Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 September 2012 [1]

Case C-300/11

ZZ
v
Secretary of State for the Home Department

(Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom))

(Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States — Decision to exclude a Union citizen from a Member State on grounds of public security — Obligation to inform the citizen concerned of the grounds for that decision — Disclosure contrary to State security — Right to effective judicial protection)

1. The present reference for a preliminary ruling concerns the interpretation of Article 30(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. [2]

2. This reference was made in a dispute between ZZ and the Secretary of State for the Home Department ('the Secretary of State') concerning the Secretary of State's decision to exclude ZZ from the United Kingdom of Great Britain and Northern Ireland on grounds of public security and to take an expulsion measure against him.

3. By inviting the Court to decide to what extent a Member State may, invoking requirements relating to State security, refuse to disclose to a Union citizen the grounds of public security justifying an expulsion measure taken against him by that State, the present case raises the awkward problem of striking the right balance between the need for a Member State to protect the essential interests of its security and the guarantee of the procedural rights enjoyed by Union citizens.

1 — Original language: French.

2 — OJ 2004 L 158, p. 77, and corrigenda in OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

I – Legislative framework

A – *EU law*

4. Article 27(1) and (2) of Directive 2004/38 provides:

‘1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.’

5. Under Article 28(2) and (3) of that directive:

‘2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years ...’

6. Article 30(1) and (2) of that directive provides:

‘1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.’

7. With regard to procedural safeguards, Article 31 of Directive 2004/38 stipulates:

‘1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

...

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.'

B – *English law*

1. Admission to and exclusion from the United Kingdom

8. The Immigration (European Economic Area) Regulations 2006 ('the Immigration Regulations') transpose Directive 2004/38 into national law. Under regulation 11(1) and (5) of the Immigration Regulations:

'(1) An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State.

...

(5) But this regulation is subject to regulations 19(1) ... .'

9. Regulation 19, entitled 'Exclusion and removal from the United Kingdom', provides, in paragraph (1):

'A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with regulation 21.'

10. Regulation 25 provides:

'(1) In this Part

...

"Commission" has the same meaning as in the Special Immigration Appeals Commission Act 1997 ("SIAC Act") ...'

11. Regulation 28 stipulates:

'(1) An appeal against an EEA decision lies to the Commission where paragraph (2) or (4) applies.

...

(4) This paragraph applies if the Secretary of State certifies that the EEA decision was taken wholly or partly in reliance on information which in his opinion should not be made public

(a) in the interests of national security;

...

(8) The [SIAC] Act shall apply to an appeal to the Commission under these Regulations as it applies to an appeal under section 2 of that Act to which subsection (2) of that section applies (appeals against an immigration decision) but paragraph (i) of that subsection shall not apply in relation to such an appeal.'

2. The rules applicable to appeals against an exclusion decision

12. Under Article 1(3) of the SIAC Act, the Commission is a superior court of record.

13. Article 5(1), (3) and (6) of that Act provides:

'(1) The Lord Chancellor may make rules

...

(3) Rules under this section may, in particular

(a) make provision enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,

...

(6) In making rules under this section, the Lord Chancellor shall have regard, in particular, to

(a) the need to secure that decisions which are the subject of appeals are properly reviewed, and

(b) the need to secure that information is not disclosed contrary to the public interest.'

14. Article 6 of the SIAC Act provides for the appointment of special advocates. In this regard, Article 6(1) of the Act stipulates that the Attorney General may appoint a person authorised to plead before the High Court of Justice (United Kingdom) 'to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission (SIAC) from which the appellant and any legal representative of his are excluded'. Furthermore, Article 6(4) of the Act provides that that person is not 'responsible to the person whose interests he is appointed to represent'.

15. Rule 4(1) and (3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 ('the SIAC Rules of Procedure') provides:

'(1) When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security ...

(3) Subject to paragraphs (1) and (2), the Commission must satisfy itself that the material available to it enables it properly to determine proceedings.'

16. Rule 10 of the SIAC Rules of Procedure provides:

'(1) Where the Secretary of State intends to oppose an appeal, he must file with the Commission:

(a) a statement of the evidence on which he relies in opposition to the appeal; and

(b) any exculpatory material of which he is aware.

(2) Unless the Secretary of State objects to the statement being disclosed to the appellant or his representative, he must serve a copy of the statement of evidence on the appellant at the same time as filing it.

(3) Where the Secretary of State objects to a statement filed under paragraph (1) being disclosed to the appellant or his representative, rules 37 and 38 shall apply.

...'

17. As regards the functions of the special advocate provided for in Article 6 of the SIAC Act, rule 35 of the SIAC Rules of Procedure stipulates:

'The functions of a special advocate are to represent the interests of the appellant by

(a) making submissions to the Commission at any hearings from which the appellant and his representatives are excluded;

(b) adducing evidence and cross-examining witnesses at any such hearings; and

(c) making written submissions to the Commission.'

18. With regard to communication between the appellant and the special advocate, rule 36 of the SIAC Rules of Procedure provides:

'(1) The special advocate may communicate with the appellant or his representative at any time before the Secretary of State serves material on him which he objects to being disclosed to the appellant.

(2) After the Secretary of State serves material on the special advocate as mentioned in paragraph (1), the special advocate must not communicate with any person about any matter connected with the proceedings, except in accordance with paragraph (3) or (6)(b) or a direction of the Commission pursuant to a request under paragraph (4).

(3) The special advocate may, without directions from the Commission, communicate about the proceedings with

(a) the Commission;

(b) the Secretary of State, or any person acting for him;

(c) the relevant law officer, or any person acting for him;

(d) any other person, except for the appellant or his representative, with whom it is necessary for administrative purposes for him to communicate about matters not connected with the substance of the proceedings.

(4) The special advocate may request directions from the Commission authorising him to communicate with the appellant or his representative or with any other person.

(5) Where the special advocate makes a request for directions under paragraph (4)

(a) the Commission must notify the Secretary of State of the request; and

(b) the Secretary of State must, within a period specified by the Commission, file with the Commission and serve on the special advocate notice of any objection which he has to the proposed communication, or to the form in which it is proposed to be made.

(6) Paragraph (2) does not prohibit the appellant from communicating with the special advocate after the Secretary of State has served material on him as mentioned in paragraph (1), but

(a) the appellant may only communicate with the special advocate through a legal representative in writing; and

(b) the special advocate must not reply to the communication other than in accordance with directions of the Commission, except that he may without such directions send a written acknowledgment of receipt to the appellant's legal representative.'

19. Rule 37 of the SIAC Rules of Procedure defines the expression 'closed material' and provides:

'(1) In this rule, "closed material" means

(a) material upon which the Secretary of State wishes to rely in any proceedings before the Commission;

(b) material which adversely affects his case or supports the appellant's case, or

(c) information which he is required to file pursuant to a direction under rule 10A(7),

but which he objects to disclosing to the appellant or his representative.

(2) The Secretary of State may not rely upon closed material unless a special advocate has been appointed to represent the interests of the appellant.

(3) Where the Secretary of State is required by rule 10(2) or 10A(8) to serve on the appellant, or wishes to rely upon, closed material and a special advocate has been appointed, the Secretary of State must file with the Commission and serve on the special advocate

(a) a copy of the closed material, if he has not already done so;

(b) a statement of his reasons for objecting to its disclosure; and

(c) if and to the extent that it is possible to do so without disclosing information contrary to the public interest, a statement of the material in a form which can be served on the appellant.

(4) The Secretary of State must, at the same time as filing it, serve on the appellant any statement filed under paragraph (3)(c).

(4A) Where the Secretary of State serves on the special advocate any closed material which he has redacted on grounds other than those of legal professional privilege

(a) he must file the material with the Commission in an unredacted form, together with an explanation of the redactions; and

(b) the Commission must give a direction to the Secretary of State as to what he may redact.

(5) The Secretary of State may, with the leave of the Commission or the agreement of the special advocate, at any time amend or supplement material filed under this rule.'

20. As regards the consideration of Secretary of State's objection, rule 38 of the SIAC Rules of Procedure stipulates:

'(1) Where the Secretary of State makes an objection under rule 36(5)(b) or rule 37, the Commission must decide in accordance with this rule whether to uphold the objection.

(2) The Commission must fix a hearing for the Secretary of State and the special advocate to make oral representations ...

...

(5) A hearing under this rule shall take place in the absence of the appellant and his representative.

(6) The Commission may uphold or overrule the Secretary of State's objection.

(7) The Commission must uphold the Secretary of State's objection under rule 37 where it considers that the disclosure of the material would be contrary to the public interest.

(8) Where the Commission upholds the Secretary of State's objection under rule 37, it must

(a) consider whether to direct the Secretary of State to serve a summary of the closed material on the appellant; and

(b) approve any such summary, to secure that it does not contain any information or other material the disclosure of which would be contrary to the public interest.

(9) Where the Commission overrules the Secretary of State's objection under rule 37 or directs him to serve a summary of the closed material on the appellant

(a) the Secretary of State shall not be required to serve that material or summary; but

(b) if he does not do so, the Commission may at a hearing at which the Secretary of State and the special advocate may make representations

(i) if it considers that the material or anything that is required to be summarised might adversely affect the Secretary of State's case or support the appellant's case, direct that the Secretary of State shall not rely on such points in his case, or shall make such concessions or take such other steps, as the Commission may specify; or

(ii) in any other case, direct that the Secretary of State shall not rely in the proceedings on that material or (as the case may be) on that which is required to be summarised.'

21. With regard to hearings in private, rule 43 of the SIAC Rules of Procedure provides:

'(1) If the Commission considers it necessary for the appellant and his representative to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, it must

(a) direct accordingly; and

(b) conduct the hearing, or that part of it from which the appellant and his representative are excluded, in private.

...'

22. With regard to the Commission's giving of determination, rule 47 of the SIAC Rules of Procedure provides:

'(1) This rule applies when the Commission determines any proceedings.

(2) The Commission must record its decision and the reasons for it.

(3) The Commission must, within a reasonable time, serve on the parties a written determination containing its decision and, if and to the extent that it is possible to do so without disclosing information contrary to the public interest, the reasons for it.

(4) Where the determination under paragraph (3) does not include the full reasons for its decision, the Commission must serve on the Secretary of State and the special advocate a separate determination including those reasons.

(5) Where the Commission serves a separate determination under paragraph (4), the special advocate may apply to the Commission to amend that determination and the determination under paragraph (3) on the grounds that the separate determination contains material the disclosure of which would not be contrary to the public interest.

(6) The special advocate must serve a copy of an application under paragraph (5) on the Secretary of State.

(7) The Commission must give the special advocate and the Secretary of State an opportunity to make representations and may determine the application with or without a hearing.'

II – The main proceedings and the question referred for a preliminary ruling

23. ZZ has both French and Algerian nationality. Since 1990 he has been married to a UK national with whom he has eight children aged from 9 to 20 old. ZZ resided lawfully in the UK from 1990 to 2005.

24. On 19 August 2005, ZZ travelled from the UK to Algeria. On 26 August 2005, ZZ was informed that the Secretary of State had decided to cancel his right of residence and to exclude him from the UK on the ground that his presence was not conducive to the public good. In the same letter it was also mentioned that ZZ's exclusion from the UK was justified on grounds of public security.

25. On 18 September 2006, ZZ travelled to the UK. On 19 September 2006, the Secretary of State decided under regulation 19(1) of the Immigration Regulations to refuse ZZ admission to the UK and to expel him on grounds of public security. On the same date, ZZ was removed to Algeria. He is currently residing in France.

26. On 9 October 2006, ZZ lodged an appeal against the decision of 19 September 2006, which was dismissed by SIAC on 30 July 2008 on the ground that the exclusion decision was justified by imperative grounds of public security. ZZ was represented by a solicitor and a barrister of his choice before SIAC.

27. Under the rules applicable to SIAC, two special advocates were also appointed to represent ZZ's interests. They had consultations with him based upon the 'open evidence'.

28. Subsequently, the remainder of the information upon which the contested decision was based, namely the information classified as 'closed evidence', was disclosed to the special advocates, who were precluded from seeking further instructions from, or providing information to, ZZ or his lawyers without the permission of SIAC. Subject to these limitations, the special advocates proceeded to represent ZZ's interests in respect of the 'closed evidence' before SIAC.

29. In order to consider the Secretary of State's objection to disclosure of some of the evidence to the appellant, SIAC held a hearing which took place in private, in the absence of ZZ and his lawyers, but in the presence of his special advocates. Ultimately, SIAC determined the extent to which disclosure to ZZ of 'closed evidence' relied on by the Secretary of State would be contrary to the public interest.

30. Subsequently, a hearing was held on ZZ's appeal, both in open and in closed sessions. The closed sessions took place in the absence of ZZ and his lawyers, but in the presence of his special advocates, who made submissions on behalf of ZZ.

31. SIAC gave two judgments, an 'open judgment' and a 'closed judgment', which was provided only to the Secretary of State and to the special advocates for ZZ.

32. In its 'open judgment', SIAC held inter alia that 'little of the case against [ZZ]' had been disclosed to him, that those elements 'did not really engage with the critical issues' and that 'for reasons explained only in the closed judgment, it was satisfied that the personal conduct of ZZ represents a genuine present and sufficiently serious threat which affects a fundamental interest of society, namely its public security, and that it outweighs his and their right to enjoy family life in the UK'.

33. ZZ filed a notice of appeal against that judgment with the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), which granted him permission to appeal.

34. The Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the principle of effective judicial protection, set out in Article 30(2) of Directive 2004/38, as interpreted in the light of Article 346(1)(a) [TFEU], require that a judicial body considering an appeal from a decision to exclude a … Union citizen from a Member State on grounds of public policy and public security under Chapter VI of Directive 2004/38 ensure that the … Union citizen concerned is informed of the essence of the grounds against him, notwithstanding the fact that the authorities of the Member State and the relevant domestic court, after consideration of the totality of the evidence against the … Union citizen relied upon by the authorities of the Member State, conclude that the disclosure of the essence of the grounds against him would be contrary to the interests of State security?'

III – My analysis

A – *Preliminary remarks*

35. When considering situations like that referred in the present case it is not possible to disregard the specific nature of a criminal activity like terrorism and the fight against this scourge.

36. Terrorism is a criminal activity which has a totalitarian inspiration, which denies the principle of individual freedom and whose aim is to seize political, economic and judicial powers in a given society in order to entrench there its underlying ideology.

37. The use of terror, as a subversive strategy, is the preferred means of achieving the desired result by destabilising the political institutions, which become incapable of ensuring the security of citizens, a key element in the social contract. At the same time, the climate of terror thus established causes the citizen, out of resignation born of fear, a consequence of the terror employed, to accept domination in order to find security.

38. This philosophy of terror, as terror becomes an end in itself, is realised through the use of exceptionally violent and cruel methods – the most violent and cruel methods, because they are the most shocking, being regarded as the most suitable means of achieving the desired aim. The choice of victims, such as children, the place where attacks are committed, such as schools, hospitals or churches, and the way in which they are perpetrated, as isolated acts or mass murders, contribute to this strategy.

39. Since effective terror requires unpredictability as a primary condition, the use of 'sleeping' organisations or agents is a traditional approach in this field. The form of attack, which must be extremely varied in order to surprise or terrorise more effectively, is in keeping with this same logic.

40. The devastating impact of the acts committed requires the public authorities to develop all conceivable means of prevention. Prevention is made particularly difficult by the characteristics which have just been described non-exhaustively, making it essential to employ the most sophisticated methods offered by the latest investigation techniques, without, however, neglecting more conventional means. Protecting intelligence assets and sources is an absolute priority. The result must make it possible to evaluate the degree of potential threat, to which a prevention measure commensurate with the identified threat must respond.

41. This calls for a highly flexible approach, because of the multi-faceted character of the situation on the ground. The conditions underlying the threat and the fight against it may be different depending on time and place, and the genuineness and the level of the threat may vary with changes in global geopolitical conditions.

42. The multitude of forms in which the threat comes must therefore be addressed by the same multitude of responses. Those responses must be made having regard to the safeguards provided by the rule of law to which the terrorist enterprise indeed poses a threat.

43. In a democratic society, it is imperative to allow the very people who are fighting the safeguards provided by the rule of law to benefit from those same safeguards in order to ensure the absolute primacy of democratic values, but this cannot result in a kind of suicide of democracy itself.

44. Consequently, according to the seriousness of the identified threat and depending on the degree of coercion in the preventive measure taken, it is necessary each time to 'balance' the degree to which the application of the rule of law is restricted against the seriousness of the danger represented by terrorism.

45. Imprisoning someone is not comparable with preventing him from communicating with a certain person or from using his financial resources to the extent that they are not required for a decent standard of living.

46. Democratic society must therefore provide the elements for striking this balance each time, both substantively and in terms of procedural rules, necessitating the existence of a credible domestic judicial review which is tailored to the reality presented by each specific case.

B – *The question referred for a preliminary ruling*

47. In the light of the material in the file and, in particular, the decision of the Court of Appeal (England and Wales) (Civil Division) of 19 April 2011,[3] I will proceed from the assumption, which must of course be confirmed by the national court, that ZZ's situation comes under Article 28(3)(a) of Directive 2004/38, that is to say the strongest protection against expulsion. Under that provision, a Union citizen who has resided in the host Member State for the previous 10 years may be expelled from that State only on imperative grounds of public security.

48. As the Court ruled in its judgment of 23 November 2010 in *Tsakouridis*,[4] and as it recently recalled in its judgment of 22 May 2012 in *I*,[5] it follows from the wording and scheme of Article 28(3) of Directive 2004/38 that, by subjecting all expulsion measures in the cases referred to in that provision to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive.[6]

49. The Court also held that the concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative grounds'.[7] According to the Court, there must be a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population.[8]

50. Furthermore, the Court ruled that an expulsion measure must be based on an individual examination of the specific case and can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State.[9] In that assessment, account must be taken of the fundamental rights whose observance the Court ensures, which include the right to respect for private and family life.[10]

51. Unlike the abovementioned *Tsakouridis* and *I* cases, the referring court in the present case does not ask the Court about the meaning of the concept of public security or the guiding purposes in the assessment of the proportionality of the measure taken by the Secretary of State. According to the examination of that measure by SIAC at first instance, the imperative grounds connected with the protection of public security appear to outweigh ZZ's right to enjoy family life in the United Kingdom.[11]

3 — *ZZ* v *Secretary of State for the Home Department* [2011] EWCA Civ 440 (paragraph 11), available at the following internet address: http://www.bailii.org/ew/cases/EWCA/Civ/2011/440.html.

4 — Case C-145/09 [2010] ECR I-11979.

5 — Case C-348/09 [2012] ECR.

6 — *I*, paragraph 19 and the case-law cited.

7 — Ibid. (paragraph 20 and the case-law cited).

8 — Ibid. (paragraph 28).

9 — *Tsakouridis*, paragraph 49.

10 — Ibid. (paragraph 52).

11 — See *ZZ* v *Secretary of State for the Home Department* [2008] UKSIAC 63/2007, available at the following internet address: http://www.bailii.org/uk/cases/SIAC/2008/63_2007.html. SIAC states, in paragraph 21:

> 'For reasons which are given in the open and closed judgments, read together, we are satisfied that the imperative grounds of public security which we have identified in the closed judgment outweigh the compelling family circumstances of ZZ's family so as to justify the Secretary of State's decision to exclude him from the United Kingdom.'

52. The present reference for a preliminary ruling concerns the procedural rights which may be claimed by a Union citizen in a situation like that of ZZ. In particular, this reference invites the Court to decide whether or not it is consistent with EU law that a Union citizen can be the subject of an expulsion measure on grounds of public security without having been informed of the grounds justifying that measure, either in detail or in summary form, because this is contrary to interests of State security.

53. The provision at the centre of the present reference for a preliminary ruling, Article 30(2) of Directive 2004/38, has its origin in Article 6 of Directive 64/221/EEC,[12] which provided that '[t]he person concerned shall be informed of the grounds of public policy, public security, or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved'. In its judgment in *Rutili*,[13] the Court had already interpreted that provision as meaning that the State concerned must give an individual a precise and comprehensive statement of the grounds for the decision, to enable him to take effective steps to prepare his defence.[14]

54. Article 30(2) of Directive 2004/38 constitutes above all an expression of 'the principle that any action taken by the authorities must be properly justified', in the words used by the Union legislature in recital 25 in the preamble to that directive.

55. It is clear from the wording of Article 30(2) of Directive 2004/38 that the general rule is that a Union citizen who is the subject of a measure restricting his freedom of movement and of residence on public policy, public security or public health grounds should be informed, precisely and in full, of the grounds for such a measure. By way of exception, only interests of State security can preclude him being informed.

56. The very wording of Article 30(2) of Directive 2004/38 thus expresses the idea that, by way of derogation, the procedural rights of a Union citizen may be restricted where this is justified by interests of State security.

57. The main difficulty raised by the present reference is determining to what extent such a restriction can apply without unduly affecting the procedural rights on which a Union citizen may rely.

58. In other words, what is the extent of the option available to the Member States under Article 30(2) of Directive 2004/38 to derogate from the principle of informing an individual, precisely and in full, of the grounds for an expulsion decision? More precisely, may a Member State invoke interests of State security to prevent a Union citizen being informed of the grounds of public security justifying an expulsion decision taken against him, even in the form of a limited summary of the main allegations?

59. In response to the problem raised, it should be stated that the obligation to state reasons is closely linked to the principle of respect for the rights of the defence and the guarantee of effective judicial protection. Thus, the purpose of the obligation to state the reasons for an act adversely affecting a person is, first, to enable the persons concerned to ascertain the reasons for the measure so that they can assess whether it is well founded and, secondly, to enable the competent court to exercise its power of review.[15]

12 — Council Directive of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117).

13 — Case 36/75 [1975] ECR 1219.

14 — Paragraph 39.

15 — See, inter alia, Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 54.

60. The rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Court ensures.[16] They require, first, that the person concerned must be informed of the evidence adduced against him to justify the measure adversely affecting him. Secondly, that person must be afforded the opportunity effectively to make known his view on that evidence.[17]

61. The principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR),[18] and in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). Under the first and second paragraphs of this latter article:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

62. According to the explanations on Article 47 of the Charter,[19] the first paragraph of that article is based on Article 13 of the ECHR. The second paragraph of Article 47 of the Charter corresponds to the level of the guarantees afforded by Article 6(1) of the ECHR, whilst having scope beyond disputes relating to civil law rights and obligations.

63. The referring court questions the Court primarily having regard to the principle of effective judicial protection in so far as it was in the judicial proceedings before SIAC that that judicial body confirmed the Secretary of State's wish not to disclose to ZZ the closed material justifying the decision to exclude him from the UK and to expel him. Consequently, the referring court essentially asks whether it is consistent with the principle of effective judicial protection, in legal proceedings reviewing the lawfulness of an expulsion measure taken against a Union citizen, for the competent national authority and the competent national court to refuse, on the basis of Article 30(2) of Directive 2004/38, read in the light of Article 346(1)(a) TFEU, to inform that citizen of the essence of the grounds justifying such a measure.

64. Article 47 of the Charter is certainly applicable in the present proceedings and can guide the Court's interpretation, since the decision taken by the Secretary of State to exclude ZZ from the UK and to expel him constitutes an instance of implementation of Directive 2004/38 and, in particular, on the assumption that ZZ enjoys the higher level of protection against expulsion, of Article 28(3)(a) of that directive.

65. As provided for in Article 52(1) of the Charter, limitations may be imposed on the rights and freedoms recognised by the Charter provided those limitations are provided for by law, they respect the essence of those rights and freedoms and, subject to the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

16 — See, inter alia, Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10439, paragraph 47 and the case-law cited.

17 — See, inter alia, Joined Cases T-439/10 and T-440/10 *Fulmen and Mahmoudian* v *Council* [2012] ECR, paragraph 72.

18 — See, inter alia, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 29.

19 — See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

66. The objective in the public interest mentioned in Article 30(2) of Directive 2004/38 consists in the protection of State security. That objective can be linked to Article 4(2) TEU, which provides:

'... [The Union] shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

67. In connection with that provision, Article 346(1)(a) TFEU stipulates that 'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security'.

68. Article 30(2) of Directive 2004/38 constitutes an expression, in the field of freedom of movement and the right of residence of Union citizens, of the general provision made in Article 346(1)(a) TFEU. An understanding of this latter provision therefore proves to be crucial in the context of the present case.

69. In this regard, the judgments of 15 December 2009 in *Commission* v *Finland*, *Commission* v *Sweden*, *Commission* v *Germany*, *Commission* v *Italy*, *Commission* v *Greece*, *Commission* v *Denmark*, and *Commission* v *Italy*[20] give some indications. In those cases, the European Commission alleged that those Member States were wrong to rely on Article 346 TFEU to justify the refusal to pay customs duties relating to imports of military equipment or dual-use goods for civil and military use. Among the grounds of defence relied on by those Member States, the Republic of Finland claimed inter alia that it could not comply with the Community customs procedure in respect of the imported defence material in question without taking the risk that information essential to its security might come to the knowledge of a third party.[21]

70. In those judgments, the Court began by stating that, according to settled case-law, although it is for Member States to take the appropriate measures to ensure their internal and external security, it does not follow that such measures are entirely outside the scope of EU law.[22] It then held that the derogations provided for in Article 346 TFEU must be interpreted strictly. It took the view that although that article refers to measures which a Member State may consider necessary for the protection of the essential interests of its security or of information the disclosure of which it considers contrary to those interests, that article cannot, however, be read in such a way as to confer on Member States a power to depart from the provisions of the FEU Treaty based on no more than reliance on those interests.[23] Consequently it is for the Member State which seeks to take advantage of Article 346 TFEU to prove that it is necessary to have recourse to that derogation in order to protect its essential security interests.

71. In the specific context of those cases, the Court held that the Member States are obliged to make available to the Commission the documents necessary to permit inspection to ensure that the transfer of the Union's own resources is correct. However, such an obligation does not mean that Member States may not, on a case-by-case basis and by way of exception, on the basis of Article 346 TFEU, restrict the information to certain parts of a document, or withhold it completely.[24]

72. I will draw several lessons from the Court's reasoning in those judgments which are helpful in examining the present case.

20 — Respectively Case C-284/05 [2009] ECR I-11705; Case C-294/05 [2009] ECR I-11777; Case C-372/05 [2009] ECR I-11801; Case C-387/05 [2009] ECR I-11831; Case C-409/05 [2009] ECR I-11859; Case C-461/05 [2009] ECR I-11887; and Case C-239/06 [2009] ECR I-11913.

21 — *Commission* v *Finland*, paragraph 36. See also, to the same effect, *Commission* v *Germany*, paragraphs 58 and 59; *Commission* v *Greece*, paragraphs 44 and 45; and *Commission* v *Denmark*, paragraphs 42 and 43.

22 — See, inter alia, *Commission* v *Finland*, paragraph 45.

23 — Ibid. (paragraph 47).

24 — Ibid. (paragraph 53).

73. First of all, it is clear that reliance by a Member State on interests of State security does not rule out the application of EU law and, in particular, the fundamental rights protected by the Charter. It is also not sufficient in itself to justify the decision not to inform the Union citizen, precisely and in full, of the grounds for an expulsion or exclusion decision taken against him by a Member State.

74. Where a Member State wishes to invoke interests of State security to prevent the grounds of public security justifying the expulsion of a Union citizen being disclosed to him, it must prove to the national court hearing an appeal against an expulsion decision that it is necessary to have recourse to the derogation provided for in Article 30(2) of Directive 2004/38. That State must thus provide proof that legitimate security concerns about the nature and sources of intelligence information taken into account in the adoption of the decision concerned militate in favour of a restriction or non-disclosure of the grounds. In the absence of such proof, the national court must always uphold the principle that the Union citizen must be informed, precisely and in full, of the grounds justifying his expulsion.

75. In its assessment of the merits of the decision taken by the competent national authority not to disclose, precisely and in full, the grounds for an expulsion measure, the national court must bear in mind that the derogation provided for in Article 30(2) of Directive 2004/38 must be interpreted strictly.

76. Furthermore, in accordance with the principle of proportionality, disclosure of the main allegations in support of the finding of the threat to public security represented by a Union citizen should always be preferred to non-disclosure of the grounds, provided the production of a summary of the grounds is compatible with the need to protect State security. Consequently, there should be complete non-disclosure of the grounds of public security only in exceptional cases.

77. All in all, in accordance with the principle that compliance with the obligation to state reasons for an act having adverse effects must be assessed with reference, inter alia, to the context of such an act,[25] the disclosure to the Union citizen of the grounds of public security justifying his expulsion can be varied according to imperative grounds connected with State security. Such variation must fall within a range extending from the Union citizen being informed, precisely and in full, of the grounds to the non-disclosure of the grounds, if State security so requires, and includes an intermediate possibility of communicating a summary of the grounds.

78. In my view, it is essential to maintain the possibility of non-disclosure of the grounds of public security on which a decision to expel a Union citizen is based where even the mere disclosure of the main allegations against that Union citizen would be likely to prejudice State security, and in particular the Member States' legitimate security concerns about the nature and sources of intelligence information taken into account in the adoption of the decision concerned.

79. Even if this possibility is reserved for exceptional cases, it must be maintained in the context of the interpretation of Article 30(2) of Directive 2004/38 if Article 346(1)(a) TFEU is not to be deprived of much of its effectiveness.

80. It should also be stated that, whilst the Member States may not unduly restrict the exercise of the right of free movement of Union citizens, conversely the constraints on those States in terms of respect for the rights of the defence and effective judicial protection must not be such that they discourage those States from taking measures to guarantee public security. It should be borne in mind in this regard that whilst, as is stated in Article 3(2) TEU, the Union is to offer its citizens an area in which the free movement of persons is ensured, it must also guarantee an area of security in which the prevention and combating of crime are ensured. Consequently, it is not acceptable to claim, as some have done in the present proceedings, that where a Member State considers that the disclosure of the

25 — See, inter alia, Case C-309/10 *Agrana Zucker* [2011] ECR I-7333, paragraph 35.

essence of the grounds is contrary to State security, it would only have the choice of making the expulsion and disclosing the grounds of public security justifying that decision or simply forgoing the expulsion of the person concerned. In other words, I do not accept the existence of a general and systematic obligation to disclose grounds which could, in certain circumstances, lead the Member States to forgo measures which they consider necessary, subject to judicial review, for the maintenance of public security.

81. In the light of these factors, I take the view that Article 30(2) of Directive 2004/38, read in the light of Article 47 of the Charter and Article 346(1)(a) TFEU, should be interpreted as permitting a Member State, in exceptional cases duly justified by the need to guarantee State security and subject to review by the national court, to prevent a Union citizen being informed of the grounds of public security for a decision to expel him, whether in detail or in summary form.

82. However, this answer is not sufficient to strike a fair balance between the interests of State security, on the one hand, and the procedural rights of Union citizens, on the other.

83. To be consistent with Article 47 of the Charter, the infringement of the rights of the defence and effective judicial protection caused by the application of the derogation under Article 30(2) of Directive 2004/38 must be counterbalanced by appropriate procedural mechanisms capable of guaranteeing a satisfactory degree of fairness in the procedure. It is only on this condition that the infringement of the Union citizen's procedural rights could be regarded as proportionate to the objective for a Member State to protect the essential interests of its security.

84. Since Directive 2004/38 does not provide for any such procedural mechanisms, it is for the Member States to establish them in accordance with the principle of procedural autonomy.

85. It is therefore ultimately in the light of the procedural context in which a Member State invokes the derogation provided for in Article 30(2) of Directive 2004/38 that it must be decided, in each case, whether a fair balance has been guaranteed between the Union citizen's right to effective judicial protection and the imperative grounds of State security.

86. Thus, as the European Court of Human Rights has stated, it must be ascertained whether the national procedure in question includes 'techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'. [26]

87. The system established by the United Kingdom is based on a judicial review by SIAC, on procedural and substantive matters, of expulsion and exclusion decisions. Because the confidentiality of certain material is claimed by the Secretary of State, SIAC may determine whether the non-disclosure of certain information is necessary. To that end, it has at its disposal all the facts and evidence on which the Secretary of State based his decision. If, after examining that material, the need not to disclose the information is confirmed, the case gives rise not only to an open judgment, but also to a closed judgment, the content of which is not disclosed to the appellant or to his representative.

26 — See European Court of Human Rights, *Chahal v. the United Kingdom*, 15 November 1996, § 131, *Reports of Judgments and Decisions* 1996-V. See also, with regard to Community measures freezing funds, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 344.

88. In addition to the existence of a judicial review both on the substance of the expulsion measure and on the need to keep certain information confidential, the procedural arsenal is supplemented by the appointment of a 'special advocate' in certain cases affecting national security. Thus, where it is necessary, in the interests of national security, for the judicial body seised to sit in private, in the absence of the person concerned and his representative, the special advocate appointed represents the interests of the person concerned in the procedure. With this in mind, his role is to seek to achieve maximum disclosure of the incriminating evidence and to evaluate the relevance of the closed material.

89. This system conceived by the United Kingdom within the framework of its procedural autonomy seems to satisfy the requirements outlined by the European Court of Human Rights in its case-law on the procedural safeguards which must accompany the expulsion or the exclusion of foreign nationals. Depending on the case, those procedural safeguards stem from Articles 8 and 13 of the ECHR [27] and from Article 1 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Strasbourg on 22 November 1984 ('Protocol No 7'). [28]

90. According to the European Court of Human Rights, where there is an arguable claim that an expulsion measure may infringe the foreigner's right to respect for family life, Article 13 of the ECHR in conjunction with Article 8 of the ECHR requires that States must make available to the individual concerned the effective possibility of challenging such a measure and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality. [29]

91. The European Court of Human Rights considers that in cases of expulsion on grounds of national security procedural restrictions may be necessary to ensure that no leakage detrimental to national security would occur and any independent authority dealing with an appeal against an expulsion decision may need to afford a wide margin of appreciation to the competent national authorities in such matters. However, in the view of that same court, such restrictions can by no means justify doing away with remedies altogether whenever the competent national authority has chosen to invoke the term 'national security'. [30]

92. The standard by which the European Court of Human Rights specifically examines the compatibility of expulsion measures with Article 13 of the ECHR includes, first, the requirement that, even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the independent appeals authority must be informed of the reasons grounding the contested decision, even if such reasons are not publicly available. That authority must be competent to reject the competent national authority's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. In addition, there must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the independent authority must examine whether the impugned measure would interfere with the individual's right to respect for his or her family life and, if so, whether a fair balance has been struck between the public interest involved and the individual's rights. [31]

27 — See, inter alia, European Court of Human Rights, *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002; *Raza v. Bulgaria*, no. 31465/08, 11 February 2010; *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010; and *Liu v. Russia (no. 2)*, no. 29157/09, 26 July 2011.

28 — See, inter alia, European Court of Human Rights, *Kaya v. Romania*, no. 33970/05, 12 October 2006; *C.G. and Others v. Bulgaria*, no. 1365/07, 24 April 2008; and *Geleri v. Romania*, no. 33118/05, 15 February 2011. Even though Protocol No 7 is not applicable to the United Kingdom, it would seem helpful, for the sake of completeness, to mention the relevant case-law.

29 — See, inter alia, European Court of Human Rights, abovementioned judgments in *Al-Nashif v. Bulgaria* (§ 133); *C.G. and Others v. Bulgaria* (§ 56); *Kaushal and Others v. Bulgaria* (§ 35); and *Liu v. Russia* (§ 99).

30 — See, inter alia, European Court of Human Rights, abovementioned judgments in *Al-Nashif v. Bulgaria* (§§ 136 and 137); *C.G. and Others v. Bulgaria* (§ 57); and *Kaushal and Others v. Bulgaria* (§ 36).

31 — See, inter alia, European Court of Human Rights, abovementioned judgments in *Al-Nashif v. Bulgaria* (§ 137); *C.G. and Others v. Bulgaria* (§ 57); *Kaushal and Others v. Bulgaria* (§ 36); and *Liu v. Russia* (§ 99).

93. It should be noted that, from the perspective of Article 8 of the ECHR in isolation, the procedural safeguards required by the European Court of Human Rights are essentially identical. [32]

94. Lastly, with regard to Article 1 of Protocol No 7, it should be noted that that article does not provide substantially different safeguards from those under Articles 8 and 13 of the ECHR, with the result that a finding of an infringement of Articles 8 and/or 13 seems automatically to entail an infringement of Article 1 of Protocol No 7. [33]

95. In the abovementioned cases, the European Court of Human Rights was led to conclude that there had been no or a purely formal judicial review conducted by the national bodies, either because the bodies did not have sufficient evidence to establish whether or not the allegation that the applicant presented a threat to national security was proven [34] or because they considered that they did not have jurisdiction to carry out such a review. [35]

96. The European Court of Human Rights thus requires above all that expulsion measures be subject to a rigorous independent judicial review. In addition, that review must be conducted in the context of a procedure which guarantees some form of adversarial proceedings. The European Court of Human Rights mentions in this regard the solution of appointing a special representative following security clearance.

97. The fact that the European Court of Human Rights has also observed in some cases that the applicants had not been informed of the allegations against them [36] does not seem a crucial factor in establishing whether they benefited from adequate safeguards against arbitrary interference. In those cases, the finding of an infringement of Articles 8 and 13 of the ECHR seems to stem from the fact that the non-disclosure to the applicants of the allegations against them had not been counterbalanced either by a rigorous independent judicial review of the genuineness of the threat to national security or by the introduction of authentically adversarial proceedings.

98. In view of this standard defined by the European Court of Human Rights with regard to the procedural safeguards applicable to expulsion and exclusion measures, I consider that the procedural system established by the United Kingdom makes it possible, in the relevant field, to strike a fair balance between the interests connected with the procedural rights of Union citizens, on the one hand, and with State security, on the other.

99. As the European Court of Human Rights has stated with regard to cases involving the United Kingdom, SIAC is a fully independent court, fully informed of allegations against the subject of an expulsion measure and fully authorised to set aside such a measure if the threat to national security presented by that person is not duly proven. To that end, it examines all the relevant evidence, both closed and open, ensuring that no material was unnecessarily withheld from the applicant. [37] The European Court of Human Rights has also held that the power for special advocates to question the State's witnesses on the need for secrecy and to make submissions to the judge regarding the case for additional disclosure can provide an additional safeguard [38] and helps to mitigate the possible risk which SIAC might run by relying on closed evidence. [39]

32 — See, inter alia, European Court of Human Rights, abovementioned judgments in *Al-Nashif v. Bulgaria* (§§ 123 and 124); *C.G. and Others v. Bulgaria* (§ 40); *Kaushal and Others v. Bulgaria* (§ 29); and *Liu v. Russia* (§§ 87 and 88).

33 — See case-law cited in footnote 28.

34 — See, inter alia, European Court of Human Rights, *C.G. and Others v. Bulgaria* (§ 47).

35 — See, in this regard, European Court of Human Rights, abovementioned judgments in *Raza v. Bulgaria* (§ 54) and *Liu v. Russia* (§ 89 and 91).

36 — See, inter alia, European Court of Human Rights, abovementioned judgments in *C.G. and Others v. Bulgaria* (§§ 46 and 60) and *Liu v. Russia* (§ 90).

37 — See, to this effect, European Court of Human Rights, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 219, ECHR 2009, and *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 220, ECHR 2012.

38 — See European Court of Human Rights, *A. and Others v. the United Kingdom* (§ 219).

39 — See European Court of Human Rights, *Othman (Abu Qatada) v. the United Kingdom* (§ 223).

100. In the light of the foregoing and having regard to the margin of discretion enjoyed by the Member States in defining procedural safeguards to ensure a balance between the different interests at stake, I consider that the procedural rules introduced by the United Kingdom offer the national court the necessary tools to guarantee a satisfactory degree of fairness in the procedure.

101. It should be stated in this regard that, in so far as the applicable principle is still that the Union citizens should be informed, precisely and in full, of the grounds for exclusion and expulsion decisions, the national court is required, in accordance with the principle of proportionality, to mobilise all the procedural tools available to it to adapt the level of disclosure of the grounds of public security to the requirements relating to State security.

102. In the light of these considerations, I propose that the Court interpret Article 30(2) of Directive 2004/38, read in the light of Article 47 of the Charter and Article 346(1)(a) TFEU, as permitting a Member State, in exceptional cases duly justified by the need to guarantee State security and subject to review by the national court, to prevent a Union citizen from being informed of the grounds of public security for a decision to expel him, whether in detail or in summary form, where the national procedural law includes techniques with which to accommodate, on the one hand, legitimate security concerns about the nature and sources of intelligence information taken into account in the adoption of the decision concerned and, on the other hand, the need to allow the individual to benefit sufficiently from procedural rules. It is for the national court, in accordance with the principle of proportionality, to use all the procedural tools available to it to adapt the level of disclosure of the grounds of public security to the requirements relating to State security.

103. Contrary to the claims made by ZZ, the Commission and the EFTA Surveillance Authority, I do not think that the abovementioned judgment of the European Court of Human Rights in *A. and Others v. the United Kingdom* modifies the standard described above in relation to exclusion and expulsion decisions taken against Union citizens on grounds of public security. More specifically, I do not think that that judgment requires the application, in this field, of a principle whereby, even if it is contrary to requirements relating to State security, those persons should, as a minimum and without any possible exception, be informed of the essence of the public security grounds against them.

104. In my view, it must be stated, from the outset, that a distinguishing feature of that judgment is that it lays down the necessary requirements for compliance with Article 5(4) of the ECHR with regard to the detention of foreign nationals suspected of terrorism. It concerned UK legislation which permitted such persons to be detained indefinitely without trial pending their expulsion.

105. Article 5(4) of the ECHR constitutes a *lex specialis* in relation to the more general requirements of Article 13 of the ECHR.[40] In connection with the application of Article 5(4) of the ECHR, the European Court of Human Rights recognised that the use of confidential material may be unavoidable where national security is at stake, whilst stating that this does not mean 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.[41]

106. In its abovementioned judgment in *A. and Others v. the United Kingdom*, the European Court of Human Rights proceeded on the basis of the finding that 'in the circumstances of the present case, and in view of the dramatic impact of the lengthy – and what appeared at that time to be indefinite – deprivation of liberty on the applicants' fundamental rights, Article 5[(4) of the ECHR] must import substantially the same fair trial guarantees as Article 6[(1) of the ECHR] in its criminal aspect'.[42]

40 — See, inter alia, European Court of Human Rights, abovementioned judgments in *Chahal v. the United Kingdom* (§ 126) and *A. and Others v. the United Kingdom* (§ 202).

41 — See European Court of Human Rights, *Chahal v. the United Kingdom* (§ 131).

42 — See European Court of Human Rights, *A. and Others v. the United Kingdom* (§ 217).

107. With regard precisely to the requirements to be observed in criminal proceedings, the European Court of Human Rights has ruled that 'the right to a fair criminal trial under Article 6 [of the ECHR] includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against the accused'.[43] The European Court of Human Rights considers, however, that 'it might sometimes be necessary to withhold certain evidence from the defence on public interest grounds'.[44] It has stated in this regard that the entitlement to disclosure of relevant evidence is not an absolute right[45] and that 'there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person'.[46] The European Court of Human Rights has nevertheless held that 'there will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities'.[47] It thus examines whether the proceedings as a whole were fair[48] or 'the extent to which counterbalancing measures can remedy the lack of a full adversarial procedure'.[49] Lastly, the European Court of Human Rights has stressed that a conviction cannot be based solely or to a decisive degree on confidential evidence where the accused or his representative has not, at any stage in the proceedings, been informed of the content of that evidence.[50]

108. Applying substantially the same fair trial guarantees within the framework of Article 5(4) of the ECHR as those under Article 6(1) of the ECHR in its criminal aspect, in its abovementioned judgment in *A. and Others v. the United Kingdom*, the European Court of Human Rights held that 'it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'.[51] According to that court, '[w]here full disclosure was not possible, Article 5(4) [of the ECHR] required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him'.[52]

109. Examining the procedure provided for by the SIAC Act in the light of these requirements, the European Court of Human Rights took the view, whilst stressing that 'SIAC was best placed to ensure that no material was unnecessarily withheld from the detainee'[53] and the 'important role'[54] played by the special advocates, that they 'could not perform [their] function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'.[55] It also held that 'where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5[(4) of the ECHR] would not be satisfied'.[56]

43 — Ibid. (§ 206).

44 — Idem.

45 — See, inter alia, European Court of Human Rights, *Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000, and *Kennedy v. the United Kingdom*, no. 26839/05, § 187 and the case-law cited, 18 May 2010.

46 — See, inter alia, European Court of Human Rights, *A. and Others v. the United Kingdom* (§ 205 and the case-law cited).

47 — Idem.

48 — Ibid. (§ 208 and the case-law cited).

49 — Ibid. (§ 207).

50 — Ibid. (§§ 206 to 208 and the case-law cited).

51 — Ibid. (§ 218).

52 — Idem.

53 — Ibid. (§ 219).

54 — Ibid. (§ 220).

55 — Idem

56 — Idem.

110. It is true that, if the main proceedings were considered having regard to the requirements thus laid down by the ECHR in connection with Article 5(4) of the ECHR, it would be difficult to conclude that the proceedings are fair. It is not disputed that ZZ received only little information on the allegations against him and that the main reasons justifying the expulsion measure remained confidential throughout the procedure before SIAC. By that authority's own admission, it is for reasons which are explained only in the closed judgment that it was satisfied that the personal conduct of ZZ represented a genuine present and sufficiently serious threat which affected a fundamental interest of security, namely its public security, and that it outweighed his right to enjoy family life in the UK. [57]

111. However, I do not think that Article 47 of the Charter requires the analogous application of guarantees as rigorous as those under Article 6(1) of the ECHR in its criminal aspect to disputes concerning expulsion measures. In my view, it is legitimate that the requirements governing whether or not a procedure can be regarded as fair may vary according to the nature of the contested decision and must be determined in the light of the circumstances of the case. [58] Consequently, I understand why the European Court of Human Rights has adopted a higher standard for procedural rights where it has been faced with detention situations than it has applied where it assessed the compatibility of expulsion decisions with Articles 8 and 13 of the ECHR. Furthermore, in its abovementioned judgment in *Othman (Abu Qatada) v. the United Kingdom*, it clearly stated that the reasoning which it adopted in its abovementioned judgment in *A. and Others v. the United Kingdom* is not generally applicable, thus showing that the fairness of the same national procedure may be assessed differently depending on the context of that assessment. [59]

112. In my view, in the same vein of stressing the variable nature of the applicable standards according to the context, the specific features of the national procedural system in question in the main proceedings, together with the fact that the present reference for a preliminary ruling relates to the freedom of movement and the right of residence of Union citizens, preclude the application, by analogy, of the reasoning adopted by the Court in its abovementioned judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*. In that judgment, the Court set out, with regard to the rights of the defence and effective judicial protection, specific requirements governing measures freezing funds and economic resources, having regard to the specific procedural context in which such measures are adopted. Nevertheless, in that judgment, the Court was careful to point out that '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'. [60]

113. Lastly, I will respond to the argument put forward by the EFTA Surveillance Authority to the effect that it would be inconsistent if, in accordance with a ruling of the House of Lords, [61] a person who is the subject of a control order under the Prevention of Terrorism Act 2005 may be informed of the main allegations against him whilst a Union citizen who is the subject of an expulsion decision could be deprived of such disclosure.

57 — *ZZ v. Secretary of State for the Home Department*, mentioned in footnote 11, paragraph 20. It should be noted, however, that the public judgment contains a number of serious complaints on which ZZ was able to make representations in the course of the procedure. Accordingly, in the claims of which the appellant was informed, it is alleged that he was involved in the activities of the Groupe islamique armé (GIA) network and in terrorist activities. More specifically, it was revealed that he is or was the owner of objects found in Belgium in premises rented by a known extremist where, among other things, a quantity of arms and munitions was found. Furthermore, the file shows that the appellant made submissions on other allegations, such as contacts with and support for certain specifically named persons and possession of large sums of money.

58 — See, to this effect, European Court of Human Rights, *Kennedy v. the United Kingdom* (§ 189).

59 — See European Court of Human Rights, *Othman (Abu Qatada) v. the United Kingdom* (§ 223).

60 — Paragraph 342.

61 — *Secretary of State for the Home Departments* v *AF and others* [2009] UKHL 28, available at the following internet address: http://www.bailii.org/uk/cases/UKHL/2009/28.html.

114. As I have previously stated, I think that the level of disclosure of grounds of public security is liable to vary according to the procedural context of the contested decision and according to the nature of the measures in question. Control orders are measures which, by various means, restrict the freedom of persons suspected of terrorism, for example with respect to their place of residence, their movements, their relationships and their use of means of communication. These measures may, in their strictest form, have similar effects to a detention measure. Control orders therefore represent a specific category of measures which is not, in my view, comparable with expulsion decisions under Directive 2004/38. In any event, the fact that a national court considers it appropriate, in applying a national law for the prevention of acts of terrorism, to extend the standard defined by the European Court of Human Rights in its abovementioned judgment in *A. and Others v. the United Kingdom* to measures other than detention is not, in itself, of such a nature as to have an impact on the level of procedural requirements which, it seems, must stem, in connection with the implementation of EU law, from Article 30(2) of Directive 2004/38, read in the light of Article 47 of the Charter and Article 346(1)(a) TFEU.

IV – Conclusion

115. In the light of the foregoing, I propose that the Court answer the question referred for a preliminary ruling by the Court of Appeal (England and Wales) (Civil Division) as follows:

Article 30(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union and Article 346(1)(a) TFEU, must be interpreted as permitting a Member State, in exceptional cases duly justified by the need to guarantee State security and subject to review by the national court, to prevent a Union citizen from being informed of the grounds of public security for a decision to expel him, whether in detail or in summary form, where the national procedural law includes techniques with which to accommodate, on the one hand, legitimate security concerns about the nature and sources of intelligence information taken into account in the adoption of the decision concerned and, on the other hand, the need to allow the individual to benefit sufficiently from procedural rules.

It is for the national court, in accordance with the principle of proportionality, to use all the procedural tools available to it to adapt the level of disclosure of the grounds of public security to the requirements relating to State security.