

ENGLAND AND WALES / JUDGMENT

Fahad Ansari, R (on the application of) v Chief Constable of North Wales Police & Anor

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[2026] EWHC 472 (Admin) IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION
ADMINISTRATIVE COURT Case No: AC-2025-LON-003211 Royal Courts of Justice Strand,
London, WC2A 2LL Date: 04/03/2026 Before : MR JUSTICE CHAMBERLAIN

- ----- Between : THE KING on the application of FAHAD ANSARI
- and - Claimant
- (1) CHIEF CONSTABLE OF NORTH WALES POLICE
- (2) SECRETARY OF STATE FOR THE HOME DEPARTMENT Defendants
- ----- Hugh Southey KC, Rabah Kherbane and Drishti Suri (instructed by Bhatt Murphy) for the Claimant Matthew Butt KC and Georgina Wolfe (instructed by the North Wales Police Service) for the First Defendant Rosemary Davidson (instructed by the Government Legal Department) for the Second Defendant Dominic Lewis (instructed by the Special Advocate Support Office) as Special Advocate Hearing date: 21 January 2026
- ----- Approved Judgment This judgment was handed down remotely at 10am on 4 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. Mr Justice Chamberlain:

Introduction

1. 2. 3. 4. 5. 6. 7. The background to this case is set out in my previous judgments of 6 October 2025 ([2025] EWHC 2764 (Admin)) and 24 October 2025 ([2025] EWHC 3330 (Admin)). In short, the claimant is an experienced solicitor specialising in national security and human rights work and currently represents Hamas in its application for depreservation under the Terrorism Act 2000 (“the 2000 Act”). He challenges the decisions taken by officers serving under the Chief Constable of North Wales Police to stop and question him at Holyhead Port in August 2025 pursuant to Sch. 7 to the 2000 Act and to seize, download, retain and inspect the contents of his mobile phone. On 24 October 2025, I refused the claimant’s application for an interim order to prevent the Chief Constable from continuing to examine the material

downloaded from the claimant's mobile phone pending determination of his claim. I also made a declaration under s. 6 of the Justice and Security Act 2013 ("JSA") that these were proceedings in which a closed material application may be made to the Court. A Special Advocate (Dominic Lewis) has been instructed to act in the interests of the claimant in the CLOSED part of the proceedings. He made written submissions that certain of the CLOSED materials should be disclosed into OPEN. Following meetings between the Special Advocate and counsel for the defendants, a substantial volume of material will be disclosed into OPEN by agreement. However, there is other material which the Special Advocate says should be made OPEN but the Chief Constable says should not. One of the issues which continues to divide the parties is whether the disclosure standard in *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28,

[2010] 2 AC 269 ("*AF (No. 3)*") applies to this case. If it does, the claimant is entitled to be provided with a sufficient gist of the case against him to enable him to disprove that case, even if doing so would be damaging to national security. If not, information falls to be disclosed to the claimant only to the extent that its disclosure would not be damaging to the interests of national security. For the Chief Constable, Mr Matthew Butt KC invited me to assume that Article 6 ECHR applies in this case, while reserving the point for appeal. He submitted, however, that even if Article 6 applies, it does not import the disclosure standard in *AF (No. 3)*. Ms Rosemary Davidson for the Secretary of State adopted the same approach. In the light of the common position advanced by the Chief Constable and Secretary of State, I accept that it is appropriate to proceed on the assumption that Article 6 applies. I therefore focus on the question whether, on that assumption, the nature of the proceedings is such as to make applicable the disclosure standard in *AF (No. 3)*. I heard OPEN submissions on this issue on 21 January 2026. At a separate CLOSED hearing on 27 January 2026, I heard submissions about (among other matters) the material the Special Advocate submits would fall to be disclosed if *AF (No. 3)* does apply. The CLOSED hearing was helpful in putting the OPEN legal submissions (which were necessarily advanced as a matter of principle) into their factual context in the circumstances of this case. The law on disclosure Natural justice, national security and other public interests 8. 9. 10. 11. One of the requirements of natural justice is that, when deciding disputed substantive issues, a court must not take into account material deployed by one party unless all the other parties have been given the opportunity to see and respond to it. In some cases, however, disclosure of some or all of the evidence or submissions to one or more of the parties would be contrary to the interests of national security or some other important public interest. The various legal regimes that deal with cases of this kind strike different balances between natural justice, on the one hand, and the public interest or interests that would be damaged by disclosure, on the other. Broadly speaking, there are two models. Public interest immunity, in its orthodox form, fully respects the natural justice principle, because when the court upholds a claim for immunity, the material to which the claim relates becomes inadmissible. But it deprives one party, and the court, of the benefit of some material that is relevant to the substantive issues. In extreme cases, this may make a

fair trial impossible, to the detriment of one of the parties, normally the one bringing the claim. This has adverse implications for the rule of law. Closed material proceedings, by contrast, involve a derogation from natural justice, because they enable the court to take into account and base its decision on closed material, which has not been disclosed to one or more parties. Closed material regimes must therefore employ procedural mechanisms to attenuate the unfairness caused by non-disclosure. Typically, these mechanisms include the use of a special advocate to test the case for non-disclosure and to make substantive submissions in the interests of the excluded party. It is a common feature of closed material procedures that the CLOSED material should be kept to a minimum. CLOSED material must be disclosed or summarised if it can be, without damage to national security (or, in some regimes, other public interests). The special advocates play an important role in this respect. Sometimes, the essence of the government's case can be disclosed to the excluded party, at least in summary, but not always. There will be some cases where key parts of the CLOSED case cannot be disclosed to the excluded party, even in summary. In cases falling into this latter category, a question arises in principle about the conditions under which the hearing can be regarded as fair. This OPEN judgment proceeds on the assumption that the question arises in the present case. The requirements of Articles 5 and 6 ECHR 12. 13. Articles 5 and 6 ECHR confer rights to a fair trial in proceedings concerning the legality of detention and disputes about civil rights or obligations. The European Court of Human Rights ("the Strasbourg Court") and domestic courts in the UK have both addressed the question whether and under what conditions closed material proceedings comply with those rights in cases where they apply. In *Chahal v United Kingdom* (1997) 23 EHRR 413, the applicant had been detained pending deportation on national security grounds. Although he could challenge the basis of his deportation (and therefore his detention) before an advisory panel chaired by a judge, which had full access to the national security material justifying his deportation, the Strasbourg Court held that this panel had no power to make rulings binding the executive and so was not a court for the purposes of Article 5(4). Moreover, the affected person had no right of legal representation before it. The Court referred at

[131] to the procedure adopted in Canada, which involved the use of a security-cleared counsel instructed by the court. This, the Court said, "illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice".

14. Much of the subsequent jurisprudence of the Strasbourg Court has focussed on whether and in what circumstances different closed material procedures satisfy the requirement to accord the excluded person a "substantial measure of procedural justice" depending on the rights in issue and the procedural guarantees applicable. 15. 16. 17. 18. 19. In *A v United Kingdom* (2009) 49 EHRR 625, the applicants were aliens who could not be removed from the UK consistently with their rights under the ECHR, but posed a risk to national security. They were detained indefinitely under the Anti-Terrorism, Crime and Security Act 2001. They had

the opportunity to challenge their detention before the Special Immigration Appeals Commission (“SIAC”) pursuant to a closed material procedure. SIAC could take into account closed evidence without disclosing it to the detainee if such disclosure would be contrary to national security or another public interest. The Grand Chamber of the Strasbourg Court held at [205] that “even under proceedings under art. 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security...”. There would not, however, be a fair trial unless “any difficulties caused to the defendant by a limitation of his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities”. At [220], the Grand Chamber held that “the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate”. This meant that, where a substantial quantity of evidence was not disclosed, the open allegations against the excluded party had to be framed in terms that were “sufficiently specific” to make it “possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed”. By contrast, 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 art. 5(4) would not be satisfied”. AF (No. 3) concerned control orders which imposed restrictions on liberty short of detention. One issue for the House of Lords was whether this was a material distinction from A’s case. Lord Phillips’s answer was that the Strasbourg Court would not draw any such distinction. Otherwise, “it is hard to see why the Grand Chamber quoted so extensively from control order cases”: [57]. Thus, the reasoning in A’s case applied. The essence of this was 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”: [59]. Lord Hope noted that “a denunciation on grounds that are not disclosed is the stuff of nightmares”: [83]. He identified the “fundamental” or “core” principle as follows: “everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him”: [83]; and “[t]he judge must insist in every case that the controlled person is given sufficient information to enable his special advocate effectively to challenge the case that is brought against him”: [85]. 20. The cases in which the Strasbourg and domestic courts first articulated the disclosure standard were ones where individuals sought to challenge the continued imposition of 21. 22. 23. coercive measures which restricted their liberty in significant ways. The coercive measures were imposed on the basis of allegations by the state against the individual: a “denunciation”, to use Lord Hope’s term. It followed that, in proceedings to challenge the measure, fairness required the affected person to be given sufficient information about the allegations to enable him to refute them. As the Court of Appeal made clear in a later case, “refute” in this context means “disprove”, not merely “deny”: *HM Treasury v Bank Mellat* [2010] EWCA Civ 483,

[2012] QB 91, [6]. Thus, the procedural model which the courts seem to have had in mind was one in which the correctness (or at least the reasonableness) of the state's allegations against the individual was a central issue and the purpose of the disclosure was to enable the affected person to disprove those allegations if they were false. Shortly afterwards, in *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, the Supreme Court considered whether the AF (No. 3) disclosure standard applied in a case where an employee suspended because his security clearance was withdrawn brought a discrimination claim in the Employment Tribunal. The answer given by the majority was "no". At [27], Lord Mance said that the Strasbourg Court's judgment in A's case "emphasises the context of that decision, the liberty of the individual" and noted that "the balancing exercise called for in [217] of the judgment... 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". Lord Mance referred at [28]-[36] to three cases decided by the Strasbourg institutions: *Leander v Sweden* (1987) 9 EHRR 433 and *Esbest v United Kingdom* (1993) 18 EHRR CD 72 (which concerned complaints about the refusal or withdrawal of security clearance) and *Kennedy v United Kingdom* (2011) 52 EHRR 4 (which concerned complaints to the Investigatory Powers Tribunal about interception). These cases showed that, provided the system contained sufficient safeguards, national security considerations may justify a closed material procedure in which even the essence of reasons for the determination are not made clear to the affected person. 24. Lord Hope agreed with Lord Mance's reasons. At [75], he said this: "No one doubts Mr Tariq's right not to be discriminated against on grounds of his race or religion. But it was his own choice to seek employment in a post for which, in the interests of national security, security clearance was required. He was a volunteer, not a conscript. This is not a case where he is the victim of action taken against him by the state which deprived him of his fundamental rights." 25. 26. Lord Brown at [88] said that the Supreme Court had regarded the principle in A's case as applicable to the facts of AF (No. 3) because of "the striking similarities between the two situations then under consideration: Belmarsh detention and the control order regime". This did not mean that the same "rigid principle" was to be imported into every situation where Article 6 applies. Heavy reliance was placed on the vetting context: see [90]-[92]. In *Mastafa v HM Treasury* [2012] EWHC 3578 (Admin), [2013] 1 WLR 1621, Collins J held that the AF (No. 3) disclosure standard applied to appeals by an individual against a decision to freeze his assets. At [35], he distinguished *Tariq* on the ground that the appeals before him "concern a measure taken against the applicant which affects his fundamental rights". 27. *Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776, [2016] QB 595 was an employment appeal where the claimant alleged that his dismissal following the withdrawal of his security clearance was discriminatory. The Employment Tribunal and Employment Appeal Tribunal applied *Tariq* and held that the Home Office did not have to disclose to him the essence of the case for withdrawal of his security clearance. He relied on ECJ authority (and in particular the decision in *Case C-300/11 ZZ (France) v Secretary of*

State for the Home Department EU:C:2013:363, [2013] QB 1136 (“ZZ”)) to the effect that EU law required disclosure of the essence of the case against him. 28. Lord Dyson MR (with whom Richards and Lewison LJ agreed) summarised the requirements of Article 6 ECHR at [23] as follows: “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 facts that (i) it did not involve the liberty of the subject; (ii) the claimant had been provided with a degree of information as to the basis for the decision to withdraw his security vetting; he was not completely in the dark; (iii) there was real scope for the special advocate to test the issue of discrimination without obtaining instructions on the facts from the claimant; and (iv) this was a security vetting case and it was clearly established in the Strasbourg jurisprudence that an individual was not entitled to full article 6 rights if to accord him such rights would jeopardise the efficacy of the vetting regime itself.” 29. He went on to conclude that EU law went no further. The requirements of Article 47 of the EU Charter of Fundamental Freedoms (which is based on Article 6 ECHR) were context-specific in the same way. In *Bank Mellat v HM Treasury* (No. 4) [2015] EWCA Civ 1052, [2016] 1 WLR 1187, the same constitution of the Court of Appeal returned to the question of where to draw the line between cases where AF (No. 3) disclosure applies and cases where it does not. The court was concerned with statutory proceedings to challenge the imposition of financial restrictions on an Iranian bank whose activities were alleged to have facilitated the Iranian nuclear programme. At [21], Richards LJ (with whom Lord Dyson MR and Lewison LJ agreed) considered the Government’s submission that AF (No. 3) did not apply because the measures being challenged did not involve the liberty of the subject. That point, he said, “does not take [the Government] very far, since restrictions on the freedom to do business or to engage in financial transactions can be as serious for a bank as restrictions on personal liberty for an individual”. At [23], Richards LJ held that, although the restrictions under challenge were not asset freezes, they were still “highly restrictive” measures with “extremely serious and possibly irreversible consequences”. The measures had the intended effect of shutting the bank out of the UK financial sector, resulting in estimated losses of \$25 million annually. The bank was also prevented from drawing on \$183 million of call and time deposits with its part-owned subsidiary in London. At [25], he held that “directions in such draconian terms involved sufficiently serious restrictions on Bank Mellat’s freedom of action, and a sufficiently serious impact on its banking business, as to call for the application of the AF (No. 3) standard of disclosure in proceedings to challenge the Orders”. 30. AF (No. 3) was a case about the procedural rights of the excluded party in proceedings to challenge a control order imposing restrictions on liberty which, as Lord Brown said in *Tariq*, were “strikingly similar” to the deprivation of liberty in A’s case. However, the domestic courts have also applied the AF (No. 3) standard to cases involving restrictions on liberty of a lesser kind. *Secretary of State for the Home Department v BC* [2009] EWHC 2927 (Admin), [2010] 1 WLR 1542 concerned control orders where the requirements were limited to a residence condition, a daily reporting condition and a condition prohibiting the controlees from associating with, in one case, one other person and, in the other case, two other persons:

see at [4]. At [55], Collins J held that AF (No. 3) applied. At [58], he said this: “It seems to me that the imposition of what are described as light obligations in order to seek to avoid the application of article 6 does not achieve that result, nor does it avoid the need for the controlled person to know sufficiently the important allegations against him to make a defence to them.” *Kamoka v Security Service* [2015] EWHC 3307 (QB) was a damages claim brought by individuals claiming that they were unlawfully detained pending their appeals to SIAC against the decision to deport them and were subsequently subject to unlawful restrictions on their liberty under control orders. Irwin J said at [22] that AF (No. 3) set an “instrumental” test. In other words, its purpose was “to enable instructions to be given so that a matter can be dealt with fairly”. At [23], he said that two aspects of context were important in determining what Article 6 required. First, what is the nature of the issue at stake? Secondly, what is needed for the fair disposal of the litigation in hand? At [27], Irwin J said this: “It appears to me that there is a spectrum to be identified in looking at the context of the different cases that have arisen. At one end is the person in detention, or subject to a freezing order, where the liberty of the subject, in the sense of the subject not being at liberty at the point in time when the matter arises, is in question. That must fall at one end of the spectrum. It may well be that the other end of the spectrum is properly represented by the ‘volunteer’ employment cases, of which Tariq is an example: those cases where as a choice of employment the individual has agreed to enter employment where national security is in question, both as to substance and as a condition of employment.” At [28], Irwin J held that the cases before him, while not brought by individuals seeking to secure their liberty, nonetheless concerned “the vindication of the right to liberty, or the vindication of protection against arbitrary detention”. This was important, but not so important as gaining release. It was also important that the relevant evidence upon which national security considerations bit concerned events and developments that happened to others and that much of this evidence was already in the public domain: [31]-[33]. The conclusion at [35] was that there was no irreducible minimum disclosure (i.e. that the disclosure standard in AF (No. 3) did not apply) but that “the provisions of Article 6 do mean that the maximum information which can properly be released will be released and that where that is not possible the maximum amount of guidance by way of summary of gist consistent with the protections offered in the statute must be made”. *Khaled v Security Service* [2016] EWHC 1727 (QB) was also a claim for damages. The claimant alleged that the Security Services had relied on information obtained from the Libyan authorities by torture in proposing to the UN that the claimant be sanctioned. Irwin J held at [34] that the case did not involve loss of liberty, detention or interference with the claimant’s Article 8 rights. It was a civil claim for damages, albeit one raising issues of high public interest. AF (No. 3) did not apply. 31. 32. 33. 34. 35. In *R (AZ) v Secretary of State for the Home Department* [2017] EWCA Civ 35, [2017] 4 WLR 94, the applicant was a refugee who had been refused a Convention Travel Document under the Qualification Directive (Council Directive 2004/83/EC) on grounds of national security. In the Court of Appeal, it was argued for the affected person that there was a distinction between, on the one hand, cases (such as Tariq and Kiani) where only damages were

sought, and, on the other, cases involving a challenge to an ongoing interference with fundamental rights (such as AF (No. 3) itself, ZZ and Bank Mellat). It was said that there was also a third category, where Article 6 did not apply at all (such as Pham v Secretary of State for the Home Department [2015] UKSC 19, [2015] 1 WLR 1591): see at [27]. At [28], Burnett LJ (with whom Jackson and Underhill LJ agreed) rejected that argument. There was, he said, “no support for such a hierarchy in the Convention or EU jurisprudence”. A dichotomy between the first and second categories would be “neither logical nor principled” since the right not to be discriminated against on grounds of race etc. was guaranteed by both the Convention and the Charter. Furthermore, it was not logical to distinguish between the disclosure standard applicable to a discrimination claim limited to damages and one involving continuing discrimination or a decision yet to be implemented when the grounds and evidence in relation to each may be identical. It followed, Burnett LJ held at [29], that: “...the touchstone to the degree of disclosure required by both the ECHR and EU law viewed in the light of the Charter is the nature and impact of the decision in question in the sense described in Kadi at [102]. The disclosure required in AF (No. 3) case under the ECHR and ZZ under EU law is reserved for cases which concern objectively high level rights. Nomenclature in this area is apt to confuse. All the rights guaranteed by the ECHR... and by the Charter... are ‘fundamental’. Yet as the jurisprudence of both the Strasbourg and Luxembourg courts recognise some of those rights admit of no qualification or derogation, and those which may be qualified demands different levels of justification from decision-makers in support of interference...” At [31], Burnett LJ noted that the refusal to issue a Convention Travel Document, did not give rise to interferences of the same order as those in AF (No. 3) or Bank Mellat. This, combined with the fact that EU law did not confer express procedural guarantees, meant that the disclosure standard in AF (No. 3) and ZZ did not apply. 36. K, A and B v Secretary of State for Defence [2017] EWHC 830 (Admin) was a public law claim brought by individuals who claimed to have acted as covert human intelligence sources for the UK in Afghanistan. They sought relief to compel the Secretary of State to relocate them to the UK and pay their associated costs: see [6]. At [12], Ouseley J (with whom Simon LJ agreed) held as follows: “There is a spectrum of cases and a spectrum of disclosure rather than a hierarchy; that much is clear from Kiani and AZ. There is certainly an end of the spectrum where the requirement will be that the gist or essence of the case be disclosed. There are also cases such as AZ itself where the court concluded, [37], that an outline of the grounds given to AZ, coupled with the protections of the CMP procedure, satisfied the procedural requirements of Article 47 of the Charter...; there was no need for the gist always to be disclosed to comply with Article 6. There are other cases, Tariq and Kiani, where it appears that an outcome between the two has been achieved with no very clearly enunciated intermediate test. But they are nonetheless cases in which the disclosure received, allied to the circumstances of the case and 37. 38. with the protection of their equivalents to the CMP, had been found adequate for the purposes of Article 6.” At [23], Ouseley J held that the case before the Divisional Court was “at a higher level than the employment context in Tariq and Kiani but... 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. Nor are the asserted risks from others the result of action taken by the Defendants against the Claimants". At [24], he said that this meant that the AF (No. 3) disclosure standard did not apply. However, "Tariq and Kiani do not require that there be no disclosure which might harm national security, for the purposes of Article 6. A balance may have to be struck between the significance of material not otherwise disclosed to the Claimants and the harm its disclosure might create for national security". Ouseley J observed at [25]-[27] that the issues relating to the existence of a policy and its scope, meaning and effect could be as easily dealt with by the special advocates as by the open representatives. The claimants had been able to give their own accounts of the risks they faced. Although it was true that the court would have to review the defendant's conclusions about the claimants' credibility, it would not be engaged in a primary fact-finding role on that question. Rather, it would be "reviewing, with whatever degree of scrutiny is required, the lawfulness (principally the rationality), of the Defendants' appraisal of the material before them". The nature of the claim was towards the higher end of the spectrum in terms of the importance of the rights in issue. But where the claimants were making a claim which arises out of their asserted engagement with national security work, there had to be a necessary acceptance that the procedure adopted will not jeopardise the very system with which they became voluntarily involved. 39. In *R (Haralambous) v St Albans Crown Court* [2018] UKSC 1, [2018] AC 236, the Supreme Court had to consider whether AF (No. 3) applied in judicial review proceedings challenging the legality of search warrants issued under the Police and Criminal Evidence Act 1984 ("PACE"). Lord Mance (with whom the other members of the Court agreed) held not. At [64], he said this: "The issue of a warrant authorising a search of premises and seizure of documents involves a short term invasion of property. Such a warrant is, as I have pointed out, not specifically directed at, or necessarily even linked with, anyone occupying the premises or having any proprietary or possessory interest in the documents. Save that the taking of the documents for so long as is required for the limited purposes of an investigation necessarily affects possession, such a warrant does not affect the substantive position of anyone who does occupy the premises or have any proprietary, possessory or other interest in any documents found therein. All it may do is provide information, and maybe direct evidence, of potential use in a current investigation into an indictable offence which the magistrate or Crown Court is satisfied there are reasonable grounds for believing has been committed. If the investigation leads to criminal proceedings, any person affected will enjoy all the normal safeguards..." 40. This was applied by the Divisional Court in *R (Terra Services Ltd) v National Crime Agency* [2020] EWHC 130 (Admin), a challenge to a search and seizure warrant granted by the Crown Court under Sch. 1 to PACE. In that case, the question was not whether the disclosure standard in AF (No. 3) applied, but whether a special advocate should be appointed. Having cited *Haralambous*, Irwin LJ (with whom May J agreed) held as follows at [21]: "In our view, as a category challenges to the issue of search warrants fall towards the lower end of any such

hierarchy [sc. the hierarchy of importance of the rights at issue], essentially for the reasons given by Lord Mance in the passages from Haralambous quoted above. The application is directed to premises and not people. There is no question of loss of liberty, or indeed any direct loss of rights, or even adjudication of rights, as a consequence of the warrant. Whilst of course search and seizure warrants are often for the explicit purpose of criminal process, any such process is accompanied by established procedures and safeguards, once that secondary or consequential process begins.” 41. *R (Reprieve) v Prime Minister* [2020] EWHC 1695 was a judicial review claim brought by a campaigning organisation challenging the decision not to establish a public inquiry to investigate allegations of involvement of UK intelligence services in torture. Dame Victoria Sharp PKBD (with whom Farbey J agreed) held that Article 6 was not engaged because the claim would not determine any civil right of the claimant. The court went to say, however, that even if Article 6 had been engaged, AF (No. 3) would not apply. The key parts of their reasoning on this latter point were as follows: “45... In our judgment, the analysis of control orders which underpinned the conclusions in AF (No. 3) does not apply here. These judicial review proceedings do not involve the liberty of the individual in the sense that the proceedings are not concerned with granting release from detention. Nor does the refusal of a public inquiry raise anything akin to deprivation of liberty, unlike control orders... 46... we are bound to take into consideration that those cases to which AF (No. 3) has been extended relate to highly restrictive, executive measures with very serious effects for individual rights. In this case, no executive action has been taken against the claimants. There are no allegations being made against them which they are compelled by force of circumstance to rebut in order to protect fundamental rights. It is the State which seeks to resist a claim brought by the claimants.” At [51], the Divisional Court rejected the proposition that the case engaged a “middle way”, i.e. an “intermediate” disclosure standard of the kind suggested in *K, A and B* at [12]. 42. *QX v Secretary of State for the Home Department* [2020] EWHC 1221 (Admin), [2021] QB 315 was a challenge to obligations imposed on an individual after his return to the United Kingdom under a temporary exclusion order pursuant to the Counter-Terrorism and Security Act 2015. These included a daily reporting obligation and weekly attendance at sessions with a mentor and theologian. Farbey J held as follows: “82. [...] It is plain from the case law that there is no uniform standard to be applied in every kind of case. At one end of the spectrum are cases concerning ‘actual or virtual imprisonment’ (per Lord Mance in *Tariq*, [27]). In such cases, full AF (No. 3) disclosure is needed for a fair trial. In other cases, an outline of the grounds for decision coupled with the protections built into the closed material procedure will suffice. 43. 44. 45.

83. The extent of the disclosure required for a fair hearing will depend on the facts of the particular case. In my judgment, it is appropriate to consider ‘the context and all the circumstances of the case’ (*Kiani*, [23]).” Since the obligations imposed in the case before her were “onerous”, and had the effect of limiting QX’s freedom of movement within the United Kingdom, they were comparable with others of the sort described by Lord Mance in *Tariq* as

“virtual imprisonment”. The AF (No. 3) standard therefore applied: see [83]. A later iteration of the proceedings brought by QX was considered on appeal by the Court of Appeal and Supreme Court but those appeals were concerned with the prior question whether Article 6 was engaged at all. Neither appellate court had to decide whether, if so, the AF (No. 3) disclosure standard applied. In *Lee and Wilkes v Security Services* [2023] UKIPTrib 8, the Investigatory Powers Tribunal considered whether AF (No. 3) applied in proceedings challenging an interference alert issued by the Security Service to the UK Parliamentary authorities to the effect that the claimants has engaged in activities affiliated with the Chinese state. At [27], the Tribunal (Singh LJ, Lord Boyd and Upper Tribunal Judge Rupert Jones) held that the facts of the case before them “do not fall anywhere close to the end of the spectrum at which AF (No. 3) and analogous cases are located”. At [39], without attempting to lay down a comprehensive statement of the relevant principles, the Tribunal said that the cases in which AF (No. 3) had been held to apply had the following features: “First, they were concerned with coercive measures which directly imposed serious restrictions on a person’s freedom of action. Secondly, these 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.” Since none of these features was present in the cases before them, AF (No. 3) did not apply: see at [40]. Finally, there is the very recent judgment of Jay J in *R (C3) v Secretary of State for the Home Department* [2026] EWHC 34 (Admin). There, a British national and her three children challenged the decision of the Foreign Secretary to refuse to provide them consular assistance to leave a camp under the control of the Democratic Autonomous Administration of North and East Syria. Jay J concluded that Article 6 did not apply because the decision being challenged fell within the “hard core of public authority prerogatives” as that term had been used by the Court of Appeal and Supreme Court in QX. The question whether, if Article 6 was engaged, the disclosure standard in AF (No.

- 3) applied did not, therefore fall for decision. Nonetheless, Jay J addressed that issue briefly at [70]. The consequences to the family of their not being afforded consular assistance were “immense”. The facts could not be further from those in *Tariq*. The case lay “at the top end” of the disclosure spectrum.

Submissions

Submissions for the claimant

46. Mr Southey for the claimant submitted that the disclosure standard in AF (No. 3) applies here. First, the claim had been brought to vindicate the claimant's right to 47. 48. 49. 50. respect for his private and family life under Article 8 ECHR. The defendant had downloaded data covering more than 15 years of the claimant's life. It was well recognised that a mobile phone contains "the sum of an individual's private life": *R (Liberty) v Secretary of State for the Home Department* [2019] EWHC 2057 (Admin),
- [2020] 1 WLR 243, [197]-[201]. See also the decision of the Irish Supreme Court in *Director of Public Prosecutions v Quirke* [2023] IESC 5, [73] and [78]. Secondly, the confidentiality of communications subject to legal professional privilege ("LPP") is also protected by Article 8 ECHR: *Michaud v France* (2014) 59 EHRR 9, [118]-[119]. It follows that the protection of personal data is of particular importance when the data may be covered by LPP: *Saber v Norway* (App. no. 459/18), judgment 17 December 2020, [51]; and, in the domestic context, *Three Rivers District Council v Governor and Company of the Bank of England* [2004] UKHL 48, [2005] 1 AC 610,
- [25] and [34], and *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, p. 236G. Thirdly, this is a case where the claimant may well be able to provide explanations for matters advanced by the defendant as justifications for the search. Moreover, without proper disclosure it is not possible for the claimant adequately to address the safeguards proposed to protect LPP. Fourthly, this is not a case where the interference with the claimant's right was entirely in the past. It is continuing. The mere storing of personal data amounts to a continuing interference with the claimant's Article 8 rights: see *S and Marper v United Kingdom* (2009) 48 EHRR 50, [67]. Any subsequent use of those data would also amount to a further interference with the claimant's rights. In any event, the examination of the data is in fact continuing. The remedies sought here are forward, as well as backwards- looking. They include an order for deletion of the downloaded data. Fifthly, if the AF (No. 3) standard applies, the fact that the individual has not been left "completely in the dark" (as it was put in *Kiani* at [23]) cannot matter. In any event, the material disclosed so far is plainly inadequate to comply with AF (No. 3), or indeed any lesser standard, because he has been given no information about the reasons for the search and no significant information about how the searches of the downloaded data will be conducted (by contrast with other cases where the data subject was able to make a "significant" contribution to the process of sifting those data: see e.g. *Faiseltex Ltd v Chief Constable of Lancashire* [2009] EWHC 799 (QB), [35]; and *R (McKenzie) v Serious Fraud Office* [2016] EWHC 102 (Admin), [2016] 1 WLR 1308, [8] and [30]). Submissions for the defendant
51. Mr Butt for the defendant submitted that the disclosure standard in AF (No. 3) does not apply. 52. 53. The matters complained of in the present claim (the historical seizure of the claimant's data and the ongoing retention and use of that data) are not comparable to the coercive measures involved in the cases where AF (No. 3) applied. This case does not concern deprivation of liberty or property or other coercive measures with highly restrictive effects. The AF (No. 3) disclosure standard has not been applied to cases where the Crown

Court has authorised retention of material pursuant to ex parte search warrants, even though the interference with human rights involved in such retention had a continuing effect (Haralambous, [61]-[63]) and even though the power to issue search warrants has been described as a “draconian power” (R (Faiseltex Ltd) v Crown Court at Preston [2008] EWHC 2832 (Admin), [2009] 1 WLR 1687, [29]) or akin to a “nuclear 54. 55. weapon” (R (Mercury Tax Group) v Commissions of HM Revenue and Customs [2008] EWHC 2721 (Admin), [2009] STC 743, [52] and [71].) See also Terra Services, [17] and [21]. The Supreme Court’s analysis of the Sch. 7 power in Beghal v Director of Public Prosecutions [2015] UKSC 49, [2016] AC 88 shows that exercises of this power should be placed towards the bottom of the hierarchy of interferences with fundamental rights, given that (i) it is confined to airports and ports (see [38] and [40]); (ii) the level of intrusion is comparatively light (see [51]); the justification for it is compelling (see [79]); and the powers have been regarded as an “essential ingredient in the fight against terrorism” (see [89]). Furthermore, the cases where the AF (No. 3) disclosure standard has been held to apply are those where the proceedings involve the state making a case against the individual, which the individual has the opportunity to rebut or disprove. The present proceedings do not fall into that category, because—if (as to which no admissions are made) the CLOSED material contains allegations against the claimant—the issue in the proceedings is not whether those allegations are true, but whether, given the material available to the officers who authorised and carried out the search, there was a lawful basis for it at the time when it was carried out. The special advocate is as well placed to make submissions on that as the claimant is. None of the claimant’s grounds of challenge requires the claimant to be informed of the nature of the allegations, if any. Discussion A spectrum of types of case or a spectrum of disclosure standards? 56. 57. 58. The foregoing review of the case law in this area shows that, in cases concerning the applicability of the AF (No. 3) disclosure standard, the courts have repeatedly returned to the idea of a “spectrum”, but that term has been used in two different senses. In Kamoka, at [27], Irwin J referred to a spectrum of types of case, from detention or asset freezing cases at one end to employment vetting cases at the other. Somewhere on the spectrum, there is a dividing line. Deciding whether AF (No. 3) applies in a particular case involves working out on which side of the line the case falls. In this sense, the idea of a spectrum is both consistent with principle and workable. In K, A and B, however, Ouseley J referred at [12] to “a spectrum of cases and a spectrum of disclosure”. The later passages from his judgment quoted above show that he thought this “spectrum of disclosure” meant that, in cases in the middle of the spectrum, the standard in AF (No. 3) would not apply, but a balance would have to be struck between fairness and national security, so that some disclosure might be necessary even if it caused harm to national security. This uses the idea of spectrum in a quite different sense to indicate a sliding scale of different disclosure standards. Ouseley J identified Tariq and Kiani as supporting this position. For my part, I would respectfully question whether either Tariq or Kiani provides such support. In Tariq, the Supreme Court decided that, on the facts of that case, there was “no absolute requirement” for Mr Tariq to be provided with sufficient detail about the allegations against him to give effective instructions to his legal representatives: see at [69]. Instead, in cases of that type, the special advocate regime

(without any minimum open disclosure requirement) provided sufficient protection for the fair trial rights of the excluded person. 59. Kiani does refer to a balancing exercise between the interests of national security and prejudice to the person concerned. This exercise was performed by the Employment Judge and the Court of Appeal found no fault with it. But the outcome of the balancing exercise in that case was that no disclosure into OPEN was required at all. It is one thing to require a balancing exercise with a binary outcome (i.e. the disclosure standard in AF (No. 3) either applies or does not apply). It is another to require an exercise that may result in some disclosure that is damaging to national security, but without providing to the excluded party the material needed to refute the case against him. It is important to recall that, even where AF (No. 3) applies, what is required to be disclosed to the excluded party is “sufficient information about the allegations against him to give effective instructions to the special advocate”. This is the “core irreducible minimum”: see Lord Hope at [81]. Often, this involves disclosure of allegations, not evidence: *ibid.*, [86]. If the court were to apply some lesser disclosure standard, then, by definition, the excluded person would not be given sufficient to enable him to mount an effective challenge to the case against him. He would be given less than the core irreducible minimum, but would nonetheless be entitled to some disclosure which would damage the interests of national security. This middle position has some similarities with the balancing exercise envisaged in the context of public interest immunity in *R v Chief Constable of the West Midlands ex p. Wiley* [1995] 1 AC 274. But in the context of statutory closed material procedures, the principled justification for it is, in my judgment, obscure. Why should the court countenance damage to national security so as to provide a hearing which does not offer the excluded party the minimum disclosure necessary to mount an effective challenge to the case against him? In practice, such a middle position would present real difficulties for the court and real uncertainty for the parties and special advocates. By what standard would the court assess how much damage to national security, or how significant a derogation from the core irreducible minimum of disclosure, is acceptable in a particular case or type of case? Would it be enough to disclose to the excluded party one of the key allegations against him, at the price of causing significant but not overwhelming damage to national security, while not disclosing other key allegations? If so, how would that help the excluded party? Would a failure by the first instance court to accord the appropriate weight to the incommensurable values of fairness and national security entitle an appeal court to strike the balance afresh? These principled and practical concerns lead me to conclude that the correct approach is to ask, simply, whether the case is of a type which engages the disclosure standard in AF (No. 3). If the answer is “yes”, the court’s task is to identify the core irreducible minimum of information which fairness requires to be disclosed to enable the excluded party to mount an effective challenge to the case against him. It is then for the state party to elect whether to disclose that information or withdraw part or all of its case. If the answer is “no”, the court should apply the plain words of the statutory provisions and rules which govern the closed material procedure in question—in this case, the Justice and Security Act 2013 and CPR Part 82, which require the court to ensure that information is not disclosed in a way which would be damaging to the interests of national security. This

approach seems to me to accord with the structure of the Human Rights Act 1998. As I have pointed out elsewhere, s. 3 of that Act does not contain a general interpretive principle which requires a court to favour a construction which better promotes the interests which ground a Convention right over one which promotes those interests less effectively. The obligation imposed by s. 3 is of relevance only when one of the competing constructions is incompatible with Convention rights: see *R (Friends of the Earth) v Secretary of State for the Environment, Food and Rural Affairs* [2024] EWHC 60. 61. 62. 63. 64. 2707 (Admin), [87]. Other than K, A and B, there is no Strasbourg or domestic authority clearly indicating, in a case where the “irreducible minimum” does not apply, that Article 6 may require disclosure which is damaging to national security. 65. In most cases where AF (No. 3) does not apply, it will be possible to disclose some material (at least in gist or summary) to the excluded party without incurring damage to those interests. But where that cannot be done, as in *Tariq*, the preponderance of the case law in my view indicates that the requirements of Article 6 will be satisfied by the involvement of a special advocate alone. This approach involves drawing a stark dividing line between cases where the AF (No. 3) disclosure standard applies and cases where it does not. This makes it important to identify accurately the factors relevant to the applicability of that standard and to apply them correctly to the facts of each case. The distinction between forward-looking and backward-looking claims 66. 67. 68. 69. Some of the case law might be thought to support the suggestion that a principled line can be drawn between cases where an individual brings a claim to challenge an ongoing restriction on his liberty (forward-looking claims) and cases where an individual claims damages in respect of an alleged wrong done to him in the past (backward-looking claims): see e.g. the first instance decisions of *Irwin J in Kamoka* at [28] and *Khaled* at

- [34] and the decision of the IPT in *Lee and Wilkes* at [39]. However, the Court of Appeal’s judgment in *AZ*, at [28], is authority for the proposition that no such distinction can safely be drawn. For my part, I respectfully agree with the Court of Appeal in *AZ* that such a distinction is not sustainable as a matter of principle. This is not only because, as *Burnett LJ* pointed out in that case, the evidence relevant to a claim will often be the same in a case where the alleged wrong is continuing as in the case where the wrong has come to an end and all that is sought is damages. It is also because claims for tortious damages—for example, for trespass to the person, false imprisonment or conversion—have historically performed an important vindicatory function in the common law, even in cases where the alleged wrong happened in the past. Claims for damages under s. 8 of the Human Rights Act 1998 now fall into the same category. There would also be obvious practical difficulties if the disclosure standard depended, even in part, on the remedy sought. Take, for example, a claim challenging the legality of detention. Where the detention is continuing, the claimant is likely to proceed by judicial review, but may also include a claim for damages. If a principled distinction were to be drawn between forward and backward-looking cases when determining the applicability of the AF (No. 3) disclosure standard, a defendant could presumably avoid the need to give disclosure assessed by reference to that standard by releasing the claimant before disclosure was required so that the only remaining issue was

damages for an alleged past wrong. The present case provides a good example of the arbitrariness of any distinction between forward-looking and backward-looking relief. The claimant pointed to the fact that, at the time of the hearing, the defendant had yet to undertake the examination of his mobile phone and that, in any event, there was a challenge to the retention of the data. But the timing of the examination is a purely contingent matter, driven in this case by the availability of the independent KC performing the sift to ensure that privileged material is not passed to the investigators. There is no good reason why this happenstance should entitle the claimant to disclosure assessed by reference to a more favourable standard. Nor is it obvious why the existence of a challenge to the defendant's continued retention of the data should make the difference. The importance of the case to the claimant may not depend on whether, at the point when the disclosure standard comes to be decided, the defendant retains the data. Does it matter whether the proceedings turn on the correctness of the CLOSED information?

70. Most of the cases in which the AF (No. 3) disclosure standard has been held to apply (*A v UK*, *AF (No. 3)*, *Mastafa*, *Bank Mellat* and *QX*) were ones in which the state had imposed coercive measures restricting the liberty of individuals on the basis of allegations that they had been involved in terrorism-related activity. Mr Butt seeks to distinguish those cases because the present proceedings will not turn on the correctness of any such allegations. Here, no grounds for suspicion are required to use the Sch. 7 power; and, even where the power is used on the basis of information received, the legality of that use does not turn on the correctness of the information, but rather on the rationality of the decision, judged on the basis of what the decision-maker knew at the time. 71. In my judgment, the fact that the legality of the stop turns on the rationality of the decision challenged (rather than on whether any information on which the stop was based can be proven to be correct) does not on its own serve to distinguish this case from those where the AF (No. 3) disclosure standard was held to apply. Many of those cases also required the court to apply a judicial review or similar standard: see e.g. *Prevention of Terrorism Act 2005*, s. 10(6) (*AF No. 3*); *Counter-Terrorism Act 2008*, s. 63(3) (*Bank Mellat*); *Counter-Terrorism and Security Act 2015*, s. 11(3) (*QX*). In these cases, the court did not have to consider whether the allegations against the affected party were proven, yet the disclosure standard in *AF (No. 3)* applied. 72. This accords with principle. Even where the issue for the court is the rationality of a decision to act on given information, rather than the correctness of that information, the individual against whom the action is taken may well have relevant evidence which is not available to the special advocate. The nature of the right in issue 73. 74. In my judgment, the case law indicates that the decision whether the disclosure standard in *AF (No. 3)* applies depends predominantly on the nature of the right in issue in the proceedings, though policy considerations also play a part. The standard was first applied in *A v UK*, which concerned proceedings to challenge detention. *AF (No. 3)* itself involved proceedings to challenge restrictions which fell short of detention, but which nonetheless amounted to serious interferences with individual liberty. In *Bank Mellat*, the challenger was a company, not an individual, but in that context the restrictions involved the most serious possible

interferences with its freedom to deal with its property. The different result in Tariq and Kiani can be explained by the fact that neither case involved a challenge to a coercive state measure impacting on individual liberty, but more importantly, by reference to policy considerations: viz. that those who apply for employment which requires vetting voluntarily subject themselves to a process which, for national security reasons, will remain in part (possibly large part) opaque to them; and this makes it acceptable as a matter of policy for legal complaints about the operation of this process, or decisions taken pursuant to it, to be adjudicated by a procedure in which considerations of national security prevail over those of procedural fairness. 75. In Haralambous, the Supreme Court held that AF (No. 3) does not apply in proceedings to challenge search warrants. That was in part because the search and seizure of 76. 77. documents involved a shorter-term interference with liberty than was involved in AF (No. 3) and in part because the proceedings did not affect the subject's "substantive position". That would be affected if and only if the search gave rise to criminal proceedings, in which case the full range of procedural protections would apply. Whether one sees this as putting search warrants into the "lower end" of a "hierarchy" (as Irwin J said in Terra Services) or as carving out search warrants as a special class of case for policy reasons, I do not consider that this case can be convincingly distinguished from Haralambous. I accept, of course, that the contents of a person's mobile phone can tell one a great deal about his private life. In that sense, a search of the contents of a mobile phone may in some cases be more intrusive than a search of a home. But a search warrant under PACE may itself authorise the seizure of electronic devices. That being so, the holding in Haralambous applies directly in the present context. In any event, the reasoning in that case is equally applicable to the present case: the exercise of the power does not involve any allegation against the claimant; the seizure and retention of the claimant's personal information does not affect his substantive legal position (in the sense that it imposes no legal obligations on him); and if the results of the search were used in criminal proceedings, the full panoply of procedural protections would apply. Finally, I have considered carefully whether the fact that the phone contained privileged information serves to distinguish Haralambous. In my judgment, it does not. In the first place, there are substantial protections in place to safeguard the integrity of the privileged information, which I described in my judgment refusing interim relief. Secondly, and in any event, to the extent that there is a risk of interference with the confidentiality of potentially privileged information belonging to third parties, the points made in Haralambous apply a fortiori with respect to those third parties. Even if the privileged material could be used against them (which it cannot), it could not affect their substantive legal positions without some further legal process in which they would enjoy the full panoply of procedural rights.

Conclusion

78. I therefore conclude that the disclosure standard in AF (No. 3) does not apply; and that neither defendant is required to give any disclosure which would be damaging to the interests of national security.

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