Miriam Rothschild and John Foster Lecture

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Fairness and National Security

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Introduction

1. Thank you for inviting me to give this year's lecture.[2] I am honoured to follow in the footsteps of some very distinguished predecessors, to many of whom I owe an intellectual debt. In looking at the list of previous speakers I noticed that some of them were not lawyers. I think this would have appealed to both John Foster and Miriam Rothschild, who would have appreciated that the subject of human rights is far too important to be left only to lawyers.

2. The subject of my lecture will be Fairness and National Security. By fairness lawyers usually mean what used to be called the rules of natural justice, that is the right to procedural fairness when decisions [of the executive or the courts] are taken which are adverse to a person's interests. It is a fundamental aspect of a just legal system that a court or tribunal must act fairly. This is so axiomatic that one hardly needs Article 6 of the European Convention on Human Rights ("ECHR") for this purpose. Indeed, in some ways the scope of Article 6 is more limited than the common law principles of natural justice or fairness. For example, much ink has been spilt in Strasbourg on the

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[2] I would like to thank my former Judicial Assistant, Lucy Jones, for research for this lecture.

concept of what is a "determination of civil rights": it is only when a decision constitutes a determination of civil rights, or where there is a criminal charge, that the requirements of Article 6 apply. By way of contrast, English law principles of natural justice apply to administrative decision-making as well. It is many decades since our own administrative law was freed from the shackles of questions such as whether a decision was "judicial" or "quasi-judicial". Those constraints on the scope of procedural fairness in domestic law were swept away in the early 1960s, in particular in the decision of the House of Lords in *Ridge v Baldwin* (1962).[3] Indeed, as long ago as 1911, in *Board of Education v Rice*[4] it had been said that the duty to listen fairly to both sides "is a duty lying upon every one who decides anything."

3. In this lecture, however, I will focus on fairness in courts and tribunals. What interests me – and I hope will interest you too – is how, and to what extent, the normal rules of fairness in judicial proceedings have had to be modified or adapted to accommodate the needs of national security.

The usual features of a fair hearing

4. Before considering the ways in which the interests of national security may require modification of the usual features of a fair hearing in a court or tribunal, it is perhaps worth setting out in outline what those traditional features are:

(1) First, all the parties are entitled to be present at the hearing.

[3] [1964] AC 40.
[4] [1911] AC 179, at 182 (Lord Loreburn LC).

(2) Secondly, the parties are entitled, at least in those forums in which legal representation is permitted, to be represented by lawyers whom they have chosen for themselves.

(3) Thirdly, the parties and their lawyers are entitled to see and hear all of the evidence and arguments made by the other parties.

(4) Fourthly, the hearing is usually conducted in open, and may be watched by members of the public, including the media, who have an important role in reporting what happens in proceedings so as to inform the wider public. The principle of open justice is a fundamental principle of both the common law and Article 6 of the ECHR.

(5) Fifthly, a judgment is usually delivered in a public way. The reasons given by a judge for reaching a decision are accessible to the parties and to the public.

(6) Sixthly, there is usually some form of disclosure, in both civil and criminal cases. By criminal cases I mean cases in which a prosecution is brought, usually by the state, alleging that a person has committed a criminal offence, such as murder or robbery. By civil cases I mean other kinds of dispute between citizens or between the citizen and the state, as when a person seeks judicial review of the actions of government. This obligation of disclosure means that documents which are in the possession of one party, but which it does not itself wish to deploy in support of its own case, nevertheless will usually have to be disclosed to the other party because they are relevant and may help to advance the other party's case or undermine the case against it.

5. As we shall see, to some extent each of these main features of a traditional judicial process has had to be modified in cases involving national security. We are now accustomed to closed hearings, at which one party will not be present and so will not see the whole of the evidence or arguments. Their interests will usually be represented by a special advocate, who is not usually permitted to communicate with them after seeing closed material. The media and the public will not be able to observe a closed hearing or report on it. At the end of the hearing there will often be a closed judgment as well as an open judgment.

6. I remember when I was in practice that I did a case at which my client and I were excluded from the hearing for most of the day and at the end of the day we were informed that my client's appeal had been allowed but for reasons that could not be disclosed to us, since they were set out in a closed judgment. Since becoming a judge I myself have conducted closed hearings, in the High Court, in the Special Immigration Appeals Commission ("SIAC") and now in the Investigatory Powers Tribunal ("IPT").

The importance of fairness

7. In *John v Rees* [1970] Ch 345, at page 402, Megarry J said, in a famous passage, that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. When something is obvious, they may say, why force everybody to go through the tiresome waste of time involved in framing charges against a person and giving them an opportunity to be heard? The result, they may say, is obvious from the start. Megarry J eloquently answered that question in the following way:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

8. In similar vein Bingham LJ said in *R v Chief Constable of Thames Valley Police, ex parte Cotton* [1990] IRLR 344, at para. 60: "This is a field in which appearances are generally thought to matter." Further, "where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied."

Some history

9. I would like to begin by going back in time to the law as it was at around the time when I first started in practice at the Bar in 1990. There are three topics in particular that I would like to mention at this stage.

10. The first is that it was very difficult, if not impossible, for a court to go behind the assertion by the executive that something was in the interests of national security. Such questions were not regarded as justiciable in the courts. This was so even where ordinarily there could have been no doubt that the rules of natural justice required a fair hearing. An example of this can be found in the decision of the Court of Appeal in *R v Secretary of State for Home Affairs, ex parte Hosenball* [1977] 1 WLR 766, which concerned a decision by the Home Secretary to deport a person on grounds of

national security. He was not entitled to see the national security case against him. Nor was he entitled to make representations before an independent court or tribunal. There was no such thing in those days as SIAC or special advocates. If the decision of the executive was challenged, the High Court itself did not see the closed material as we would now call it. The most that a person could expect was that there was an informal panel (known colloquially as the "Three Wise Men"), which advised the Home Secretary.

11. In *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 WLR 890, a decision at the time of the first Gulf war, the applicant brought an application for both *habeas corpus* and judicial review against the decision to deport him on the ground that this was conducive to the public good for reasons of national security. The Court of Appeal confirmed what had been said in *Hosenball*.

12. In giving the main judgment Lord Donaldson of Lymington MR cited the statement made by the Home Secretary in Parliament on 15 June 1971, in which he had set out the procedure in such cases, which included the panel of three advisors. Interestingly, at the time of *Cheblak* the panel included a serving judge of the Court of Appeal, Sir Anthony Lloyd, who later became a Law Lord. At the time he was also the Vice-Chairman of the Security Commission, which reported to the Prime Minister on the work of the security services. Lord Donaldson observed that the Home Secretary was fully accountable to Parliament for his decisions and, as part of that accountability, for any failure to heed the advice of the non-statutory panel. He was also subject to the jurisdiction of the High Court. Nevertheless, he said, "the exercise of the jurisdiction of the courts in cases involving national security is necessarily restricted, not by any unwillingness to act in protection of the rights of individuals or any lack of

independence of the executive, but by the nature of the subject matter. National security is the exclusive responsibility of the executive …"

13. Lord Donaldson also cited Geoffrey Lane LJ in *Hosenball*, at page 783, where he had said:

> "There are occasions, though they are rare, when what are more generally the rights of an individual must be subordinated to the protection of the realm."

14. Later Lord Donaldson described the approach adopted by the advisory panel as an "independent quasi-judicial scrutiny." He noted that all of its members had the necessary security clearance to enable them to take an active role in questioning and evaluating the weight of the evidence and information which formed the basis of the Home Secretary's decision.

15. It is interesting to observe, albeit with the enormous benefit of hindsight, that a generation later we have become used to members of an independent court or tribunal being able to see national security material without the need for the relative informality which was thought to be necessary at that time. By way of example, that is what I do when I sit as President of the IPT.

16. The approach that was taken in cases such as *Hosenball* and *Cheblak* had long been the approach of the courts. In a case arising during the course of the First World War, *The Zamora* [1916] 2 AC 77, at 107, Lord Parker of Waddington said that:

> "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public."

17. Nevertheless, in *The Zamora* itself, at 108, Lord Parker said that it was not sufficient that the Government could have acted for reasons of national security. It had to adduce evidence that it had in fact acted on those grounds.

18. In my experience when I was in practice in the early 1990s, and sometimes represented the Home Secretary in court, where there was such evidence on behalf of the Government, for example in the form of an affidavit from a civil servant, that was sufficient to bring the curtain down and no further investigation could or would be undertaken by the court into the underlying evidence.

19. The second point I want to make is that in the early 1990s it was established doctrine that, even where otherwise the rules of natural justice would apply, they might be abrogated by the demands of national security. It was not simply a question of modifying them. The best example of this is perhaps the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* (1984), often referred to as the GCHQ case.[5]

20. This arose from the well-known decision of the then Prime Minister (Margaret Thatcher) to ban membership of trade unions at the Government Communications Headquarters (or GCHQ). The House of Lords held that, in principle, the decision was amenable to judicial review. This itself was in its time a breakthrough in administrative law. Previously it had been thought that the exercise of a prerogative power was not amenable to judicial review, although the existence and extent of the prerogative power were. Furthermore, the decision was and remains important because it established that a legitimate expectation of procedural fairness could be

[5] [1985] 1 AC 374.

created not only by an express promise of consultation but by a past practice of consultation. There had for many years been consultation of the trade unions at GCHQ before fundamental terms and conditions of service there were altered. On this occasion, however, the ban had been decided upon without any consultation with the unions. In principle that would therefore have been a breach of the requirements of natural justice. The case, however, turned upon the fact that the interests of national security were invoked by the Government of the day to explain why there had not been consultation. This was raised in evidence after the High Court had decided the case against the Government. Both the Court of Appeal and the House of Lords accepted that argument.

21. The third topic I want to mention at this stage is the concept of public interest immunity ("PII"). The normal obligation of disclosure has for a long time been subject to questions of PII, which is a broader concept than the interests of national security. This concept was already well-established in our law by the early 1990s. It had replaced the earlier absolute concept of Crown Privilege as a result of the decision of the House of Lords in *Conway v Rimmer* (1966).[6] It had become established therefore that there is no absolute immunity from disclosure of certain documents simply because the Government says so. Although an executive certificate is required that it would not be in the public interest for a document to be disclosed in litigation, the decision is ultimately one for the court, which must balance the public interest in non-disclosure against the public interest in the fair administration of justice.

22. PII issues can arise not only in civil proceedings but also in criminal cases. It is not unusual, as my own experience shows when I used to sit as a criminal judge in the Crown Court, for the prosecution to make an application that material which would

[6] [1968] AC 910.

otherwise be disclosable to the defence ought not to be disclosed because it would be contrary to the public interest. This can happen, for example, in relation to the identity of the source of certain information. In an extreme case, that person's life may be at risk.

23. The significant point about PII is that, if the application by the prosecution or other party requesting non-disclosure is granted, the result is that *neither* party can make use of that material. The material which is not disclosed to the defence cannot be adduced by the prosecution and is never seen by the jury, which is the tribunal of fact in a trial in the Crown Court. The grant of PII does not have the consequence that the court can take that material into account when reaching its decision on the merits of a case.

The different ways in which the law has responded to national security issues

24. Over the last 50 years or so the law of this country has responded to the threat posed by terrorism and other threats to national security in a variety of ways. Depending on which response is taken as a matter of substantive law, the impact on procedural fairness has also varied.

The criminal justice system

25. The first type of response has been to treat people suspected of terrorism and similar offences no differently from others who are suspected of breaching the criminal law. In principle they have been put on trial and, if convicted after a fair trial, have been punished accordingly. This was essentially the response which the UK took towards

the problem of terrorism in Northern Ireland. As is well known, the criminal justice system there was modified, in particular by dispensing with juries in "Diplock courts", but the essence of the trial process was maintained.

26. This was subject to one major exception, which was the use of internment in Northern Ireland in the early 1970s. Time does not permit me to go into that important topic today but I will be coming back to the use of powers to detain terrorist suspects without trial later, when I consider what happened after the events of 9/11 in 2001.

27. Human rights issues have arisen nevertheless even in the ordinary criminal justice process. For example, in *Jasper v United Kingdom* (2000) 30 EHRR 441 complaint was made that the defence had not been given disclosure of evidence obtained by the interception of communications. The Strasbourg Court held, by a narrow majority of 9 to 8, that there had been no breach of Article 6 because the principle of "equality of arms" had been respected. Neither the prosecution nor the defence can use intercept evidence at trial. This is because, as a matter of law, no evidence can be adduced which discloses the contents of a communication which has been obtained following the issue of an interception warrant: see section 17 of the Regulation of Investigatory Powers Act 2000 ("RIPA"). This is one consequence of the longstanding policy in this country that the fact that interception of communications has taken place in any particular case should remain secret and not be disclosed to the subject of that interception. This is because of the need to protect the continuing value of interception as a means of gathering intelligence.

28. An example of where the criminal justice process had to be adapted to take account of the interests of national security is to be found in *Re Guardian News and Media Ltd and Others* [2014] EWCA Crim 1861; [2015] 1 Crim App R 4, in which the Court of

Appeal (Criminal Division) had to consider a very unusual trial which was about to take place at the Central Criminal Court. The trial judge had ordered that the entirety of the trial should be held *in camera* and that the defendants should remain anonymous. The Court of Appeal modified that procedure in part by permitting the identity of the defendants to be published and also by enabling a number of accredited journalists to attend the trial *in camera* in order to be able to report the proceedings later.

29. In giving the judgment of the Court, at para. 10, Gross LJ said that one aspect of the rule of law is open justice. Open justice, he said, is both a fundamental principle of the common law and a means of ensuring public confidence in our legal system; exceptions are rare and must be justified. Any such exceptions must be necessary and proportionate. He also drew a distinction between open justice and natural justice. At para. 12, he said that concerns as to natural justice may arise under closed material procedures, where a party is excluded from the proceedings, but such concerns do not arise when the hearing is *in camera*.

30. He also observed that national security is itself an interest of the first importance. It is in the interests of justice, he said, that the Crown should not be deterred from prosecuting cases of suspected terrorism by the risk of material, which is properly secret, becoming public through the trial process. Considerations of national security will not by themselves justify departure from the principle of open justice. However, open justice must give way to the more fundamental principle of the paramount object of a court, which is to do justice. Accordingly, where there is a serious possibility that the administration of justice would be frustrated, for example by deterring the Crown

from prosecuting the case, a departure from open justice may be justified: see para. 17 of his judgment.

Deportation

31. The second approach which has been taken by the state, in the case of foreign nationals, is to consider deporting them on grounds of national security. We have already come across this in the cases of *Hosenball* and *Cheblak*. This was considered by the European Court of Human Rights in *Chahal v United Kingdom* (1996).[7] In that case the system which had developed in this country and was endorsed in cases such as *Cheblak* was held to be in breach of Article 6. That decision led to the establishment in 1997 of SIAC, to afford the person affected a fair procedure before an independent court, albeit not the ordinary courts but a specialist tribunal created for this purpose, which is chaired by a High Court judge.

Special Advocates

32. The adoption of special advocates in the United Kingdom was another response to the judgment of the European Court of Human Rights in *Chahal*.

33. The Strasbourg Court stated as follows:

> "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved ... [T]here are techniques

[7] (1997) 23 EHRR 413.

> which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence and yet accord the individual a substantial measure of procedural justice." (paras. 130-131)

34. The Strasbourg Court was influenced in that case by its understanding of a procedure used in certain closed material proceedings in Canada, which involved the use of a security-cleared counsel appointed by the court, who cross-examined the witnesses and generally assisted the court to test the strength of the state's case. It appears that the Court's reference to Canadian practice mistakenly suggested that these special counsel appeared before Canadian federal courts in immigration cases. The Court probably had in mind the use of special security-cleared counsel before the Security Intelligence Review Committee.[8]

35. In the definition used by the House of Commons Constitutional Affairs Committee in 2005, a special advocate is a specially appointed lawyer (typically, a barrister) who is instructed to represent a person's interests in relation to material that is kept secret from that person (and their ordinary lawyers) but analysed by a court or equivalent body at an adversarial hearing held in private.[9]

36. The special advocate has the advantage that he or she can see closed material and attend a closed hearing. They will represent the interests of the excluded person in the absence of the open representatives. But in general they cannot communicate with that person once they have seen the closed material. This means that the special advocate cannot know what answers that person may have to the matters raised in the closed material.

[8] J Ip, "The Rise and Spread of the Special Advocate" [2008] PL 717, p. 719.
[9] House of Commons Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*. HC Paper No. 323-I (Session 2004/05), para. 44.

37. Since 1997, the variety of schemes in which special advocates may be used has been expanded by Parliament. Some examples include:

(1) The Proscribed Organisations Appeals Commission, which was created by section 4 of the Terrorism Act 2000. I think I may be one of the few people who ever appeared before that body when I was in practice, because I think it has only ever heard one appeal.

(2) The Pathogens Access Appeals Commission: the Attorney General may appoint "a person to represent the interests of any person who will be prevented from hearing or inspecting any evidence" on grounds of national security (Pathogens Access Appeals Commission (Procedure) Rules 2002, SI 2002/1845, rule 8).

(3) Local planning inquiries: if the Secretary of State decides that a local planning authority is to be held in secret on national security grounds, the Attorney General may appoint a special advocate to represent the interests of any person prevented from being there (Planning and Compulsory Purchase Act 2004, section 80).

(4) Employment Tribunals: a minister may, "if he considers it expedient in the interests of national security", direct an Employment Tribunal to hold a secret hearing (Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861) Schedule 1, para. 54; see now Employment Tribunals (Constitution and Rule of Procedure) Regulations 2013 (2013/1237) Schedule 1, para. 94).

38. The Canadian system which influenced the decision of the Strasbourg Court in *Chahal* may in fact have been similar not so much to the special advocate model but

to the model which we have adopted in the IPT, of having Counsel to the Tribunal ("CTT"), who is appointed by the Tribunal and not by the Law Officers. Moreover, the CTT is permitted to carry on communicating with both parties throughout the proceedings, even after seeing closed material, without the need for communications with the claimant to be agreed by the respondent or, in default of agreement, sanctioned by the Tribunal. The role of CTT is now expressly recognised in rule 12 of the IPT Rules 2018 (SI 2018/1334).

39. As we shall see later, the Supreme Court has held that it is not for the courts to extend the special advocate system beyond the boundaries which Parliament has chosen to draw for its use thus far; therefore the procedure can only be introduced by legislation.[10] However, the procedure need not be expressly authorised by statute; necessary implication of the power will suffice.[11] In 2005 the House of Lords held that the Parole Board was impliedly authorised to adopt the special advocate procedure in deciding whether to release a mandatory life prisoner on licence.[12]

40. Furthermore, the Supreme Court has held that its own statutory powers under the Constitutional Reform Act 2005, section 40(2) and (5) to decide an appeal "from any order or judgment of the Court of Appeal" and to determine "any questions necessary… for the purposes of doing justice in an appeal" were sufficient to confer the required power for it to hold a closed hearing.[13]

41. As we have seen, SIAC and the concept of special advocates were first introduced to deal with the problem revealed by the decision in *Chahal* so that there would be a fair

[10] *Al Rawi and ors. v Security Service and ors* [2011] UKSC 34; [2012] 1 AC 531, para. 47 (Lord Dyson JSC).
[11] HWR Wade and CF Forsyth, Administrative Law (11th ed, Oxford University Press, Oxford 2014), p. 434.
[12] *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738, the special advocate procedure was impliedly authorised by the Criminal Justice Act 1991, Schedule 5, para. 1(2)(b), granting power to the Parole Board to "do such things…as are incidental to or conducive to the discharge" of its functions.
[13] *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 38; [2014] AC 700, at 729-762 (jurisdiction judgments).

procedure to challenge a decision to deport a person, for example on grounds of national security.

42. But even where there is such a fair procedure, if in fact that person cannot be deported, the state has had to find other ways of dealing with that person while they remain in the UK. The difficulty has arisen in those cases where deportation is not practicable because there is a real risk of torture or other treatment contrary to Articles 2 or 3 of the ECHR if that person is deported. This was in fact another aspect of the decision in *Chahal* itself. The state has tried to address this difficulty in a variety of ways.

Detention without trial

43. The first approach which was taken, after the events of 9/11 in 2001, was to permit the Home Secretary to certify that a suspected international terrorist should be detained without charge in circumstances where that person could not be deported. This led to the well-known decision of the House of Lords in *A v Secretary of State for the Home Department* (2004),[14] often known as the "Belmarsh case", because the applicants in that case were detained at Belmarsh prison. In that case a declaration of incompatibility was made under section 4 of the Human Rights Act 1998 by the House of Lords in respect of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"), principally on the ground that the legislation applied only to foreign nationals and was therefore discriminatory.

[14] [2004] UKHL 56; [2005] 2 AC 68.

44. In the light of that decision Parliament decided to repeal Part 4 of the 2001 Act and replaced it with a system of "control orders".

Control orders and TPIMs

45. The control orders regime was established by the Prevention of Terrorism Act 2005 ("the 2005 Act"). The 2005 Act empowered the Home Secretary to make a "control order" against any individual. A control order specified and imposed a range of obligations upon the controlled person. These could be of various kinds but generally specified the individual's residence, imposed a curfew requirement and restricted their communications with others. It was a criminal offence to contravene any obligation (section 9(1) of the 2005 Act).

46. Control orders proved controversial and they have now been replaced by TPIMs. These changes were effected by the Terrorism Prevention and Investigation Measures Act 2011 ("the 2011 Act"). A TPIM may be imposed by the Home Secretary when she "reasonably believes that the individual is, or has been, involved in terrorism-related activity" and she "reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual" (section 3(1), (3) of the 2011 Act).

47. A TPIM may only be imposed with the permission of the court unless the Home Secretary considers that the matter is urgent (section 3(5)); the court then determines whether the TPIM is "obviously flawed" (section 6(3)(a)). Provision has been made for special advocates and closed hearings to deal with intelligence material. If the court grants permission for a TPIM, it must set a date for a "review hearing", the open

part of which the individual who is the subject of the TPIM is allowed to attend (section 8). At this hearing the court will apply the "ordinary principles of judicial review" (section 9(2)). A TPIM may remain in force for up to two years (section 5).

48. The powers of the Secretary of State are somewhat weaker under the TPIM regime than they were under the control order regime. In particular there is no longer the power to "relocate" the subject, curfews have been renamed "overnight residence measures" and the subject is now entitled to access to a fixed-line telephone and the internet in their home (Schedule 1 to the 2011 Act).[15]

49. TPIMs, like control orders before them, are considered by the High Court and not by a tribunal. The challenge to a control order or, since 2011, to a TPIM, is therefore made in the ordinary courts. However, there are procedural rules which have modified the way in which the court must conduct its hearing which are similar to the rules which govern procedures in tribunals such as SIAC and the IPT. In particular, there is a rule which is common to each of those jurisdictions that the court or tribunal must ensure that information is not disclosed contrary to the public interest. This would be so, for example, if it is made contrary to the interests of national security.

50. The requirements of fairness in the context of control orders made under the 2005 Act were considered in two important cases. The first was the decision of the Grand Chamber of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625. The second was 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.

[15] For further see, C Walker and A Horne, "The Terrorism Prevention and Investigations Measures Act 2011: one thing but not much the other?" [2012] Crim LR 421.

51. In *AF* the House of Lords considered that the approach taken by the Court of Human Rights in the case of *A* had to be applied in the context of control orders.

52. The position of people subject to control orders such as *AF* had previously been considered by the House of Lords in *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] AC 440. However, the position had to be revisited in the light of the judgment of the Court of Human Rights in the case of *A*.

53. The case of *A* itself concerned those who had been detained without charge under the 2001 Act after 9/11. The Court of Human Rights considered that in that context Article 5(4) of the ECHR imports substantially the same fairness guarantees as Article 6(1) does in criminal cases: see para. 217 of its judgment. Against that background, the Court said that it was essential that as much information about the allegations and evidence against each applicant should be disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) required that the difficulties this caused should be counter-balanced in such a way that each applicant still had "the possibility effectively to challenge the allegations against him."

54. Further, the Court considered that, while a special advocate can perform an important role in this regard, he or she could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations made against him to enable him to give effective instructions to the special advocate.

55. In summarising the effect of the Strasbourg decision on control order proceedings, Lord Phillips of Worth Matravers concluded in this way, at para. 65 of *AF*:

> "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."

56. Lord Brown of Eaton-under-Heywood summarised the position pithily, 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)

He continued, at para. 120:

> "Plainly *A* does not require the disclosure of the witness's identity or even their evidence, whatever difficulties that may pose for the suspect. What is required is rather the substance of the essential allegation founding the Secretary of State's reasonable suspicion."

Deprivation of citizenship

57. Another approach which is sometimes available to the state is to exclude a person who is considered to be a threat to national security from coming into the UK in the first place. This may even be done in the case of a person who has held British nationality. This has led to some cases in which the Home Secretary has deprived a person of their British citizenship on the ground that this is conducive to the public good.[16] This can be done in a case where that person will not be rendered stateless,[17] for example where they have dual nationality or are entitled to the nationality of another state by descent through their parents or grandparents.

58. The decision to deprive a person of British citizenship can itself be challenged in SIAC. Although there is no right to a fair hearing in advance of the deprivation, and

[16] Section 40(2) of the British Nationality Act 1981, as amended by the Immigration, Asylum and Nationality Act 2006.
[17] Section 40(4) of the British Nationality Act 1981.

bringing a challenge does not act as a suspension of the decision to deprive a person of their citizenship, it has been held that the opportunity to have recourse to an independent tribunal affords a fair procedure in this context.[18]

Closed material procedures and civil litigation

59. As I mentioned earlier, the Supreme Court has stated that the use of special advocates may only be used where authorised by statute. In *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 452, it was established that a court has no power to approve a closed hearing in an action for damages, holding that the common law does not allow such a procedure, and that only Parliament could authorise it.[19] That case arose out of the detention of the claimants at various foreign locations, including Guantanamo Bay. They alleged that the UK's Security Service had been complicit in their ill-treatment there. Lord Dyson JSC, who gave the main judgment for the majority in that case, noted that closed material procedures and the use of special advocates continued to be controversial precisely because they involve "an invasion of … fundamental common law principles".

60. That decision led, in 2013, to the enactment of the Justice and Security Act, which extended the possibility of using "closed material procedures" to all civil proceedings in the High Court and above. The central provision in the legislation is section 6, which sets out the conditions in which the court may make a declaration that the proceedings are proceedings in which a closed material application may be made to

[18] *Al-Jedda v Secretary of State for the Home Department* [2014] SC/66/2008, at paras. 158-159 (Flaux J).
[19] [2012] 1 AC 531, para. 47 (Lord Dyson JSC).

the court.[20] In broad terms, the conditions are that, first, a party to the proceedings would be required to disclose sensitive material to another person (whether or not a party to the proceedings); and, secondly, that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.

61. More recently, *Al Rawi* was distinguished by the Supreme Court in *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1; [2018] AC 236, at paras. 53-59, where Lord Mance DPSC observed that a closed material procedure must be available in judicial review cases arising from a lower court or tribunal in which Parliament has authorised such a procedure. He considered that the proper analogy was not with ordinary civil proceedings, as in *Al Rawi*, but with appeals, as in *Bank Mellat*. As I mentioned earlier, in that case the Supreme Court held that it could itself hold a closed hearing in order to hear an appeal from a lower court in which there had been a closed judgment.

Conclusion

62. By way of conclusion, I would suggest that our legal system has come a long way in less than 30 years, since the time when I was in the early years of my practice at the Bar. At that time, it was very difficult for the courts to go behind the invocation of national security; and the normal requirements of procedural fairness were overridden by the interests of national security.

[20] For application of the legislation, see *CF v Security Service* and *Mohamed v Foreign and Commonwealth Office* [2013] EWHC 3402 (QB); [2014] 1 WLR 1699 and *R (Sarkandi) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWHC 2359; [2016] 3 All ER 837; see also De Smith's Judicial Review (8th ed, Sweet and Maxwell, London 2018), chapter 8.

63. Today, there is a more nuanced approach, so that the normal features of a fair hearing may have to be modified to accommodate the interests of national security but there is a core irreducible minimum of fairness that cannot be extinguished. I am well aware that there continue to be concerns, expressed in academia, in Parliament and elsewhere, for example about the limitations of the special advocate system.

64. If one compares what happens in closed proceedings, whether in the ordinary courts or in specialist tribunals like SIAC or the IPT, to what we would expect in normal cases, clearly there are many features which would be unacceptable were it not for the important public interests on the other side of the balance, including the interests of national security. But if one compares what happens now to what went before, in particular before the decision of the Strasbourg Court in *Chahal* in 1996, it might be said that the glass is half fall rather than half empty.