeping it under review proceeds.

**79. ... I think that the balance lies firmly in favour of allowing the tribunal, in its discretion, to make use of the closed procedure. I would dismiss the cross-appeal. ...**

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. I would allow the appeal. [emphasis added]

42. Lord Dyson held:

160. I would add the following points which reinforce the Home Office case. First, the subject matter of the claim is a claim for damages for alleged discrimination. I do not wish to underestimate the importance of the right not to be subjected to discrimination. But, on any view, discrimination is a less grave invasion of a person's rights than the deprivation of the right to liberty. **Secondly, the issues in the present case are such that the presence of an independent court and a special advocate are likely to go a long way to making up for the fact that Mr Tariq will be unable fully to participate in the proceedings.** As I have explained at para 147 above, there is likely to be only limited (if any) scope for Mr Tariq to be able to give instructions to the special advocate which are necessary to enable her to test the Home Office case effectively.

Conclusion

161. I would, therefore, allow the Home Office's appeal **primarily on the ground that this case concerns a decision taken in the context of security vetting. In other classes of civil case which are outside the surveillance/security vetting context, the balance between the individual's article 6 rights and other competing interests may be struck differently. It is said that this gives rise to undesirable uncertainty. But much of the content of the European Convention on Human Rights is about striking balances.** This is sometimes very difficult and different opinions can reasonably be held. As a consequence, outcomes are sometimes difficult to predict. This is inevitable. But it is 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.** [emphasis added]

43. What is apparent from these authorities is that the CLOSED procedure can be compatible with Article 6 fair trial rights, in large part because its applicability, and the possible provision of some information to the employee, is under the control of an Employment Judge, who must balance the competing factors to ensure fairness, only necessary derogation from the open justice principle, and compatibility with Convention rights.

44. In **R (Unison) v Lord Chancellor** [2017] UKSC 51, [2020] AC 869 Lord Reed JSC stated, in the very different context of the Employment Tribunal fees regime then in place, of any limitation to access to justice :

... even where **primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation.** As it was put by Lord Bingham in *Daly*, **the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve.** [emphasis added]

45. To consider the extent of any "implied limitation" and whether the claimant's suggested application of the Section 3 **HRA** interpretative obligation gives rise to an impossible interpretation, it is necessary to consider the objectives that Section 56 **IPA** is intended to serve. In doing so, it is important to have in mind Lord Justice Underhill's comments in **AB** about the particular nature of the interests of national security, which the Employment Tribunal (or indeed EAT) may not be well placed to assess; and the importance of recognising the weight which must be accorded to any real risk to the interests of national security; and of the limits to the assessment of that risk which it may realistically be possible to carry out. All that said, as Lord Justice Underhill stated, tribunals cannot

abdicate their responsibilities to make the necessary assessment whenever national security is invoked.

46. The core purpose of the **IPA** is to outlaw certain methods of the interception of communications generally; but to permit the lawful interception of communications in limited circumstances, including where it is necessary in the interests of national security. Section 56 **IPA** is to be construed in that context. In broad terms, section 56 **IPA** prevents evidence being given in proceedings that relates in any way to intercepted communications, primarily to protect the interests of national security.

47. It is obvious that evidence about the interception of communications could damage the interests of national security. There may be powerful reasons why the content of intercepted communications must be kept secret. The protection will often extend to the methods by which communications are intercepted and the identity of those whose communications are intercepted; either individually or because of their membership of some group. I shall refer to information that requires protection in the interests of national security as “sensitive information”.

48. The paradigm example of the application of Section 56 **IPA** in the Employment Tribunal is where there is evidence, of which the employee is unaware, disclosure of which could result in sensitive information becoming known to the public and/or to the claimant and any people whom the claimant might tell about it. It is easy to understand why the consideration of sensitive information can make the CLOSED procedure appropriate in such cases.

49. In the scenario considered in this appeal, it is assumed, being neither accepted nor denied, that employees work with intercepted communications. Any content, origin, individuals involved and method of such assumed interception is unlikely to be relevant to any claims of such employees in the Employment Tribunal. It is unlikely that there would be evidence that would result in the disclosure of sensitive information in the scenario that has been assumed.

50. The respondent’s interpretation of Section 56(1)(b) **IPA** would require that the Employment

Tribunal proceedings be conducted in CLOSED in the absence of the employees. While Special Advocates could be appointed they could not discuss the material relied on by the respondent with the employees or their legal representatives as a result of the provisions of Paragraphs 14 and 15 of Schedule 3 **IPA**.

51. On a literal interpretation, the scope of Section 56(1)(b) **IPA** is exceptionally wide ranging. If a company supplied headphones to an “intercepting authority” and there was a commercial dispute about the sale of those goods, it could be argued that the sale of headphones tends to suggest that “interception-related conduct may be going to occur” and so any evidence about the sale of the headphones or their specifications would be precluded by Section 56(1)(b) **IPA**. It might be said that is an absurd example, but is it so much more surprising than the respondent’s contention that, merely because an employee is assumed to have worked in a role that involved some consideration of intercepted communications, the employee must be excluded from Employment Tribunal proceedings and cannot be told about, or give instructions on, the evidence, even if the determination of the complaints would not require the consideration of any sensitive information?

52. The problem with the respondent’s interpretation is that it means that by operation of Section 56(1)(b) **IPA** the discretionary CLOSED procedure in the Employment Tribunal becomes mandatory in interception-related conduct cases; which undermines the basis upon which the CLOSED procedure has been held to be lawful; i.e. because it involves an Employment Judge weighing up the competing interests; including the interests of national security, the open justice principle and the Article 6 rights of the employee. Paragraph 15 of Schedule 3 **IPA** prevents an Employment Judge from considering the possibility of even providing a gist of any relevant evidence to the employee. The Employment Judge would not be able to consider whether the interests of national security could be secured by any of the less invasive orders that are available in cases involving issues that may impact on national security, such as holding part of the hearing in private.

53. Having regard to the Section 3 **HRA** interpretative obligation, I consider that the problem can

be resolved by limiting Section 56(1)(b) **IPA**, in this employment law context, to apply to **particular** interception-related conduct. I use the term “particular” rather than “specific”, as was suggested by the claimants, to provide a broader protection than would apply if Section 56(1)(b) **IPA** only covered “specific” interceptions of communications. The term is designed to be sufficiently flexible so that it will be for a Court or tribunal to determine in the factual circumstances of the case whether there is, or is not, particular interception-related conduct. Particular interception-related conduct could include the interception of a specific communication or group of communications, interception-related conduct targeting specific individuals or groups and various different types of interception-related conduct. It would be for the Employment Tribunal to determine whether there is particular interception-related conduct having regard to factors such as the seriousness of the prejudice to national security if the existence of the interception-related conduct were to become known and the risk of that occurring. The Employment Tribunal can have regard to the prejudice to the fair trial rights of the employee if Section 56(1)(b) **IPA** applies and to the other options available to ensure that sensitive information does not get into the public domain. Cases which involve interception-related conduct would be dealt with in a manner similar to other national security cases, the Employment Tribunal being under an obligation pursuant to Rule 94 (**ETR 2013** (now Rule 93 **ETR**) to “ensure that in exercising its functions, information is not disclosed contrary to the interests of national security”. The Employment Tribunal would balance the relevant interests in a similar manner to how it does generally when deciding whether to order that a hearing takes place in **CLOSED**. The Employment Tribunal can ensure that the degree of intrusion on the employee’s participation in the hearing is not greater than is justified by the objectives which Section 56 **IPA** is intended to serve.

54. In effect, Section 56(1)(b) **IPA** would be rewritten in this employment law context as follows:

56 Exclusion of matters from legal proceedings etc.

(1) No evidence may be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which (in any manner)—

(a) discloses, in circumstances from which its origin in interception-related conduct may be inferred—

(i) any content of an intercepted communication, or

(ii) any secondary data obtained from a communication, or

(b) tends to suggest that any **particular** interception-related conduct has or may have occurred or may be going to occur. [added word in bold and underlined]

55. I can see nothing to suggest that this is an impossible interpretation. It goes with the grain of the **IPA** and is consistent with its purpose in preventing sensitive information getting into the public domain contrary to the interests of justice. It can only be assumed that the legislative intent behind Section 56 **IPA** was a proportionate protection of national security rather than a blanket exclusion of claimants from hearings which will only involve a broad consideration of their job role in circumstances that often will not pose a risk to national security.

56. In disposing of the individual appeals my intention is that the management of the proceedings will be for the Employment Tribunal, which will be best placed to ensure that any orders necessary for the protection of national security are in place, that they are kept under regular review and if, as disclosure takes place, witness evidence is exchanged and the hearings proceed, there is evidence about **particular** interception-related conduct, that Section 56 **IPA** is applied.

57. Within 14 days of the hand down of this judgment the parties should provide written submissions as to the next stages of dealing with the determination, and disposal of, the individual appeals, including whether **CLOSED** material should now be made available to the claimants, whether a further hearing is required, or the remaining matters can be dealt with on paper, and any orders that may be necessary to protect the interests of national security in these appeals.