13 July 2011

PRESS SUMMARY

Al Rawi and others (Respondents) (Respondents) v The Security Service and others (Appellants) [2011] UKSC 34
On appeal from the Court of Appeal (Civil Division) [2010] EWCA Civ 482

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lady Hale, Lord Brown, Lord Mance, Lord Kerr, Lord Clarke, Lord Dyson

BACKGROUND TO THE APPEAL

The question in this appeal is whether the court has the power to order a "closed material procedure" for the whole or part of the trial of a civil claim for damages. This question is formulated as a preliminary issue which arose in the context of claims brought by the respondents against the appellants. The respondents claimed compensation for their alleged detention, rendition and mistreatment by foreign authorities in various locations, including Guantanamo Bay. They claimed that the appellants had been complicit in what they alleged had happened. These claims settled prior to the hearing before the Supreme Court. However, the appellants pursued their appeal which was accepted by the Supreme Court on the basis that a decision is needed to clarify the law on this point of general importance.

The appellants claimed that they had security sensitive material within their possession which they wished the court to consider in their defence but which could not be disclosed to the respondents. They requested that this material be put into a closed defence and that the proceedings take place with parallel open and closed hearings and judgments. The respondent and the other claimants objected and this dispute formed the basis of the preliminary issue. The preliminary issue defined "closed material procedure" as a procedure whereby a party can withhold certain material from the other side where its disclosure would be contrary to the public interest. The closed material would be available to special advocates, who act in the interests of the excluded party but who cannot take instructions from them, and the court. At first instance, Silber J granted a declaration that it could be lawful and proper for a court to order a closed material procedure in a civil claim for damages: [2009] EWHC 2959 (QB). The Court of Appeal (Lord Neuberger MR, Maurice Kay and Sullivan LJJ) disagreed. They denied that a court had such a power: [2010] EWCA Civ 482.

JUDGMENT

The Supreme Court, by a majority, dismisses the appeal. The lead judgment is given by Lord Dyson, with whom Lords Hope, Brown and Kerr agree. Lord Phillips would also dismiss the appeal but for different reasons. Lord Mance, with whom Lady Hale agrees, and Lord Clarke give dissenting judgments. Lord Rodger, who died before judgment was given in this case, had indicated that he would have dismissed the appeal.

REASONS FOR THE JUDGMENT

The court unanimously decides that there is no power at common law to replace public interest immunity ("PII"), whereby a judge decides whether in the public interest certain material should be excluded from a hearing, with a closed material procedure. Such a change could only be for Parliament to make: **[67]-[69], [107]**, **[152], [192]**. Lords Dyson, Hope, Brown and Kerr further hold that there is no power at common law to introduce a closed material procedure following the conclusion of the

normal PII process. A closed material procedure, unlike the law relating to PII, involves a departure from the principles of open and natural justice, which are essential features of a common law trial: **[10]-[14]**. In certain specified cases, Parliament has enacted legislation which departs from the open justice and natural justice principles in introducing a form of closed material procedure and special advocates. This legislation responds to the increasing need in recent years to balance the public interest in maintaining a fair justice system with the public interest in the protection of national security.

The court has an inherent power to regulate its own procedure. In so doing it may introduce innovations in the interests of justice. However, the court cannot exercise its power to regulate its own procedures in such a way that will deny parties their common law right to a fair trial: **[18]-[22]**. The case of *R v Davis* [2008] AC 1128 is analogous. The House of Lords in *Davis* decided that the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament could do that. The closed material procedure excludes a party from the closed part of the hearing. This prevents him from being able to see and challenge the evidence and submissions made in the closed hearing. It also prevents him from reading the closed part of the judgment. He may never know why his case was decided the way it was. The use of special advocates can mitigate some of these defects but they cannot cure them. In many cases special advocates will be hampered by not being able to take instructions from their client on the closed evidence. Accordingly, a closed material procedure cannot properly be described as a development of the common law process of PII: **[27]-[37]**. There is no clear and established line of authority to support the proposition that the court has power to order a closed material procedure in the absence of statutory authority: **[51]-[59], [85]**. There are certain limited classes of case, such as wardship cases in which the interests of the child are paramount, or intellectual property cases where the whole object of the proceedings is to protect a commercial interest, where a departure from the normal rule is justified for special reasons in the interests of justice. However, these cannot be relied upon to justify the creation of a general rule applicable to all civil litigation: **[62]-[66]**. It is not for the courts to extend something as controversial as the closed material procedure beyond the boundaries which Parliament has chosen to draw for its use. If this is to be done at all, it is better done by Parliament: **[47]-[48], [67]-[69], [72]-[74], [78]**. The question of whether it would be open to the court to adopt a closed material procedure if the parties consented does not need to be decided in this case and is left open: **[46], [75], [99]**. In Lord Brown's view, however, consent cannot justify recourse to a closed material procedure: **[84]**. Lord Phillips leaves the question of whether there is a common law power to permit a closed material procedure open: **[196]**.

Lord Mance, with whom Lady Hale agrees, and Lord Clarke would have held that the court has the power, in certain circumstances, to order a closed material procedure. They disagree, however, over what those "certain circumstances" are. In Lord Mance's view, the court may order a closed material procedure, but only where the closed material is in the defendant's possession and the claimant consents in order to avoid his claim being struck out: **[112]-[121]**. For Lord Clarke, the circumstances in which a court may order a closed material procedure are not necessarily so limited. In Lord Clarke's view, after the PII process has been completed the parties should consider their respective positions and make representations to the judge as to the appropriate way forward, which may be to order a closed material procedure. The precise circumstances in which a closed material procedure may be ordered would be for the court to work out in a concrete case: **[159]-[188]**.

References in square brackets are to paragraph numbers in the judgment.