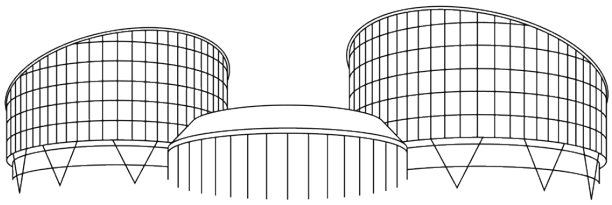

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

Applications nos 46538/11 and 3960/12
Bilal GULAMHUSSEIN against the United Kingdom
and Kashif TARIQ against the United Kingdom
lodged on 21 July 2011 and 10 January 2012 respectively

STATEMENT OF FACTS

The applicants are Mr Bilal Gulamhussein, a Yemeni and British national who was born in 1967, and Mr Kashif Tariq, a British national who was born in 1979. Both applicants live in London. They were represented before the Court by Mr A.F. Whitehead of Russell Jones & Walker, a firm of solicitors based in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. Mr Gulamhussein

Mr Gulamhussein was employed by the Home Office as an administrative assistant in the immigration service from 15 November 1999. On 17 January 2000 he obtained the security clearance required for the post.

On 1 February 2005 his security clearance was suspended and he was suspended from duty. He was informed that this was because of:

> "Association with individuals suspected of involvement and support for terrorism overseas, in particular the insurgency in Iraq."

On 21 March 2005 Mr Gulamhussein was informed that the Home Office was minded to withdraw all levels of security clearance. On 4 May 2005 a decision was taken to withdraw all levels of security clearance. On 11 August 2005 his internal appeal was refused. He subsequently appealed to the Security Vetting Appeal Panel ("SVAP").

On 3 February 2006 the Home Office submitted its statement of case to the SVAP. It stated that Mr Gulamhussein:

> "... had been identified as a close associate of a network of suspected Islamic extremists who were assessed to be supporting the insurgency in Iraq."

The proceedings before the SVAP comprised an open stage, in which Mr Gulamhussein and his legal representatives could participate, and a closed stage, from which they were excluded. A special advocate was appointed to represent his interests as regards the closed material submitted in the case. However, he could only take instructions from Mr Gulamhussein before he had seen the closed material. After this point, he was no longer permitted to communicate with Mr Gulamhussein.

At a hearing on 20 November 2009 the SVAP heard submissions from Mr Gulamhussein in which he argued that Article 6 applied to proceedings before the SVAP and challenged the procedures before the SVAP as being contrary to Article 6 of the Convention, relying on this Court's judgment in *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

On 16 February 2010 the SVAP sent its ruling to Mr Gulamhussein's solicitors. It held that Article 6 did not apply to proceedings before it because it was only able to make recommendations and not decisions so the proceedings did not determine Mr Gulamhussein's rights. It further considered that developments which had taken place in the Court's case-law as regards the rights of civil servants (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II) were not directly applicable as the present case concerned a special category of employment which required specific security clearance. It referred to the Commission decision in *Leander v. Sweden*, 26 March 1987, Series A no. 116, which dealt specifically with a security vetting procedure, in which the complaint under Article 6 § 1 was found to be inadmissible. In the circumstances it was not strictly necessary to consider whether the requirements of fairness demanded the approach to disclosure set out by this Court in *A. and Others*. However, the SVAP indicated that even if, contrary to what it had decided, Article 6 did apply to the proceedings, the approach to disclosure set out in *A. and Others* was not required to comply with that Article.

On 12 October 2010 the SVAP heard Mr Gulamhussein's appeal. The proceedings began with an open hearing at which he was legally represented by counsel and by a solicitor. A special advocate was present. No information about the case against Mr Gulamhussein was provided at the open hearing. It is understood that following the open hearing, a closed hearing took place.

On 25 January 2011 the SVAP sent its decision to the solicitors for Mr Gulamhussein. It rejected Mr Gulamhussein's appeal and recommended that the refusal of security clearance should stand. It stated that:

> "The Panel has had the opportunity to review in depth the sensitive information on which the decision to withdraw security clearance was based. It is satisfied that the information is reliable and was properly assessed by those involved in the vetting process and provides a sufficient basis for the reasons given to the appellant. In light of this, and with regard to the sensitivity of the post occupied by the appellant, the Panel is satisfied that the decision to withdraw SC clearance was a proper one ..."

On 21 April 2011 Mr Gulamhussein lodged judicial review proceedings in respect of the decisions of the SVAP, arguing that they violated Article 6 of the Convention. On 7 July 2011 the judicial review proceedings were

stayed pending a judgment of the Supreme Court in a similar case involving Mr Tariq (see below).

On 13 May 2011 the Home Office terminated Mr Gulamhussein's employment as he did not have security clearance.

On 13 July 2011 the Supreme Court dismissed Mr Tariq's appeal. The judgment in that case had the effect of determining Mr Gulamhussein's claim for judicial review.

2. Mr Tariq

Mr Tariq started employment with the Home Office as an immigration officer on 21 April 2003, having received the necessary security clearance on 18 February 2003.

On 10 August 2006 Mr Tariq's brother and cousin were arrested during a major counter-terrorism investigation into a suspected plot to mount a terrorist attack on transatlantic flights. On 11 August 2006 inquiries were made to establish whether Mr Tariq was involved with the plot in any way. It was concluded that there was no information to suggest that Mr Tariq had himself been involved in any terrorism plot.

On 19 August 2006 Mr Tariq was suspended from duty on basic pay while consideration was given to the withdrawal of his security clearance on national security grounds. On 24 August 2006 Mr Tariq's brother was released without charge; his cousin was later convicted, in September 2008, of conspiracy to murder.

On 30 August 2006 Mr Tariq was advised that the review of his security clearance had been prompted by national security concerns and that these related to his vulnerability. On 20 December 2006 the applicant was advised by letter that his security clearance had been withdrawn. The letter stated:

> "The reason for the withdrawal of your security clearance is your close association with individuals suspected of involvement in plans to mount terrorist attacks. Association with such individuals may put you at risk of their attempting to exert undue influence to abuse your position."

Mr Tariq lodged an internal appeal against the decision on 16 January 2007. Mr Tariq was informed by letter dated 9 August 2007 that his appeal had been dismissed. The letter stated:

> "... I am satisfied that the grounds for refusal are sound and that the risks identified can not be managed within the Border and Immigration Agency (BIA) or other parts of the Home Office. I also took note of the fact that not all of the information in this case was made available to you and that you understandably found it difficult to make your appeal."

On 4 September 2007 Mr Tariq submitted a further appeal to the SVAP. It was eventually dismissed in 25 January 2011.

Meanwhile, on 15 March 2007, Mr Tariq commenced Employment Tribunal proceedings claiming discrimination on grounds of race and/or religion, contrary to the Race Relations Act 1976 and the Employment Equality (Religion and Belief) Regulations 2003.

On 10 July 2007 Mr Tariq supplied further particulars of the discrimination alleged. He contended, *inter alia*, that the Home Office had relied upon stereotypical assumptions about him and/or Muslims and/or individuals of Pakistani origin such as susceptibility to undue influence, coercion or "brainwashing" and had indirectly discriminatory security

policies, procedures and methods of investigation. The Home Office in its grounds of resistance dated 6 August 2007 denied this and maintained that it acted throughout to protect national security. It explained that there were concerns in August 2006:

> "that [Mr Tariq] could be vulnerable to an approach to determine if terrorist suspects had been flagged to the authorities or to smuggle prohibited items airside."

Mr Tariq was supplied with a bundle of papers ("the open bundle"). The Home Office indicated that a further bundle of papers ("the closed bundle") would be made available only to the Employment Tribunal and any special advocate appointed.

Mr Tariq subsequently sought further disclosure from the Home Office regarding the basis of its security concerns. For the most part, the Home Office responded that for national security reasons it could provide no further information than that contained in the open bundle.

The Home Office subsequently made an application to the Employment Tribunal, asking it to order a closed material procedure with a special advocate under the discretionary power conferred by rule 54(2) of the Employment Tribunals Rules of Procedure (see "Relevant domestic law and practice", below). Representations were heard from both parties on 10 January 2008. The Employment Tribunal concluded, in an order dated 15 February 2008, that it was expedient in the interest of national security to make orders under rule 54 that the whole of the proceedings be in private; that Mr Tariq and his representative be excluded from part of the proceedings when closed evidence and/or documents were being considered; and that the Employment Tribunal consider both open and closed documents and that the Home Office would make available the appropriate closed material to any special advocate appointed.

A special advocate was subsequently appointed by the Attorney General.

The reasons for the Tribunal's decision of 15 February 2008 were submitted to the minister in the first instance, in accordance with rule 10 of the ET National Security Rules (see "Relevant domestic law and practice", below). He directed that one paragraph be abridged and another omitted. As a result, an edited version of the reasons was initially issued to Mr Tariq and his representatives on 15 October 2008. However, on 9 December 2008 the full reasons were released. The reasons for granting the application of the Home Office were encapsulated in paragraph 10 of the 15 October 2008 reasons (paragraph 11 of the full reasons):

> "Having read the relevant documents and having heard submissions, I was satisfied that it was expedient in the interest of national security to make an order under rule 54 as set out in the separate document marked as 'Orders'. I was further satisfied that it would be in the interest of the claimant if a special advocate were to be appointed for the matter to be further reviewed, as I am required to do, at the next case management discussion ... when not only can the issues as to what documents should be in the 'closed' and 'open' bundles and what should be included in the 'closed' and 'open' witness statements be addressed but also any submissions from the special advocate in that regard at that case management discussion in the anticipation that there would have been such an appointment before then."

A full hearing on the merits of the claim was listed for 12-20 January 2009. At the beginning of the hearing before the Employment Tribunal, Mr Tariq's counsel submitted that the Tribunal should not consider any

document which Mr Tariq had not seen nor hear any witnesses in his absence. On 19 January 2009 the Employment Tribunal ruled, unanimously, that it had the power to admit closed evidence and that it would hear the closed evidence before hearing the open evidence. The reasons for the decision were sent to the parties on 5 March 2009.

Mr Tariq appealed against the decision to the Employment Appeals Tribunal ("EAT"). On 16 October 2009 the EAT handed down its judgment. Referring to this Court's judgment in *A. and Others*, cited above, the EAT concluded that the rule 54 procedure was not in itself incompatible with Article 6 of the Convention, but it considered that disclosure was required to enable a person to be provided with adequate details of the allegations against him to enable him to give effective instructions to his special advocate ("gisting").

The Home Office and Mr Tariq appealed to the Court of Appeal. The Home Office argued that Article 6 did not require "gisting" in a case of this nature. Mr Tariq challenged the finding that the closed material procedure was compatible with Article 6. The court handed down its judgment on the appeal on 4 May 2010. It held that there was no inherent incompatibility between the closed material procedure and Article 6 of the Convention. However, it upheld the decision of the EAT on the need for disclosure of relevant documents for Mr Tariq to know the case against him. It therefore dismissed both appeals.

Both parties appealed to the House of Lords. The case was heard by a panel of nine judges in January 2011 and judgment was handed down on 13 July 2011. The House, by a majority, upheld the appeal by the Home Office (Lord Kerr dissenting) and dismissed Mr Tariq's cross-appeal.

Lord Mance, with whom the other majority judges broadly agreed, considered that the cases relied on by Mr Tariq, including *A. and Others*, in which more stringent disclosure requirements had been found to apply could be distinguished from the present case. He explained that those cases involved detention, control orders and freezing orders, which directly impinged on personal freedom and liberty in a way to which Mr Tariq could not be said to be exposed. In his view the balancing exercise between the public interest in counter terrorism efforts and the right to procedural fairness under Article 5 § 4 of the Convention discussed in *A. and Others*, cited above, § 217, depended on the nature and weight of the circumstances on each side. He continued:

> "... [C]ases 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."

He referred to the decisions in *Leander*, cited above; *Esbester v. the United Kingdom*, no. 18601/91, Commission decision of 2 April 1993, unpublished; and *Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010 to support his view that the outcome of the balancing exercise could differ depending on the circumstances. He considered that these three decisions established that the demands of national security could necessitate and justify a system for handling and determining complaints under which an applicant was, for reasons of national security, unable to know the secret material by reference to which his complaint was determined. The critical

questions under the Convention were whether the system was necessary and whether it contained sufficient safeguards. He was satisfied that in the civil, as opposed to the criminal, context, a balance might have to be struck between the interests of claimant and defendant if a defendant could only defend itself by relying on material the disclosure of which would damage national security. He therefore found that the closed material procedure, including the role of the special advocate, was lawful.

On the question of "gisting", Lord Mance noted at the outset that the general nature of the Home Office's case was communicated to Mr Tariq, namely his close association with suspected terrorists and his vulnerability. He continued

> "... Mr Tariq must be able to meet this case on a general basis, in particular, by disclosing and describing his relationship and the nature and extent of his association with those of his relatives suspected and his cousin who was ultimately convicted of terrorist activity; and he has, further, on the basis of, in particular, his questioning in interview also been able to mount a sufficiently arguable case of discrimination to avoid any application to strike out his claim ..."

He considered whether the Convention imposed any absolute requirement that a person be provided with sufficient details of the allegations against him, where this would involve the disclosure to Mr Tariq of the detail of allegations which would in normal litigation require to be disclosed but which the interests of national security required to be kept secret. He noted that it was a "very significant inroad into conventional judicial procedure" to hold a closed material procedure admissible if it would lead to a claimant not knowing of such allegations in such detail. As such, he was of the view it should only be permitted by a court if satisfied after full consideration of the relevant material and after hearing the submissions of the special advocate, that it was essential in the particular case; and that this decision should be kept under review throughout the proceedings. He considered that such an approach was not prohibited by Article 6 of the Convention, having regard in particular to the Court's judgment in *Kennedy*, cited above. He concluded:

> "I would therefore allow the Home Office's appeal, and set aside the declaration made below to the effect that there exists an absolute requirement that Mr Tariq personally or his legal representatives be provided with sufficient detail of the allegations made against him to enable him to give instructions to his legal representatives on them. As I have indicated, both Mr Tariq and his legal representatives already know of the general nature of the Home Office's case. The Employment Tribunal will, with the assistance of the special advocate, keep under review and will be able to determine whether any and what further degree of gisting of the Home Office's case, or of disclosure regarding the detail of allegations made in support of it, is required, having regard to (a) the nature of the relevant allegations and of the national security interest in their non-disclosure and in the light of its best judgment as to (b) the significance of such allegations for the Home Office's defence and (c) the significance for Mr Tariq's claim of the disclosure or non-disclosure of such allegations to him."

On the closed material procedure, Lord Hope added:

> "As for the procedure that the 2004 Regulations provide for, several features indicate that the balance has been struck in the right place. First, there is the fact that, under the procedure provided for by rule 54(2) of Schedule 1 to the Regulations, the decision as to whether closed procedure should be resorted to rests with the tribunal or the employment judge. The fact that the decision is taken by a judicial officer is

> important. It ensures that it is taken by someone who is both impartial and independent of the executive. Second, there is the fact that, as this is a judicial decision, it will not be taken without hearing argument in open court from both sides. It will be an informed decision, not one taken without proper regard to the interests of the individual. Third, it opens the door to the use of the special advocate. Fourth, it is a decision that can and should be kept under review as the case proceeds: see the last sentence of rule 54(2). Fifth, the special advocate can and should be heard as the process of keeping it under review proceeds."

He emphasised that this had to be balanced against the consequences for national security if this procedure were not to be available to the Tribunal, noting:

> "Without it, there would be a stark choice: to conduct the entire defence in open proceedings however damaging that might be to the system of security vetting, and in particular to those who contributed to it in this case; or to concede the case and accept the consequences..."

Lord Brown added:

> "... Security vetting by its very nature often involves highly sensitive material. As an immigration officer, Mr Tariq required security clearance to a comparatively high level ... Immigration officers require long-term, frequent and controlled access to secret information and assets. It is surely, therefore, not altogether surprising that, upon his brother's and his cousin's arrest – and more particularly since his cousin's conviction and life sentence for conspiracy to murder arising out of a terrorist plot to attack transatlantic flights from Heathrow – he has been suspended from duty ... and his security clearance withdrawn. No one suggests that Mr Tariq himself was involved in the plot. What is suggested, however, is that he could be vulnerable to pressures from someone in his community to abuse his position as an immigration officer."

As noted above, Lord Kerr disagreed with the majority on the question of the disposal of the Home Office's appeal. He referred to the reasons given to Mr Tariq by the Employment Tribunal for applying the closed procedure in his case and expressed the view that these were, to say the least, not informative. The disclosure of redacted reasons on the instructions of the minister and the subsequent decision to disclose the reasons in full was, in Lord Kerr's view "profoundly troubling" as it:

> "... illustrates all too clearly the dangers inherent in a closed material procedure where the party which asks for it is also the repository of information on the impact that an open system will avowedly have on national security."

He considered that the right to know and effectively challenge the opposing case was central to the fairness of a trial. Where, as in this case, the challenged decision was the subject of factual inquiry or dispute and the investigation of the disputed facts centred on an individual's actions or his supposed vulnerability, that individual was the critical source of information needed to discover the truth, and was in many cases the only source. Lord Kerr continued:

> "... If he is denied information as to the nature of the case made either directly against him or, as seems more likely here, against others whose presumed relationship with the claimant renders it unsuitable for him to retain security clearance and if he is thereby forced to speculate on the content of the defendant's case, no truly adversarial proceedings are possible ..."

He concluded that the withholding of information from a claimant which was then deployed to defeat his claim was a breach of his fundamental common law right to a fair trial. It was also a breach of his right under

Article 6 § 1 as the restrictions on equality of arms in the case meant that the very essence of his right was impaired.

B. Relevant domestic law and practice

1. Racial and religious discrimination

The Race Relations Act 1976 ("the 1976 Act") prohibits discrimination on racial grounds in the context of employment. Discrimination under the Act includes less favourable treatment or the application to a person of a provision, criterion or practice which would be applied to persons not of the same race or ethnic or national origins but which puts the former at a particular disadvantage when compared with other persons and which is not a proportionate means of achieving a legitimate aim. Section 42 provides that nothing in the Act renders unlawful an act done for the purpose of safeguarding national security if the doing of the act was justified by that purpose.

The Employment Equality (Religion or Belief) Regulations 2003 extends the non-discrimination principle outlined in the 1976 Act to discrimination on grounds of religion or belief. Paragraph 24 of the Regulations provides that nothing in the Regulations renders unlawful an act done for the purpose of safeguarding national security if the doing of the act was justified by that purpose

2. The Employment Tribunal and the closed material procedure

Employment Tribunals are established under the Employment Tribunals Act 1996 ("the 1996 Act"). Section 7 of the 1996 Act entitles the Secretary of State to make by regulations such provision as appears to him to be necessary or expedient with respect to proceedings before Employment Tribunals. Section 10 of the Act specifically authorises the making, in the interests of national security, of regulations providing for a closed material procedure, either by direction of a minister or by order of the Employment Tribunal, and for the appointment by the Attorney General in that context of a special advocate.

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 contain rules made under sections 7 and 10 of the 1996 Act.

Schedule 1 contains the Employment Tribunals Rules of Procedure ("the ET Procedure Rules"). Rule 54(1) permits a minister to direct an Employment Tribunal, if he considers it expedient in the interests of national security, to:

> "(a) conduct proceedings in private for all or part of particular Crown employment proceedings;
>
> (b) exclude the claimant from all or part of particular Crown employment proceedings;
>
> (c) exclude the claimant's representatives from all or part of particular Crown employment proceedings;

(d) take steps to conceal the identity of a particular witness in particular Crown employment proceedings."

Rule 54(2)(a) empowers an Employment Tribunal, by order, if it considers it in the interests of national security, to do anything which can be required by direction to be done under Rule 54(1). Pursuant to Rule 54(2)(b) and (c), an Employment Tribunal may order that any documents not be disclosed to an excluded person; and may take steps to keep secret all or part of the reasons for its judgment. The Employment Tribunal is required to keep under review any order it has made under Rule 54(2).

Rule 54(4) provides:

"When exercising its or his functions, a tribunal or Employment Judge shall ensure that information is not disclosed contrary to the interests of national security."

Schedule 2 of the Regulations contains the Employment Tribunals (National Security) Rules of Procedure ("the ET National Security Rules"). Rule 8 provides for the appointment of a special advocate to represent the interests of a claimant excluded from any part of the proceedings. Pursuant to Rule 8(4) the special advocate is not permitted to communicate directly or indirectly with any person (including the excluded person) regarding the written grounds on which the claim is resisted or any proceedings in respect of which the judge sat in secret. However, Rule 8(5) and (6) permits a special advocate to apply to the Tribunal in writing for an order authorising him to seek instructions or otherwise communicate with an excluded person on these matters.

Rule 10 of the ET National Security Rules addresses the giving of reasons in national security proceedings. It provides that prior to reasons being sent to any party, a full copy of the reasons shall be sent to the minister. The minister may direct the Employment Tribunal that the full reasons should not be disclosed, in the interests of national security.

3. The role of the special advocate

The general role of the special advocate was described by Sedley LJ in *Murungaru v. Secretary of State for the Home Department* [2008] EWCA 1015 (Civ) as follows:

"The ways in which a special advocate will seek to represent the interests of an appellant are, first, to test by cross-examination, evidence and argument the strength of the case for non-disclosure. Secondly, to the extent that non-disclosure is maintained, the special advocate is to do what he or she can to protect the interests of the appellant, a task which has to be carried out without taking instructions on any aspect of the closed material ... [T]he special advocate represents no-one. A special advocate system is thus not a substitute for the common law principle that everyone facing an accusation made by the State is entitled to a fair chance to know the evidence in support of it and to test and answer it in a public hearing. But it is the best procedure so far devised to mitigate the effect of trial without disclosure if such a trial is unavoidable."

COMPLAINTS

Mr Gulamhussein complains under Article 6 § 1 of the Convention that the procedure before the Security Vetting Appeal Panel violated his right to a fair hearing.

Mr Tariq complains under Article 6 § 1 of the Convention that the procedure before the Employment Tribunal interfered with his rights to an adversarial hearing; to equality of arms; and to a reasoned decision and was therefore incompatible with that Article.

QUESTIONS TO THE PARTIES

1. Was Article 6 § 1 of the Convention under its civil head applicable to the proceedings before the Security Vetting Appeal Panel in Mr Gulamhussein's case?

2. If so, did Mr Gulamhussein have a fair hearing in the determination of his civil rights and obligations, in accordance with Article 6 § 1 of the Convention? In particular, were the principle of equality of arms; the right to an adversarial hearing; and the right to a reasoned judgment respected in the closed procedure employed in his case?

3. Did Mr Tariq have a fair hearing in the determination of his civil rights and obligations, in accordance with Article 6 § 1 of the Convention? In particular, were the principle of equality of arms; the right to an adversarial hearing; and the right to a reasoned judgment respected in the closed procedure employed in his case?

4. What was the outcome of the substantive proceedings before the Employment Tribunal in Mr Tariq's case? In particular, was any further disclosure ordered in the course of those proceedings? Please provide copies of relevant decisions.