MASTER OF THE ROLLS

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KADI, FUNDAMENTAL RIGHTS AND THE RULE OF LAW

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Introduction

1. Good evening. I have to say that, when as an undergraduate at King's, a short while ago now, I swapped economics for law, I hardly expected to find myself 45 years later returning to give a lecture to the Cambridge Law Society, never mind being invited to do so as Master of the Rolls. That I am doing so is a real pleasure.

2. I thought that I would start this evening's lecture with a couple of quotations to stir the blood. The first is Thomas Paine's famous closing line from his *First Principles of Government*. He said this:

   "*He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself.*"[1]

   The second is from a little closer to home and is to be found in Locke's *Second Treatise on Government*, with which I am sure you are all familiar. Locke said this:

   "*Where-ever law ends, tyranny begins.*"[2]

   Remember this dictum. It is certainly true.

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[1] Paine, *First Principles of Government (1795)*, in *The Writings of Thomas Paine*, Vol. III (ed. Conway) (Putnam & Son (1895)) at 277.
[2] Locke, *Second Treatise of Government*, Book II, Chapter XVIII, Section 20.

Moving forward in time to 1942, we find ourselves listening to Lord Atkin in his famous dissenting speech refusing to uphold a wartime regulation in *Liversidge v Anderson*, where he said this:

"*In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. . .*"[3]

Another proposition to remember.

We then move further in time to 2006 and to a place not too far from here, Cambridge's Centre for Public Law, where Lord Bingham, who was of course Master of the Rolls then Lord Chief Justice and then Senior Law Lord, had this to say:

"*The core of the . . . principle [of the rule of law] is, I suggest that all persons and authorities within the state, public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.*"[4]

3. All stirring stuff I'm sure you would agree. But what do these various thoughts have in common? And what do they have in common with the European Court of Justice's recent decision *in Kadi (Spain and Others, interveners) v Council of the European Union (France and Another, interveners)* [2008] 3 CMLR 41? *Kadi* is the subject of this talk and I have chosen it because it illustrates the importance of the rule of law. But before answering those questions I should perhaps tell you a little bit of the story behind the *Kadi* decision.

Kadi

4. On 15 October 1999 the UN Security Council, which is of course responsible for maintaining international peace and security under Article 1.1 of the UN Charter, adopted Resolution 1267 of 1999. It did so, as Cardwell, French and White put it in an article in the International Comparative Law Quarterly, as part of '*a series of [UN] resolutions which attempted to prevent the planning and carrying out of*

[3] [1942]AC 206.
[4] Lord Bingham, *The Rule of Law*, 6th David Williams Annual Lecture, Centre for Public Law, Cambridge University (http://cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php)

terrorist attacks by [Osama] bin Laden and the Al-Qaeda network.'[5] This specific resolution required, primarily, the Taliban to deliver Osama bin Laden to appropriate authorities. As we all know that was not done. The resolution also however required all States to:

"*Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need.*"[6]

The committee referred to, which was to be known as the Sanctions Committee, was soon established. Resolution 1267 of 1999 was supplemented on 19 December 2000 by Resolution 1333 of 2000. Paragraph 8(c) of that Resolution further provided that States were to:

"*freeze without delay funds and other financial assets of Osama bin Laden and individuals and entities associated with him as designated by the [Sanctions Committee] . . .*"

The Sanctions Committee were required to maintain an updated list of individuals and entities associated with Osama bin Laden. In October and November 2001 the Sanctions Committee issued two updates to that list of individuals whose assets had to be frozen: Mr Kadi, a Saudi Arabian national, was one of the individuals added in October 2001 (as was a Swedish based organisation called Al Barakaat International Foundation, the second appellant to the proceedings before the ECJ).

5. In response to the various UN Security Council resolutions the European Community took action. It did so in order to implement those provisions throughout the EU.[7] Most significantly, for present purposes, it implemented

[5] Cardwell, French and White, *Kadi v Council of the European Union (C-402/05 P), Case Comment*, (2009) I.C.L.Q. (58(1)) 229 at 229.
[6] UNSC Resolution 1267 of 1999 para. 4(b) (http://daccessdds.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement).
[7] See Common Position 1999/727/CFSP; Regulation (EC) No 337/2000.

UNSC Resolution 1333 of 2000 by way of Regulation (EC) 467 of 2001.[8] Implementation was said to be based on Articles 60 and 301 of the EC Treaty (EC). Article 2 of Regulation 467 of 2001 was, no doubt from Mr Kadi's perspective, of greatest significance as this implemented the freezing order provisions of Resolution 1333 of 2000. Annex I of Regulation 467 of 2001 contained the list of proscribed individuals and entities. Mr Kadi's name was added to the proscribed list by way of an amendment to Regulation 467 of 2001 on 19 October 2001 by way of Regulation (EC) 2062 of 2001.

6. Further Security Council resolutions were then adopted in 2002, which then in turn adopted by the EC through further Common Positions and, ultimately, Regulation (EC) 881 of 2002 as later amended by Regulation (EC) 561 of 2003. Regulation 881 of 2002 was said to be based on Articles 60, 301 and 308 EC and both repealed and replaced Regulation 467 of 2001.[9] There is no need to remember all this. It is the point of principle we are interested in.

7. In December 2001 Mr Kadi issued proceedings before the Court of First Instance (the CFI) challenging the legality of Regulations 467 and 2062 of 2001. Given the repeal and replacement of Regulation 467, after some procedural wrangling, the issue before the CFI focused on the legality of Regulation 881 of 2002, or as it was referred to in the proceedings '*the contested regulation*'. As Advocate General Maduro described it, before the CFI,

   "*[Mr Kadi] argued that the Council had lacked competence to adopt the contested regulation. Most importantly, the appellant asserted that that regulation breached a number of his fundamental rights, in particular the right to property and the right to a fair hearing.*"[10]

8. There were three fundamental rights arguments: first, that his right to fair trial had been breached; secondly, his right to property had been breached; and finally, that his right to effective judicial review had been breached. The Court of First Instance (the CFI) rejected his arguments and upheld the contested regulation.[11] Mr Kadi appealed. I will go on straight to the European Court of Justice's (the ECJ's) judgment. While both the CFI's reasons for its decision and Advocate General Maduro's opinion, which was that the CFI had reached the

[8] Also see Common Position 96/746/CFSP.
[9] See further Common Position 2003/140/CFSP.
[10] [2008] 3 CMLR 41 at [AG9].
[11] *Kadi v Council of the European Union & Others* (T-315/01) (21 September 2005) (http://www.bailii.org/eu/cases/EUECJ/2005/T31501.html).

wrong conclusion, are extremely interesting, not least because the Advocate General's opinion is in strong terms and because of the different approaches he and the CFI took to the issue from that eventually taken by the ECJ, it would take more than an evening's lecture to do justice to them. For those of you who are interested in obtaining a short overview of those reasons you could do no worse than looking at Cardwell, French and White's recent case comment published in the International Comparative Law Quarterly or Tridimis' critique in the European Law Review. I return to these in a moment.

9. The ECJ's Grand Chamber handed down its decision last September (03 September 2008). It held, first of all, that the EU was competent, through the combination of Articles 60, 301 and 308 EC, to adopt the contested resolution.[12] The appeal therefore turned to Mr Kadi's fundamental rights points. There were two questions here: first, whether the contested regulation was in fact capable of review by the community courts; and secondly, if the answer to the first question was yes, whether the contested regulation did in fact breach the three fundamental rights relied upon by Mr Kadi.

10. The CFI had answered the first question in the negative.[13] It concluded at that the Community Courts had no power, subject to one exception, to review Security Council resolutions in order to assess whether they conformed with fundamental rights, so as to lead if they did not to the annulment of the contested regulation.[14] Subject to that exception, it held that:

    "[it was] bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations."[15]

    What of the exception? That arose as a consequence of the UN Charter itself which, by Article 24(2), required the Security Council to discharge its duties consistently with the UN's purposes and principles, one of which was to

[12] [2008] 3 CMLR 41 at [163] – [178].
[13] *Kadi v Council of the European Union & Others* (T-315/01) (21 September 2005) at [182] – [225].
[14] *Kadi v Council of the European Union & Others* (T-315/01) (21 September 2005) at [176].
[15] [2008] 3 CMLR 41 at [225].

'*encourage respect for human rights and for fundamental freedoms*'.[16] As the CFI stated:

"*(229) Those principles are binding on the Members of the United Nations as well as on its bodies. . . .[Under] Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act* '*in accordance with the Purposes and Principles of the United Nations*'*. The Security Council*'*s powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.*

(230) International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens [jus cogens being, of course, a fundamental principal of international law from which no State can derogate]. *If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.*

(231) The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of jus cogens have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute '*intransgressible principles of international customary law*'*. . .*"

11. Having accepted that there was an exceptional basis on which to carry out such an indirect review the CFI then went on to assess whether the contested regulation did breach Mr Kadi's fundamental rights. It concluded that it did not.[17] The ECJ itself did not think much of the CFI's approach. It did not deal with CFI's *jus cogens* exception. It did not have to as it rejected the notion that underpinned the CFI's judgment that the Community Courts could not review the lawfulness of

[16] *Kadi v Council of the European Union & Others* (T-315/01) (21 September 2005) at [228].
[17] *Kadi v Council of the European Union & Others* (T-315/01) (21 September 2005) at [252], [260 and 276] and [291 – 292].

Security Council resolutions. It adopted the same line as that taken by Advocate General Maduro, who, before concluding that the Community and its courts could not '*dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order*'[18] had this to say in the same stirring style as the quotations I started with:

"*it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.*"[19]

For Advocate General Maduro the rule of law is not to be silenced, not even if a particular law or legal instrument has the imprimatur of the United Nations.

12. The ECJ, as I noted earlier, did not adopt Advocate General Maduro's reasoning in its entirety, although it did agree that it was not its role to simply acquiesce in such international laws as those in question when they were implemented in EU law. The ECJ's starting point for its assessment of the issue was this:

"*(281) . . . it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty , which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Parti Ecologiste Les Verts v European Parliament (294/83) [1986] E.C.R. 1339; [1987] 2 C.M.L.R. 343 at [23]).*

(282) It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Art.220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Draft Treaty on a European Economic Area (No.1), Re (Opinion 1/91) [1991] E.C.R. I-6079; [1992] 1 C.M.L.R. 245 at points AG35 & AG71; and Commission of the European Communities v Ireland (C-

[18] [2008] 3 CMLR 41 at [AG54].
[19] [2008] 3 CMLR 41 at [AG24].

459/03) [2006] E.C.R. I-4635; [2006] 2 C.M.L.R. 59 at [123] and case law cited)."[20]

For the ECJ then not only is it not possible to alter the nature and constitutionality of the European Union's legal system through international agreement but as for the Advocate General that legal system, and community, was one where the rule of law is not silenced. The rule of law animates the life of the EU just as it animates the life of the democratic states which came together to create it.

13. Having set that out the ECJ then went on to confirm, that which was settled case law: the importance of fundamental rights to the EU's legal system. It put it this way:

"*(283) . . . fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, inter alia, Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres (C-305/05) [2007] 3 C.M.L.R. 28 at [29] and case law cited).*"

It went on to add that:

"*(284) It is also clear from the case law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94 at point AG34) and that measures incompatible with respect for human rights are not acceptable in the Community (Eugen Schmidberger Internationale Transporte Planzuge v Austria (C-112/00) [2003] E.C.R. I-5659; [2003] 2 C.M.L.R. 34 at [73] and case law cited).*"

The upshot of this was that:

"*(316) . . . the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.*"[21]

[20] [2008] 3 CMLR 41 at [281] – [282].
[21] [2008] 3 CMLR 41 at [283] – [284] & [316].

A strong statement and surely correct.

14. In the light of this it was not surprising that the ECJ went on to reject the submission that it ought to refrain from examining the legality of the contested regulation by way of showing proper deference to the Security Council resolutions simply because of their point of origin. It went on therefore to assess the legality of the contested regulation in light of fundamental rights. It held that Mr Kadi's rights had been infringed but that by way of an application of Article 231 EC the regulation would continue in force for three months so as to give the EU time to remedy the infringements.[22] This shows that the ECJ does identify the relevant principles but recognises that practical solutions are necessary for enforcement.

Discussion

15. Different views can be taken of the ECJ's decision. Cardwell, French and White, for instance, see its confirmation of the centrality of fundamental rights, and by extension of the importance of the rule of law to the EU, and say that the role of the courts as guarantor of those rights was '*unquestionably powerful symbolic rhetoric*'.[23] The unspoken inference is that it is no more than that. They go on to say that the ECJ's conclusion that the European courts must provide a proper and full review of Community instruments in light of those fundamental rights appears in '*the abstract . . . both reasonable and sound . . .*'.[24] The problem for them comes when the abstract is replaced by the concrete and the commitment to a proper and full review '*is placed against the normative framework of binding resolutions of the UN Security Council.*' For them, when this happens, the ECJ's stance becomes '*contentious in its application.*'[25]

16. Takis Tridimis, Professor at Queen Mary University (amongst others), takes a less sanguine view than Cardwell et al to the ECJ's decision. For him it is

"*the most important judgment ever delivered by the ECJ on the relationship between Community and international law . . . it makes important pronouncements of principle in relation to the competence of the Community and the scope of fundamental rights protection under Community law [not least in holding that UNSCR] resolutions are binding only in international law and*

[22] [2008] 3 CMLR 41 at [374] – [376].
[23] Cardwell, French and White (2009) at 233.
[24] Cardwell, French and White (2009) at 233 – 234.
[25] Cardwell, French and White (2009) at 233 – 234.

cannot take precedence over the Community's internal standards for the protection of fundamental rights."[26]

He goes on to say this:

"*In relation to fundamental rights protection, it is unmistakeably liberal. The underlying values of the judgment are respect for liberal democracy and Community empowerment.*"[27]

I imagine Thomas Paine would have well agreed with this, as I am sure he would have agreed with the ECJ upholding the proposition that, as Tridimis put it, '*under no circumstances may the Community depart from its founding principles, in particular, respect for human rights and fundamental freedom*.'[28]

17. Tridimis' conclusion, which is to be contrasted with Cardwell et al's, who see the *Kadi* decision as one which in their words is '*perhaps not a ground-breaking one*'[29], is that the decision is '*of major constitutional importance . . . [as, on] the one hand it empowers the Community to play a role in foreign relations and security policy . . .[while, on] the other hand, it places fundamental rights at the apex of the Community edifice*.'[30]

18. I am sure these views will not be the last word on this. Time will no doubt tell whose view is right, and as with so much else, the true answer may well lie somewhere in between. Tridimis' conclusion however draws me back to where I started from: Paine, Locke, Atkin and Bingham and the question, what do their thoughts have in common and what do they have in common with the ECJ's decision in *Kadi*?

19. The essential point that they each make is one which John Adams made in advancing the case for American independence, and I paraphrase him here, that the ideal form of government, '*good government is an empire of Laws*': laws applicable to everyone equally and applied by the courts, as the judicial oath has it, "*without fear or, affection or ill will.*"[31] Good government is one, as the ECJ, acknowledged which is based on a strong, and I should add, unwavering commitment to the rule of law, of just laws. Such a commitment requires there to

[26] Tridimis, *Terrorism and the ECJ: Empowerment and democracy in the EC legal order*, (2009) E.L. Rev. (34(1)) 103 at 103 – 104.
[27] Tridimis (2009) at 104.
[28] Tridimis (2009) at 112.
[29] Cardwell, French and White (2009) at 233.
[30] Tridimis (2009) at 125.
[31] Adams, *Thoughts on Government*, (1776), chapter 4 (http://press-pubs.uchicago.edu/founders/documents/v1ch4s5.html).

be judicial scrutiny of executive acts. This may give rise to a tension between the executive and judicial branches of the State, but it is a healthy tension and one necessary to ensuring that the rule of law does not become, in Plato's words, a noble lie – that is to say one that helps to maintain an orderly society despite being false.[32] It is a tension that may, at times, become more acute in periods of heightened security, but it is one, as the sentiments expressed by Paine and Lord Atkin particularly exemplified, that is necessary for the protection and security of all. It is because it is essential to our commitment to the rule of law.

20. Indeed, as Advocate General Maduro put it, it is not for the Community courts, as indeed it is not for any court committed to upholding the rule of law, to '*turn its back on [those] fundamental values that lie at the basis of the Community legal order and which it has the duty to protect.*'[33] The ECJ agreed. While it is the case that the adoption of certain measures, intended to secure the liberty and security of all, such as those set out in UNSC Resolution 1267 of 1999 are necessary their application through Community instruments, or here through powers conferred by the United Nations Act 1946, is a matter for judicial scrutiny to ensure, as the ECJ put it, all those subject to those measures are afforded '*a sufficient measure of procedural justice.*'[34] The provision of such a measure of procedural justice is, to my mind, the means by which a society committed to the rule of law ensures that in times of war and other similar threats to national security, law and laws are not silent.

21. The *Kadi* decision, like that which the Court of Appeal took in *A, K & others v HM Treasury* [2008] EWCA Civ 1187 (the Treasury case) in which I gave the lead judgment but which is a lecture for another day, exemplifies our commitment to the rule of law and the fundamental freedoms which, as Lord Bingham has on a number of occasions argued, give it content. The ECJ's refusal to accept the CFI's simple – a critic might say blind, acquiescence to a law simply because it enacts a UNSCR resolution is I think, as Tridimis has it, of major constitutional importance. It is, because it affirms the commitment to those rights and freedoms which lie at the heart of society and that scrutiny of measures intended to protect those rights and freedoms is a necessary consequence of that very commitment.

22. The principles espoused by the ECJ are high sounding and in my opinion correct. However, the devil is in the detail. The ECJ did not strike down the measure

[32] Plato, *The Republic*, (Penguin) (2007) Book 2, section 414 – 417.
[33] [2008] 3 CMLR 41 at [AG44]
[34] [2008] 3 CMLR 41 at [344].

immediately but gave the Council of the EU three months to introduce a new regulation that would remedy the infringements.

23. But, it should be noted that the ECJ's judgment shows the balance which the courts have been wrestling with for some time. In that regard it said this at paragraphs 342 – 344 of its judgment:

"*342 In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.*

343 However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.

344 In such a case, it is nonetheless the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect, the judgment of the European Court of Human Rights in Chahal v United Kingdom (22414/93) (1997) 23 E.H.R.R. 413 § 131)."

24. It is the last paragraph, 344, which shows the uneasy balance that must be struck. The Court of Appeal noted this uneasy balance in the Treasury case, when in my judgment I accepted the submission that: "*. . . that the court should not lightly declare a provision made pursuant to such a wide power [as the United Nations Act 1946] to be ultra vires . . .* ".[35]

25. In the Treasury case similar problems arose in circumstances in which the Treasury was not willing to disclose very much to the individuals against whom they were making freezing orders. Like the ECJ, we did not solve the problems

[35] [2008] EWCA Civ 1187 at [39].

there and then. The Court of Appeal did however have this to say in paragraph of 120 of my judgment:

"*120 So far as possible in the circumstances, G should be put in the same position as he is as a subject of a direction under the TO , with the right to challenge it under article 5(4) of it. There must be procedures to enable him, again so far as possible, to discover the case against him, so that he may have an opportunity to meet it. This may involve, as in the case of the TO , appropriate use of a special advocate. How the system will work in a particular case will depend upon the circumstances, as the House of Lords held is appropriate in the control order cases in MB and AF . There may be greater difficulties in a case where HMT knows nothing of the facts upon which the designation was made by the Committee. I would leave the possible problems in such a case to be solved when they arise. Here there is no such problem because HMT knows all the facts relevant to the TO and must know either all or most of the facts which led to G's designation by the Committee.*"

26. This is a problem which has arisen in many different types of case, where the State is not willing to disclose the details of its case and sometimes the evidence to the individual concerned. The problem arises in, for example, criminal cases, and in cases of detention, as in the Strasbourg Court's recent decision in *A v The UK*,[36] which is a very important case, in non-derogating control order cases, in these freezing order cases and in another kind of case which we have recently been considering, where the Secretary of State refuses an application for citizenship on the ground that the applicant has not shown good character and refuses to give reasons or at any rate full reasons on the ground that to do so would be a danger to national security.

27. The problems in these cases are the same. What should the person be told? What documents should be disclosed? Should the tribunal look at any of the documents in the absence of the person or his lawyer? Should a special advocate be appointed? Is there a balance to be struck? There are many examples of such cases in both the Court of Appeal and the House of Lords, not least, *Secretary of State for the Home Department v MB and Secretary of State for the Home Department v AF* [2008] 1 AC 440 or *Secretary of State for the Home Department v AF (No 3) and others* [2009] 2 WLR 423, which is now before a nine member panel of the Law Lords.

[36] *A and others v The United Kingdom* - 3455/05 [2009] ECHR 301.

27. Before the Strasbourg court's decision in *A v UK* the position taken to the problems posed in these cases was that a person should be told the gist of the case against them. But questions remained as to what documents they could be given and in what state. Equally, the role of special advocates was not as clear as it might be. Answers were not just unclear in respect of such cases *per se*, but it was, and is, unclear as yet as to whether the same answer holds true of every class of case or whether different classes of case give rise to different answers. It will be interesting to see how the answers to these questions evolve and how the House of Lords in *AF (No 3)* looks at these issues in light of the *A v UK* decision. Watch this space.

29. Before returning to *Kadi* I should say a further word about *A v UK*.[37] It is a decision which ranges widely over a number of the issues that arise where fundamental rights, individual liberty and legitimate security measures are concerned. I cannot comment on those tonight, but it seems to me that its observations on the use of special advocates are worthy of mention. Special advocates are appointed in certain cases that involve allegations of terrorism, where material, known as closed material, is relied on. Such material is withheld from the defendant and his legal representatives for national security reasons. The special advocate is appointed by the Attorney-General to act on behalf of the defendant and can have sight of the closed material. Once they have seen that material however they cannot take instructions from the defendant or his representatives, although they still play a role in making submissions to the court both on procedural and on substantive matters.

28. In *A v UK* the Strasbourg Court first of all accepted that the defendant's rights, specifically the right to fair trial, were protected by the allegations and evidence, including closed material, being examined by a fully independent court.[38] It thus affirmed, just as the ECJ did, the essential role that an independent judiciary play has to play in protecting the rights not only of the individual but of society as a whole. The Strasbourg Court went on to hold the use of special advocates performs a further

"*important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing . . . during closed hearings. [But that] the special advocate could not perform this function in any useful way unless the detainee*

[37] *A and others v The United Kingdom* - 3455/05 [2009] ECHR 301.
[38] *A and others v The United Kingdom* - 3455/05 [2009] ECHR 301 at [219].

was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate."[39]

29. This seems to suggest that the detainee must be given the gist of the case against him. But what is meant by 'the gist'? It still seems to contemplate that some use of closed material can be used and not shown to the detainee. How will this work in practice? What will be allowed to be shown to the detainee? Why and in what circumstances should detainees be allowed access to any such documents? How will the special advocate be able to take effective instructions? Questions remain. But as I said earlier it will be interesting to see what the House of Lords makes of this when considering the appeal in *AF (No 3)*. It seems to me that the Strasbourg Court in giving this guidance has further reaffirmed the commitment to ensuring that, through the use of the independent judiciary and effective procedural measures that ensure procedural justice for all, it has taken the same approach to fundamental rights and the balance that must be struck between them and legitimate security issues as the ECJ. I hope the same can be said of the UK courts.

30. Turning back to *Kadi* it seems to me that, as Paine might have put it, the ECJ is to be applauded because the CFI's decision was one that set a precedent for the EU to accept and implement without the possibility of demur measures that might *ex hypothesi* place our individual liberty less secure: a precedent which, in the light of *A v UK*, the Strasbourg Court would undoubtedly have had concerns about. This is not an argument for suggesting that States might be able to rely on fundamental rights arguments to evade their obligations as set out in the UN Charter, but rather one which requires UN signatories to ensure that they implement measures arising from such obligations consistently with the commitment to those freedoms and the rule of law.

31. It is an argument that requires all States committed to the rule of law to ensure when implemented necessary and legitimate security measures to protect the very fabric of our society and liberal democracy to ensure that they do not depart from the rule of law. It is the role of government, the executive to carry out that task. It is the role of the courts, when cases are brought before them, to scrutinise such measures within, as Lord Bingham put it recently, '*the proper limits of the judicial function. . .*'[40] The ECJ has rightly committed the EU to this once more. We, in the UK, have a long tradition of doing so. We should ensure that that long

[39] *A and others v The United Kingdom* - 3455/05 [2009] ECHR 301 at [220].
[40] Bingham, *Judges possess the weapon to challenge surveillance*, The Guardian (17 February 2009).

tradition continues both here, in the EU and further a field. If we do not do so and uphold the rule of law, then, as the United States Court of Appeals, Second Circuit, put it in a related context (the prohibition on torture), we run the risk of finding ourselves, "*hostis humani generis*, an enemy of all mankind."[41]

32. But questions remain. How do we strike the balance? Is any compromise permissible? These are difficult questions for the future. But they are questions that we are properly asking and which the Lords may provide an answer to in *AF (No 3)*.

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[41] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) at [54] (http://openjurist.org/630/f2d/876/filartiga-v-pena-irala)