Case No: A2/2014/4129

Neutral Citation Number: [2015] EWCA Civ 776
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Langstaff
UKEAT/0009/14/DM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 July 2015

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE LEWISON

- -

Between :

AFZAAL AHMAD KIANI	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Hugh Southey QC and Paul Troop (instructed by **Bindmans LLP**) for the **Appellant**
Charles Bourne QC (instructed by **the Government Legal Department**) for the **Respondent**

Hearing dates : 6 July 2015

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Judgment

Master of the Rolls:

1. The appellant was employed by the respondent as an immigration officer. He was suspended on 18 March 2008 and his security clearance was withdrawn on 27 June 2008. On 27 July 2010, he was dismissed from his employment. No reasons were given for these decisions.

2. On 24 December 2009 and 20 October 2010, the appellant lodged Employment Tribunal ("ET") claims alleging respectively discrimination on grounds of race and religion (he is a British Pakistani Muslim) and unfair dismissal. By its grounds of resistance, the respondent asserted that the decisions had been taken for reasons of national security and that he had been dismissed because he no longer had security clearance.

3. At a Case Management Discussion held on 10 February 2012, Regional Employment Judge Potter made interim orders under rule 54 of the Employment Tribunals Rules of Procedure 2004 ("the 2004 Rules") that (i) the appellant and his representatives should be excluded from the secret parts of the interlocutory hearings which would be regarded as "closed"; (ii) secret material should not be disclosed to the appellant; and (iii) the Attorney General should be informed that it might be appropriate to appoint a special advocate. Rule 54(2) of the 2004 Rules permits a tribunal or Employment Judge, if it or he considers it expedient in the interests of national security, to make orders including that documents are not disclosed to a person who is excluded from proceedings ("an excluded person").

4. A special advocate was appointed. In due course, the secret material was disclosed to the special advocate, but he was precluded from meeting the appellant and taking instructions from him in relation to it.

5. On 14 September 2012, the appellant applied to the Employment Tribunal for an order to determine (i) what orders were required "to address the lack of substantive disclosure by the Respondent"; and (ii) the extent to which his right to a fair trial guaranteed by article 6 of the European Convention on Human Rights ("the Convention") had been complied with by REJ Potter in the orders that she had made. The appellant sought inter alia an order that the respondent should be required to choose between (i) disclosing the evidence or the gist of the evidence on which she had relied in making the two decisions under appeal and (ii) withdrawing reliance on the evidence altogether.

6. A closed Case Management Discussion was held on 18 October 2012 from which the appellant and his legal representatives were excluded. At this hearing, REJ Potter dismissed an application by the special advocate for further "gisting" and disclosure.

7. Meanwhile, the appellant had also appealed to the Security Vetting Appeals Panel (SVAP) against the removal of security clearance. Pursuant to a direction by SVAP, on 27 July 2012 the respondent provided some further information in the following terms:

> "Mr Kiani's wife, Riffiat Kiani, worked for a company called Global Immigration Management Ltd. This company, which has offices in London and Pakistan, specialises 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."

8. An open Case Management Discussion was held by the ET (Employment Judge Snelson) on 9 July 2013 to deal with the appellant's application of 14 September 2012. The judge gave his decision in a reserved judgment on 23 August 2013. At this stage, I need say no more than that he held that the orders made under Rule 54 were compatible with article 6 of the Convention and he refused to revoke or vary them. In reaching his decision, the judge placed considerable reliance on the decision of the Supreme Court in *Tariq v The Home Office* [2011] UKSC 35, [2012] 1 AC 452.

9. The appellant appealed this decision to the Employment Appeal Tribunal (EAT). At the heart of his argument was the submission that, in a case which is within the scope of EU law (such as the present case), the focus should not be on the Convention jurisprudence. Rather, it should be on the EU law jurisprudence and in particular on the decision of the CJEU in *ZZ (France) v Secretary of the State for the Home Department* (Case C—300/11) [2013] QB 1136. I shall refer to this decision as "*ZZ (CJEU)"*. The appellant contended that, whatever was required by article 6 of the Convention, *ZZ (CJEU)* showed that EU law required a minimum gist of the case against him to be disclosed openly and that since this had not occurred, the appeal should be allowed. His appeal was dismissed by Langstaff J in a reserved judgment given on 21 November 2014.

10. The appellant appeals with the permission of Langstaff J.

The grounds of appeal

11. The first ground of appeal is that the EAT failed to apply what is said to be the principle in *ZZ (CJEU),* namely that where a national authority withholds material concerning the reasons for treatment that interferes with rights guaranteed by EU law, the excluded person is entitled *in all circumstances* to be informed of the essence of the grounds for that treatment: this is the minimum level of disclosure that must always be given.

12. The second ground of appeal is that there was insufficient material to justify the conclusion of the EAT that the ET had conducted a "balancing exercise" which was compliant with EU law and the Convention on the particular facts of this case.

13. The third ground of appeal as expressed in the Grounds of Appeal is that "the ET was obliged to make its own assessment of whether a fair trial was possible (so that the position envisaged by *Carnduff v Rock* [2001] 1 WLR 1786 might apply)", rather than deferring this to the appellant in circumstances where he was in no position to make such an assessment".

THE FIRST GROUND OF APPEAL

The law

14. It is not in dispute that the discrimination claim with which we are concerned is within the scope of EU law. The Race Directive 2000/43/EC of 29 June 2000 and the Equality Directive 2000/78/EC of 27 November 2000 underpin employment equality rights. The third recital of the Race Directive states that the right to equality before the law and protection against discrimination for all persons "constitutes a universal right recognised by the Universal Declaration of Human Rights….". Article 7 provides:

> "Member States shall ensure that judicial and/or administrative procedures….for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them…. ".

15. Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter") provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law….."

16. Article 52 of the Charter provides:

> "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest by the Union or the need to protect the rights and freedoms of others.
>
> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

17. It is also necessary to refer to the Explanations relating to the Charter published on 14 December 2007 (2007 C303/02). The Explanation on article 47 states that its second paragraph "corresponds" with article 6 of the Convention. It also states that in Union

law the right to a fair hearing is not confined to disputes relating to "civil rights and obligations". It continues: "Nevertheless, in all respects other than their scope, the guarantees afforded by the [Convention] apply in a similar way to the Union". The Explanation on article 52 states that paragraph 3 is intended to ensure "the necessary consistency between the Charter and the [Convention], by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the [Convention], the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the [Convention]". It also states that the last sentence of paragraph 3 is "designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may not be lower than that guaranteed by the [Convention]".

18. In these circumstances, it is not surprising that in *Tariq* Lord Mance said at para 23:

> "…..It is, however, clear from both *Kadi* cases that the Court of Justice will look for guidance in the jurisprudence of the European Court of Human Rights when deciding whether effective legal protection exists, and how any balance should be struck when a question arises whether civil procedures should be varied to reflect concerns relating to national security. A national court, faced with an issue of effective legal protection or, putting the same point in different terms, access to effective procedural justice, can be confident that both European courts, Luxembourg and Strasbourg, will have the same values and will expect and accept similar procedures. Article 6(2) of the Treaty on the European Union ("The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law") and the Charter of Fundamental Rights already point strongly in this direction. Assuming that the European Union will in due course formally subscribe to the European Convention on Human Rights, as contemplated by the Treaty amendments introduced under the Treaty of Lisbon, the expectation will receive still further reinforcement."

19. He returned to this point at para 61 where he said that the principles of EU law which arose for consideration were "clear". Lord Mance said that there must be effective legal protection in respect of the rights not to be discriminated against and "so far as guidance is necessary, it is to be found for the relevant purposes in the [Convention] and the case law of the European Court of Human Rights". This seems to be clear enough. But Mr Southey submits that the subsequent CJEU decision in *ZZ (CJEU)* shows that the statements by Lord Mance no longer hold good. As I shall explain, the central question in relation to the first ground of appeal is whether there is any material difference between the Convention jurisprudence and EU law as regards the degree of disclosure that is required to secure a fair hearing for an excluded person in a case where national security issues are at stake. Mr Southey submits that there is a material difference and that this is demonstrated by *ZZ (CJEU)*.

What is required by the Convention?

20. I start with the Convention because *Tariq* was a Convention case (as well as an EU law case) and EJ Snelson relied heavily on it in reaching his decision. On its facts, *Tariq* was in many respects similar to the present case.

21. The claimant was employed as an immigration officer. His security clearance was withdrawn and in consequence he was suspended. He claimed that he was the victim of discrimination on the grounds of race and religious belief. The Home Office said that it was in the interests of national security that much of the evidence on which it wished to rely should not be disclosed to the claimant or his advisers. It obtained orders under rule 54(2) of the 2004 Rules for the proceedings to be held in private and for the claimant and his advisers to be excluded from the proceedings when closed evidence was given. His challenge to these orders was rejected by the Supreme Court. It held (by a majority) that there was no absolute requirement that the detail of allegations, which would be revealed in normal litigation, should be disclosed where the interests of national security required secrecy. The fundamental right to a fair trial had to be balanced against the strong countervailing public interest in maintaining national security. There was an important distinction between the right to a fair hearing (which is absolute) and the right to minimum disclosure of relevant information (which is not). On the particular facts of that case, the disadvantage to the claimant of withholding secret material was outweighed by the paramount need of the Home Office to protect the integrity of the security vetting process.

22. I refer to what I said:

> "139. The article 6 right to a fair trial is absolute…..
>
> 140. But the constituent elements of a fair process are not absolute or fixed: see *Brown v Stott* [2003] 1 AC 681 at 693D-E per Lord Bingham; 719G-H per Lord Hope; and 727H per Lord Clyde. This was re-affirmed by the ECtHR in relation to article 5(4) in *A v United Kingdom* (2009) 49 EHRR 29 at para 203: 'The requirement of procedural fairness under article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances'.
>
> 141. Moreover, it has been recognised by the ECtHR that there are circumstances where a limitation on what would otherwise be a general rule of fairness is permissible.....
>
> 142. Prima facie, a closed material procedure denies the party who is refused access to the closed material the right to full and informed participation in adversarial proceedings and to that extent is inconsistent with the principle of equality of arms. There are two factors which the Secretary of State says are sufficient to counterbalance the effects of the closed material procedure in the present case. The first is that there is scrutiny by an independent court (the Employment Tribunal) fully

appraised of all relevant material and experienced in dealing with discrimination cases. The second is the testing by a special advocate of the Home Office's case in closed session.

143. But are these factors sufficient in circumstances where the gist of the Home Office case is not disclosed to the claimant? How can the special advocate represent the claimant's interests if the claimant is unable to give full instructions to him? The answer to these questions in the context of proceedings involving the liberty of the subject is clear. If the special advocate is unable to perform his function in any useful way unless the detainee is provided with sufficient information about the allegations to enable him to give effective instructions to the special advocate, then there must be disclosure to the detainee of the gist of that information: see *A v United Kingdom* at para 220 and, in the context of control orders, *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. In such a case, there must be disclosure, regardless of how important the competing national interest may be in favour of withholding the information. The consequence of this will inevitably be that in some cases the prosecuting or detaining authorities will be faced with the invidious choice of disclosing sensitive information or risking losing the case.

…….

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* (Application No 26839) (unreported) 18 May 2010, the European Court of Human Rights 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)……

146. Nevertheless, I would accept that the *general* rule is that an applicant should enjoy the full panoply of article 6 rights, including full disclosure of all relevant material and that any limitation on the ordinary incidents of article 6 requires careful justification.

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 QC 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."

23. In summary, therefore, the requirements of article 6 depend on context and all the circumstances of the case. The particular circumstances in *Tariq* included the fact 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).

ZZ (CJEU)

24. The CJEU was asked for a preliminary ruling on the question of whether the principle of effective judicial protection, set out in article 30(2) of the Parliament and Council Directive 2004/38/EC (as interpreted in the light of article 346(1)(a) of the Treaty on the Functioning of the EU), requires a judicial body considering an appeal from a decision to exclude a EU citizen from a member state on grounds of public policy and public security, to ensure that the citizen is informed of the "essence of the grounds against him", notwithstanding the fact that the authorities of the member state and the relevant domestic court conclude that this disclosure would be contrary to the interests of state security.

25. Article 27(1) of the Directive permits member states to restrict freedom of movement and residence of Union citizens "on grounds of public policy, public security or public health". Article 30(2) provides that the persons concerned "shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decisions taken in their case is based, unless this is contrary to the interests of state security". Article 31 provides that the persons concerned "shall have access to judicial….procedures …to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health".

26. The court decided at para 69:

> " In the light of the foregoing considerations, the answer to the question referred is that Articles 30(2) and 31 of Directive 2004/38, read in the light of Article 47 of the Charter, must be interpreted as requiring the national court with jurisdiction to ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision taken under Article 27 of that directive is based and to disclose the related evidence to him is limited to that which is strictly necessary, and that he is informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence."

27. It is clear that, as the court saw it, the reference raised the question of the proper interpretation of articles 30(2) and 31 of the Directive. The court said at para 49 that:

> "It is only by way of derogation that Article 30(2) of Directive 2004/38 permits the Member States to limit the information sent to the person concerned in the interests of State security. As a derogation from the rule set out in the preceding paragraph of the present judgment, this provision must be interpreted strictly, but without depriving it of its effectiveness."

28. It was "in that context" that the court said at para 50 that it had to decide whether and to what extent:

> "Articles 30(2) and 31 of Directive 2004/38, the provisions of which must be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter, permit the grounds of a decision taken under Article 27 of the directive not to be disclosed precisely and in full."

29. The court's analysis concluded with the following:

> "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.

> 66. Second, the weighing up of the right to effective judicial protection against the necessity to protect the security of the Member State concerned – upon which the conclusion set out in the preceding paragraph of the present judgment is founded – is not applicable in the same way to the evidence underlying the grounds that is adduced before the national court with jurisdiction. In certain cases, disclosure of that evidence is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities."

ZZ (Court of Appeal)(No 2)

30. The meaning of para 69 of the CJEU judgment was considered by this court in *ZZ (France) v Secretary of State for the Home Department (No 2)*[2014] EWCA Civ 7, [2014] QB 820. Richards LJ (who gave the principal judgment) held that the minimum requirement of disclosure of the "essence of the grounds" could not yield to the demands of national security. He said at para 18 that such a result was not particularly surprising "in the context of restrictions on the fundamental rights of free movement and residence of Union citizens under European Union law". It was a striking feature of the CJEU decision that it had made no reference to the ECtHR jurisprudence on the Convention, for example, *A v United Kingdom* (2009) 49 EHRR 29. At para 32, Richards LJ said:

> "….. I certainly accept that *A v United Kingdom* is consistent with my reading of the judgment in *ZZ* 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 CJEU and the Strasbourg court in terms of basic approach in this general field: Lord Mance JSC observed in *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, at 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 ECHR 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…..

31. At para 33, he added:

> "Accordingly, although the approach laid down by the CJEU in *ZZ* 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 CJEU makes no mention of *A v United Kingdom* in its

> judgment lead me to the view that the CJEU's judgment should be interpreted independently of the decision in *A v United Kingdom*."

Discussion

32. Mr Southey submits that the approach to fairness required by the Convention is not identical to that required by EU law in general and the Charter in particular. He accepts that Convention law permits the withholding of material from an excluded person in certain circumstances depending on the context and the rights that are at stake in the proceedings. But he submits that EU law does not. He says that EU law requires that an excluded person must *always* be provided with a core minimum of relevant information about the secret material where the vindication of EU rights is sought.

33. I do not accept Mr Southey's submissions. The points made by Lord Mance at paras 23 and 61 of *Tariq* continue to hold good. In the light of article 6(2) of the Treaty on European Union and the passages from articles 47 and 52 of the Charter and the Explanations of them that I have set out at paras 15 to 17 above, it would be remarkable if there were a material difference of general approach between Convention law and EU law in relation to the important issue of procedural justice raised in this appeal.

34. Mr Southey submits that *ZZ (CJEU)* supports his submission that such a difference is recognised in EU law. I need, therefore, to return to that decision. I can start with the opening words of para 50 of the judgment of the court (see para 28 above).

35. The opening words of para 50 "It is in that context" show that the court was not purporting to enunciate a universal principle of EU law which applied in the same way regardless of the context. On the contrary, it made it clear in this paragraph (and other paragraphs) that it was interpreting articles 30(2) and 31 of the Directive. The particular feature of the context that it identified was that (i) article 30(2) contained a derogation from an EU right to be informed "precisely and in full" of the grounds on which the decision was taken unless this was contrary to the interests of state security and (ii) this derogation had to be strictly construed. As Mr Bourne QC says, the court would not have expressed itself in these terms if it was of the view that article 47 of the Charter requires disclosure of the essence of the grounds in every case where a person seeks to vindicate an EU law right. If it had intended to say that the ECtHR context-dependent approach to article 6 of the Convention did not apply in EU law, it would surely have said so.

36. The entire discussion by the court was directed to the question of what information a person affected by a decision under article 27 of the Directive is entitled to have by reason of articles 30(2) and 31. Paras 65 and 66 of the judgment (which I have set out at para 29 above) are likewise directed to that issue. It is true that the court did not say that articles 27, 30(2) and 31 have unique features. But importantly, there is nothing to suggest that the court was of the view that its conclusion as to the extent of the disclosure obligation in that case applied to all cases within the scope of EU law. Nor is there anything in the judgment to suggest that the court was purporting to lay down some new general principle of law. In so far as it stated a general principle, it is perhaps to be found in para 53, where the court said:

> " According to the Court's settled case-law, if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information (Joined Cases C-372/09 and C-373/09 *Peñarroja Fa* [2011] ECR I-1785, paragraph 63, and Case C-430/10 *Gaydarov* [2011] ECR I-11637, paragraph 41), so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (see, to this effect, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 337)."

37. Mr Southey also relies on *European Commission v Kadi (No 2)* [2014] 1 CMLR 24. The applicant's name was placed on a list so that his assets in the European Union were frozen. The CJEU referred at para 100 of its judgment to the fundamental right enshrined in article 47 of the Charter which (the court said) requires that the person concerned must be placed in a position:

> "…..so as to make it possible for him to defend his rights in the best possible conditions and to decide with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction and in order to put the latter in a position to review the lawfulness of the decision in question."

38. In support of this statement, the court referred to *ZZ (CJEU)*. At para 102, it said:

> "Further, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of each particular case…including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question."

39. In my view, this passage is entirely consistent with the context-specific approach adopted by the ECtHR in relation to the Convention and inconsistent with the absolutist approach advocated by Mr Southey. At paras 125 to 130, the court conducted an exercise which mirrors precisely that set out at paras 61 to 68 of *ZZ (CJEU)* i.e. the court has to decide whether the reasons relied on against disclosure are well-founded, and if so it has to strike a balance between the right to effective judicial protection guaranteed by article 47 of the Charter and the requirements of state security. At para 129, the court said:

> "In order to strike such a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question. Irrespective of whether such possibilities are taken, it is for the Courts of European Union to assess whether and to what the extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential information."

40. I can see no inconsistency between this approach and that adopted in the Convention jurisprudence in relation to article 6 of the Convention. *Kadi (No 2)* provides no support for the idea that article 47 of the Charter requires the essence of the factual basis of a decision to be supplied to the person concerned *in all cases*, regardless of the context and the particular circumstances.

41. I should add that there is nothing in the Court of Appeal decision in *ZZ* which casts doubt on this. All that the court was doing was to interpret *ZZ (CJEU)*. The circumstances and context of that case were materially different from those of the present case.

42. To summarise, therefore, I agree with what Langstaff J said at para 40 of the EAT judgment:

> "Though I accept Article 47 applies, I do not accept [Mr Southey's] 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."

THE SECOND GROUND OF APPEAL

43. It is common ground that, in a case where state security considerations are invoked as a ground for withholding information from an excluded person, the court must strike "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": *ZZ (CJEU)* para 64. The same approach is required by article 6 of the Convention: see, for example, *A v UK* (2009) 49 EHRR at paras 205-208 and *Tariq* at paras 44 and 71-72. It is also clear that the balancing of these competing interests must take account of all the material facts of the particular case.

44. At para 10 of his judgment, EJ Snelson cited para 19 of the judgment of Underhill J in *AB v Secretary of State for Defence* [2010] ICR 54. This included the proposition that, in a national security case, a balance had to be struck between the interests of national security and the prejudice to the person concerned resulting from the infringement of the principle of open justice. The judge stated that what he described as "the Rule 54 exercise" involved an evaluation of all the relevant circumstances. This required a balancing exercise to be undertaken. At para 14, he asked the question: what was the correct outcome of the balancing exercise? He referred to the competing considerations mentioned in *Tariq* and took account of the fact that the Supreme Court held that the balance on the facts of that case came down against disclosure. At para 15, he rejected the appellant's submission that the closed material procedure was inappropriate and that the respondent should be left to apply for a public interest immunity certificate. He said:

> "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 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 the material. Nor would it lead to justice for the Claimant. It would make the proceedings untriable and leave him with no sustainable route to a successful outcome."

45. At para 17, the judge said that he must proceed "on the basis that justice (albeit imperfect justice) is possible through the compromise which the closed procedure necessarily involves".

46. He expressed his conclusion at para 18 as follows:

> "For the reasons stated, I am satisfied that the closed material procedure is appropriate and compatible with the Claimant's Article 6 rights….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. "

47. It is, therefore, clear that EJ Snelson took account of the closed material sufficiently to enable him to reach the conclusion that it formed the very essence of the case. He provided further clarification in the edited closed reasons that he gave on 28 January 2014 for refusing the application by the special advocate for further gisting and disclosure. It will be recalled that REJ Potter had refused this application on 18 October 2012. In his further reasons, EJ Snelson said:

> "4. …It is plain from her reasons that the REJ had the matter fully argued and performed the balancing exercise which Article 6 entails. She did so in the light of the judgment of the Supreme Court in [*Tariq*]. Employment Tribunals exist to deliver swift, practical, economical justice in employment disputes. It is not in keeping with that purpose or the statutorily

> enshrined 'overriding objective' for procedures and arguments to be repeated at the same level of decision-making, unless a good reason is shown. The case invokes important rights and raises serious questions, but that is not a reason to go back to the beginning and 'have another go'. The correct route of challenge is by reconsideration (where applicable) or appeal.
>
> 5. That disposes of the application, but I should add for completeness that, had I been faced with deciding it afresh, I would have reached the same conclusion as REJ Potter."

48. Mr Southey submitted to the EAT that the decision of EJ Snelson was flawed because there was little indication that he had relied on the closed material or even what factors or types of factors he had taken into account in conducting the balancing exercise. Furthermore, he argued that, even if the judge did take into account the closed material, it seemed improbable that he had said as much as might properly have been said about the closed material in his open judgment. This was contrary to the guidance given by Lord Neuberger in *Bank Mellatt v HM Treasury (No 1)* [2013] UKSC 38, [2014] AC 700 at para 69. In fairness to EJ Snelson, this guidance post-dated his decision.

49. Langstaff J rejected these submissions for reasons with which I agree and which I can summarise quite shortly. As I have said, it is clear that EJ Snelson did take into account the closed material. He conducted the balancing exercise knowing that it contained the "very essence of the case". At para 47 of his judgment, Langstaff J said:

> "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."

50. We have not seen the closed material. It may well be that EJ Snelson could and should have said more about it in his judgment and that, if he had had the benefit of Lord Neuberger's guidance, he would have done so. But for the reasons given by Langstaff J, it is clear that the balancing exercise was undertaken. EJ Snelson was right to say that the present case had a great deal in common in *Tariq*. Both cases involved a claim by an immigration officer who was suspended or dismissed as a result of the withdrawal of security clearance. Both claimants alleged that they were the victims of discrimination on grounds of race and religion. Neither case involved the liberty of the subject. In both cases, the Home Office said that what they had done was in the interests of national security and refused to disclose material on grounds of national security. In both cases, a special advocate had been appointed.

51. Mr Southey submits that it is probable that EJ Snelson failed to appreciate that the question he had to decide was not the same as that which was before the Supreme Court in *Tariq*. He says that the Supreme Court only decided whether, as a matter of principle, a gist had to be provided in all cases. This did not require scrutiny of the

evidence in that case. I do not agree. The Supreme Court did not only decide this question of principle. It set aside a declaration requiring that the claimant be provided the gist of the case against him. It did this after weighing the relevant competing interests on the facts of that case. EJ Snelson did not, of course, say that the facts of *Tariq* were indistinguishable from those of the present case. But he was right to say that the two cases had "a great deal in common" with each other.

52. To summarise, EJ Snelson did conduct the necessary balancing exercise and did have regard to the closed material. He did not misdirect himself. In my judgment, there is no substance in the second ground of appeal.

THE THIRD GROUND OF APPEAL

53. I have found the third ground of appeal somewhat elusive. In *Carnduff v Rock,* the Court of Appeal recognised that there were circumstances in which a fair trial was impossible and that for that reason a trial should not take place. Mr Southey submits that, since a claimant has no way of assessing the nature or extent of the unfairness that results from the non-disclosure of closed material, the correct course is for the court to determine whether a fair trial is possible and, if it is, to offer the claimant the option of continuing with or withdrawing the claim. He says that it was wrong for EJ Snelson to treat the choice as being one for the claimant to make in the first place. He submits that fairness required the court to decide whether a reasonable claimant would decide not to proceed with the claim. An adverse outcome of the claim would imply that the claimant had made an unmeritorious discrimination claim. An unsuccessful claim could also have adverse costs implications.

54. Langstaff J rejected these submissions. In short, Mr Southey says that EJ Snelson and Langstaff J erred by placing the onus on the appellant to decide whether a fair trial was possible.

55. EJ Snelson ruled at para 18 of his judgment that "the closed material procedure is appropriate and compatible with the claimant's Article 6 rights". He rightly observed at para 17 that the appellant "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". In my view, the judge was right (or at least entitled) to adopt this approach. Indeed, at the time when he gave his ruling on the disclosure issue on 23 August 2013, he was in no position to form a view as to the prospects of the appellant succeeding in his discrimination claims. He was rightly focusing on the arguments on the question of whether to revoke or vary the rule 54 orders that had been made by REJ Potter. It was for the appellant to decide whether to continue with or withdraw his claim. I reject the third ground of appeal.

REFERENCE TO THE CJEU ?

56. Mr Southey submits that, if we are disposed to reject the first ground of appeal, the issue raised by it is not acte clair and we should make a preliminary reference to the CJEU.

57. In my view, the law is clear. As Lord Mance said at para 61 in *Tariq:*

> "the principles of European Union law which arise for consideration in this case are clear."

58. I would refuse to make a reference.

OVERALL CONCLUSION

59. For the reasons that I have given, I would reject each of the three grounds of appeal and dismiss this appeal.

Lord Justice Richards:

60. I agree.

Lord Justice Lewison:

61. I also agree.