Neutral Citation Number: [2023] UKIPTrib 8

Case Nos: IPT/22/11/H & IPT/22/12/H

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 22 September 2023

Before:

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
JUDGE RUPERT JONES

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B E T W E E N:

(1) Christine LEE **(2) Daniel WILKES**	**Claimants**
- and -	
SECURITY SERVICE	**Respondent**

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Tony Muman and Muhammad UI-Haq (instructed by Luke & Bridger Law) appeared on behalf of the Claimants
Rosemary Davidson and Ros Earis (instructed by the Treasury Solicitor) appeared on behalf of the Respondent
Jonathan Glasson KC and Jesse Nicholls appeared as Counsel to the Tribunal

Hearing date: 11 July 2023

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OPEN JUDGMENT

Lord Justice Singh:

Introduction

1. This is the OPEN judgment of the Tribunal.

2. On 11 July 2023 the Tribunal held an OPEN hearing to consider two issues of law which have been raised at this interim stage of these proceedings:

   (l) Whether Article 6(1) of the European Convention on Human Rights ("ECHR") applies to these proceedings; and

   (2) If so, whether OPEN disclosure is required of the essential elements of the Respondent's case in accordance with the decision of the House of Lords in *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269 (*AF (No.3)*).

3. For reasons that will become apparent, we consider that it is unnecessary to reach a final view on the first issue, because the main dispute between the parties relates to the second issue, and it was on that issue that the parties' submissions rightly focussed.

The proceedings in this Tribunal

4. These claims are brought under section 7(l)(a) of the Human Rights Act 1998 ("HRA"). Since the Respondent is one of the intelligence services, this Tribunal has exclusive jurisdiction for this purpose: see section 65(2)(a) and (3)(a) of the Regulation of Investigatory Powers Act 2000 ("RIPA").

5. The claims were commenced on 21 March 2022. They arise from a Security Service Interference Alert ("IA") dated 13 January 2022 issued by the Respondent to the

Parliamentary Security Director of the UK Parliament. The IA asserted that the First Claimant had engaged in the facilitation of donations to political parties, Parliamentarians and others and that her activities had been affiliated with the Chinese state. The First Claimant is a solicitor practising in this country. Her claim is based on various public law grounds, for example that the IA was issued for political purposes, and also alleges breaches of the Claimant's rights under Articles 3, 8, 10, 11 and 14 of the ECHR.

6. The Second Claimant is the First Claimant's son. He was employed as a Parliamentary Assistant to Barry Gardiner MP and, for this purpose, had a form of security clearance known as "CTC" (Counter-Terrorism Clearance). In his claim he asserts that, on 13 January 2022, after the IA in respect of his mother was issued, a meeting was held between employees of the Respondent and Mr Gardiner and others, in the absence of the Second Claimant, at which it was alleged that his mother had engaged in political interference and activities in this country on behalf of the United Front Work Department of the Chinese Communist Party. The Second Claimant alleges that, as a result, he lost his security clearance and was forced to resign from his job with Mr Gardiner on the same date. He contends that the actions of the Respondent were unlawful as a matter of public law and that his rights under Articles 8 and 14 of the ECHR were breached.

7. The remedies which the Claimants seek include damages for loss of income and damage to their reputations.

8. The Respondent has filed an OPEN Preliminary Response, in which the claims are resisted.

9. The Tribunal has not yet held a substantive hearing and therefore expresses no view about the merits of the claims. At this stage the Tribunal is concerned only with a procedural issue, relating to whether sufficient OPEN disclosure has been made to the Claimants.

10. In accordance with the Tribunal's normal practice in cases of this kind, Counsel to the Tribunal ("CTT"), Jonathan Glasson KC and Jesse Nicholls, have been instructed in order to assist the Tribunal by exercising the functions which they can be asked to perform under rule 12 of the Investigatory Powers Tribunal Rules 2018 ("the Rules"). This includes a process by which consideration is given to whether, and to what extent, further OPEN disclosure can be made to the Claimants.

11. The process has reached the stage at which the parties and CTT need to know whether the minimum disclosure required by *AF (No. 3)* applies to these proceedings. That is what led to the two issues of law being debated at the OPEN hearing before this Tribunal which we have outlined above.

The first issue: applicability of Article 6(1) of the ECHR

12. Although this Tribunal has been in existence for 23 years, the issue of whether Article 6(1) of the ECHR applies to its proceedings has not been authoritatively settled. As this Tribunal noted in *Various Claimants v Security Service & Others* [2022] UKIP Trib 3, [2023] 2 All ER 949, to which (like the parties before us) we will refer as *E & Others*, at para. 55:

> "… this Tribunal (Mummery LJ, President, and Burton J, Vice President) held in *Kennedy (In the matter of Applications Nos.*

> *IPT/01/62* and *IPT/01//77*, judgment of 23 January 2003) that Article 6 did apply to claims before it alleging a breach of Convention rights such as Article 8. We note that this has not been the subject of authoritative determination in the European Court of Human Rights itself: see e.g. *Kennedy v United Kingdom* (2011) 52 EHRR 4, at para. 179)."

13. As the European Court said in that passage, it was unnecessary to reach a conclusion as to whether Article 6(1) applied to the proceedings in that case as, assuming that it did apply, the Court considered that the Rules complied with its requirements.

14. It is important to note, as Ms Davidson reminded us at the hearing before this Tribunal, that the claim in *Kennedy* itself had been based on an alleged breach of the applicant's Convention rights, and the remedies claimed included damages for economic loss: see paras. 13 and 15 of the European Court's judgment. Accordingly, it cannot be said that, as a matter of principle, the mere fact that a claim is brought in this Tribunal under section 7(l)(a) of the HRA for a breach of Convention rights leads to the conclusion that Article 6(1) of the ECHR, which (so far as material to civil cases) applies to the "determination" of "civil rights and obligations", is applicable to the proceedings.

15. At the hearing before us Mr Muman made clear that he was not submitting that the Rules are in themselves incompatible with Article 6(1) if it does apply. He was right not to do so. As both the European Court and this Tribunal have said on a number of occasions, the fact that the normal procedures that would apply to civil proceedings cannot apply in the same way in this Tribunal does not mean that this Tribunal's procedures are incompatible with Article 6(1): see e.g. *Kennedy v UK*, at paras. 184-191; and *E & Others*, at para. 56.

16. This Tribunal is under a duty to carry out its functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security or, among other things, the continued discharge of the functions of any of the intelligence services: see rule 7(1) of the Rules. In many cases, this means that the claimant will not even know that they are a person of interest to the intelligence services. At the end of the day, if there is no determination in their favour, it may not be possible, under rule 15 of the Rules (which is expressly subject to the general duty in rule 7(1): see rule 15(6)) to give any reasons for that conclusion, e.g. whether they were a person of interest but no unlawful conduct has taken place or whether they were not a person of interest at all, since to disclose even that much would usually offend against the principle of "neither confirm nor deny" or "NCND", which this Tribunal has long regarded as an important principle which it must uphold in accordance with its duty in rule 7(1).

17. This does not mean that this Tribunal's procedures are unfair or incompatible with Article 6(1). There are other features of the procedural framework that governs this Tribunal which have been put in place so as to ensure fairness in the particular context in which this Tribunal has to operate. For example, a complainant does not have to overcome "any evidential burden" before making a complaint to this Tribunal: see *Kennedy v UK*, at para. 190; the Tribunal's jurisdiction is in part an investigatory one and its role "includes an inquisitorial element": see *Al-Hawsawi v Security Service & Others* [2023] UKIPTrib 5, at para. 39; the Tribunal itself is an independent judicial body with full access to all documents, including classified ones: see *E & Others*, at para. 44; and this Tribunal has, in appropriate cases, the benefit of the assistance of CTT, who have access to the relevant documents and can perform functions such as the

cross-examination of witnesses if evidence is heard in the absence of the complainant: see rule 12(2)(c) of the Rules.

18. Against that background, we do not consider that it is necessary for us to reach a final conclusion in this case on the first issue. In the light of the submissions that were made to us, it seems to us that the crucial question is whether, even assuming that Article 6(1) of the ECHR does apply to these proceedings, it requires the minimum disclosure to the Claimants which would be required if the principles in *AF (No. 3)* are applicable.

19. We therefore turn to the second issue.

The second issue: whether the principles in *AF (No. 3)* are applicable to these proceedings

20. Before we turn to the decision of the House of Lords in *AF (No. 3*) itself, it is important to recognise the background to that case. After the terrorist attacks on the United States of 11 September 2001, the UK Parliament enacted the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act"). Part 4 of that Act enabled the Secretary of State to authorise the detention of suspected international terrorists if certain conditions were met, but only if they were foreign nationals. That statutory regime was held by the House of Lords to be incompatible with Article 14 of the ECHR, read with Article 5, and a declaration of incompatibility was made under section 4 of the HRA in respect of Part 4 of the 2001 Act: see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, sometimes known as the "Belmarsh case" after the prison where the detainees in that case were held. Parliament's response to that decision was to repeal Part 4 of the 2001 Act and to replace it with the system of "control orders" created by the Prevention of Terrorism Act 2005 ("the 2005 Act"). It was that system of control orders that was the subject of *AF (No. 3),* but a crucial part of the reasoning of the House of Lords was based on the decision of the European Court in *A v United*

Kingdom (2009) 49 EHRR 29, which was the Belmarsh case after it had gone to Strasbourg.

21. It was because the Belmarsh case itself concerned detention without charge that one of the complaints made to the European Court was that there had been a breach of Article 5 of the ECHR, which guarantees the right to personal liberty. One of the applicants' contentions was that there had been a breach of the right to procedural fairness in Article 5(4). The European Court accepted that contention: see paras. 216-220 of its judgment. The European Court was of the view that, in that context, Article 5(4) must import substantially the same fair trial guarantees as Article 6(1) "in its criminal aspect": see para. 217. Although the European Court considered that the procedures used in the Special Immigration Appeals Commission ("SIAC") had important elements which counterbalanced the lack of a full, open, adversarial hearing, including the role played by special advocates, a role similar although not identical to that of CTT in this Tribunal, there is nevertheless an irreducible minimum of disclosure that must be made to the applicants. The European Court expressed the principle in this way at the end of para. 220:

> "Where … the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of 5(4) would not be satisfied."

22. Shortly after the decision of the European Court in *A v UK*, the House of Lords had to consider the case of *AF (No. 3)*. As we have said, this concerned the regime for control orders under section 2(1) of the 2005 Act. The House of Lords clearly considered that the reasoning of the European Court in *A v UK* was applicable to the context of control

orders by way of analogy. The essence of the decision of the House of Lords can be found helpfully set out at para. 59 in the opinion of Lord Phillips of Worth Matravers:

> "… I am satisfied that the essence of the Grand Chamber's decision lies in para. 220 and, in particular, in the last sentence of that paragraph. This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

23. At para. 65, Lord Phillips expressed the point more succinctly still:

> "The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the *essence* of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order." (Emphasis added)

24. It will be recalled that the sort of restrictions that were normally imposed under a control order were that the controlee had to reside in a particular place; they had to stay there for a certain number of hours each day; they could not associate with certain people and they could not have access to the internet on a computer.

25. Other members of the House of Lords made similar statements to Lord Phillips. In particular, Lord Brown of Eaton-under-Heywood, expressed the principle starkly at para. 116:

> "In short, Strasbourg has decided that the suspect must *always* be told sufficient of the case against him to enable him to give 'effective instructions' to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk." (Emphasis in original)

26. On behalf of the Claimants before us Mr Muman submitted that the *AF (No. 3)* principles apply to the present proceedings, in particular that there is an irreducible minimum that must be disclosed to the Claimants if they are to be able to give effective instructions to CTT. Although they have access to open-source material and although the Claimants have filed a considerable amount of evidence, including witness statements from others as well as themselves, he submitted that, in truth, the Claimants are "in the dark" as to the reasons why the IA was issued by the Respondent and so are left guessing what the target is at which they should aim. Before us Mr Muman also emphasised the serious consequences for the Claimants which the IA has caused, e.g. damage to their reputations and their ability to do certain types of work.

27. We are unable to accept those submissions. In our view, Ms Davidson was correct in her submission that the present proceedings do not fall anywhere close to the end of the spectrum at which *AF (No. 3)* and analogous cases are to be located. Such cases have concerned challenges to measures imposed by the executive which directly imposed severe restrictions on the fundamental freedoms of the individual; those restrictions

were continuing; and the purpose of the proceedings was to have those restrictions lifted or at least modified.

28. That there is a spectrum is supported by subsequent authorities. It is also clear from those authorities that, at the other end of the spectrum from the control order regime that was considered in *AF (No. 3)* will be cases where, however important the consequences for a claimant, their complaint is in essence a civil claim for compensation for past (alleged) wrongs. In such cases, even if Article 6(1) is applicable, the principles in *AF (No. 3)* will not apply.

29. An example is provided by *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, in which it was argued on behalf of the claimant in Employment Tribunal proceedings for discrimination, where a closed material procedure was used, that the *AF (No. 3)* principles applied. That argument was rejected by the Supreme Court. At para. 27, Lord Mance JSC observed that the reasoning in *A v UK* had emphasised the context of that decision, "the liberty of the individual". He continued:

> "Detention, control orders and freezing orders impinge directly on personal freedom and liberty in a way to which Mr Tariq cannot be said to be exposed. … [T]he balancing exercise called for in para. 217 of the judgment in *A v UK* depends on the nature and weight of the circumstances on each side, and cases where the state is seeking to impose on an 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."

30. In similar vein, at para. 81, Lord Hope DPSC said:

> "This is an entirely different case from *Secretary of State for the Home Department v AF (No. 3)*. There the fundamental rights of the individual were being severely restricted by the actions of the executive. Where issues such as that are at stake, the rule of law requires that the individual be given sufficient material to enable him to answer the case that is made against him by the state. In this case the individual is not faced with criminal proceedings or with severe restrictions on personal liberty. This is a civil claim and the question is whether Mr Tariq is entitled to damages. He is entitled to a fair hearing of his claim before an independent and impartial tribunal. But the Home Office says that it cannot defend the claim in open proceedings as, for understandable reasons, it cannot reveal how the security vetting was done in his case. That conclusion is unavoidable, given the nature of the work Mr Tariq was employed to do."

31. At para. 88, Lord Brown JSC, in characteristically robust terms, dismissed the suggested analogy with "Belmarsh detention and the control order regime" as "absurd".

32. As this Tribunal noted in *E & Others*, at paras. 44-45 and 50-51, *Tariq* went to Strasbourg as one of the cases considered in *Gulamhussein v United Kingdom* (2018) 67 EHRR SE2, where the application was found to be inadmissible by the European Court because it was manifestly ill-founded.

33. That there is a "sliding scale for the purposes of disclosure" was confirmed by the Court of Appeal in *R (AZ) v Secretary of State for the Home Department* [2017] EWCA Civ 35, [2017] 4 WLR 94, at para. 29 (Burnett LJ). As Burnett LJ said earlier in the same paragraph, the "touchstone" of the degree of disclosure required is "the nature and impact of the decision in question", and the disclosure required by *AF (No. 3)* "is reserved for cases which concern objectively high level rights".

34. In *R (Reprieve) v Prime Minister* [2021] EWCA Civ 972, [2022] QB 447, at para. 55, Lord Burnett of Maldon CJ, said that "the purpose of *AF (No. 3)* disclosure is to enable a claimant to give effective instructions to special advocates so that the most effective challenge can be made to allegations which underlie the coercive measure in question (whether it be a control order, a TPIM, or a freezing order)".

35. As that passage notes, the principles in *AF (No. 3)* have subsequently been held to apply in cases that concerned not control orders but analogous coercive measures such as terrorism prevention and investigation measures ("TPIMs") under the Terrorism Prevention and Investigation Measures Act 2011; asset-freezing orders under the Terrorist Asset-Freezing etc. Act 2010: see *Mastafa v HM Treasury* [2012] EWHC 3578 (Admin), [2013] 1 WLR 1621; and restrictions imposed on financial institutions pursuant to sanctions against another state: see *Bank Mellat v HM Treasury (No. 4)* [2015] EWCA Civ 1052, [2016] 1 WLR 1187.

36. A more recent example of the type of coercive measure that can be said to be analogous so as to attract the need for *AF (No. 3)* disclosure is a temporary exclusion order imposed under the Counter-Terrorism and Security Act 2015. Such an order can include serious restrictions on the liberty of the individual after their return to the UK, such as reporting to the police on a daily basis: see *QX v Secretary of State for the*

Home Department [2022] EWCA Civ 1541, [2023] 2 WLR 1103. In that case the High Court held that *AF (No. 3)* disclosure was required and there was no cross-appeal on this point: see para. 119 (Elisabeth Laing LJ).

37. On the other side of the line, where *AF (No. 3)* disclosure will not be required are cases where a claim for damages is brought for an alleged violation of rights in the past: see e.g. *Khaled v Security Service & Others* [2016] EWHC 1727 (QB), at para. 34 (Irwin J).

38. There may be cases along the spectrum which fall at a higher point on it but which nevertheless will not require *AF (No. 3)* disclosure. For example, in *K, A and B v Secretary of State for Defence & Another* [2017] EWHC 830 (Admin), at para. 23, Ouseley J (with whom Simon LJ agreed) said:

> "… the claims are based on asserted public law obligations in relation to the risk of harm to life and limb. This is at the higher end of the spectrum or scale when it comes to procedural fairness. It is, in my judgment, at a higher level than the employment context in *Tariq and Kiani* but it is not at the level of a Control Order, or asset freezing or other restriction such that *AF (No. 3)* disclosure is required. Executive action has not been taken against the Claimants to restrict their liberty or finances or movement rights."

39. Although we should not be taken to be attempting to set out a comprehensive statement of the relevant principles to be derived from the authorities, what can be distilled from them is that the situations in which *AF (No. 3)* disclosure has been required have had the following features. First, they were concerned with coercive measures which directly imposed serious restrictions on a person's freedom of action. Secondly, those

measures were imposed by the executive. Thirdly, they were measures that were continuing, not in the past. Fourthly, the nature of the proceedings was (whether by way of appeal or otherwise) a challenge to those measures, with a view to having them lifted or modified, and not, for example, a claim for compensation for past (alleged) wrongs.

40. None of those features is relevant to the present claims. Important though the consequences of the IA may be for the Claimants, it did not impose any direct restrictions on their freedom of action. The nature of these proceedings is to challenge the IA on public law grounds and to claim compensation for the alleged breaches of Convention rights said to flow from the IA. Even if Article 6(1) is applicable to these proceedings, we are satisfied that this Tribunal's usual procedures are capable of dealing with these claims fairly. There is no need for *AF (No. 3)* disclosure to achieve fairness in this case.

Conclusion

41. For the reasons we have set out above, we conclude that the disclosure principles in *AF (No. 3)* are not applicable to these proceedings.

Is this decision amenable to appeal?

42. Before making a determination or decision which might be the subject of an appeal, the Tribunal must specify the Court which is to have jurisdiction to hear the appeal: see section 67A(2) of RIPA. If this decision were amenable to an appeal, the relevant appellate Court would be the Court of Appeal of England and Wales. However, we have reached the conclusion that the decision is not amenable to an appeal.

43. Section 67A(1) provides that a relevant person may appeal on a point of law against any "determination" of the Tribunal of a kind mentioned in section 68(4) or any "decision" of the Tribunal of a kind mentioned in section 68(4C). We have not yet determined these proceedings and so this decision does not fall within section 68(4). Section 68(4C) applies to any decision which "(a) is a final decision of a preliminary issue in relation to any proceedings … and (b) is neither a determination of a kind mentioned in subsection (4) nor *a decision relating to a procedural matter*." (Emphasis added)

44. Having considered the written submissions filed by the parties after this judgment was circulated in draft on a confidential basis before hand down, we have reached the clear conclusion that this is "a decision relating to a procedural matter." Although the distinction between a procedural matter and a substantive matter is not always straightforward, the authorities show that a distinction has been drawn between "the mode of proceeding by which a legal right is enforced" and "the law which gives or defines the right": see *Poyser v Minors* (1881) 7 QBD 329, at 333 (Lush LJ), cited with approval by Lord Goff of Chieveley in *McKerr v Armagh Coroner* [1990] 1 WLR 649, at 657.

45. In the present proceedings we accept the Respondent's submission that disclosure is the paradigm example of a procedural matter.

46. In the alternative, the Claimants invite this Tribunal to specify that the only other remedy available to the Claimants is to apply for judicial review against this decision at this stage instead of waiting for the Tribunal's final determination. In our judgement, the question whether or not judicial review is available in the circumstances of this case

and, if so, whether permission should be granted is a matter for the High Court and not for this Tribunal.