Neutral Citation Number: [2021] EWCA Civ 972

Case No: T3/2020/1211

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
The President of the Queen's Bench Division and Mrs Justice Farbey
[2020] EWHC 1695 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2021

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE STUART-SMITH
and
THE RT HON LADY JUSTICE ELISABETH LAING DBE

- -

Between:

THE QUEEN ON THE APPLICATION OF **(1) REPRIEVE** **(2) RT HON DAVID DAVIS MP** **(3) DAN JARVIS MBE MP**	**Appellants**
- and -	
THE PRIME MINISTER	**Respondent**

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- -

Mr Ben Jaffey QC, Mr Jason Pobjoy and Ms Natasha Simonsen (instructed by **Birnberg Peirce**) for the **Appellants**
Sir James Eadie QC, Mr Ben Watson QC and Mr James Stansfeld (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 28 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on 30 June 2021.

Lord Burnett of Maldon CJ:

Introduction

1. This is the judgment of the Court to which all members have contributed.

2. The underlying judicial review proceedings behind this appeal seek to challenge the decision of the Prime Minister, announced on 18 July 2019, not to hold a public inquiry into alleged complicity of British state agents in the unlawful rendition, detention and mistreatment of individuals by other states in the years following the attack on New York in September 2001. The Divisional Court (Dame Victoria Sharp P and Farbey J) determined two preliminary issues against the claimants. The claimants appeal against that determination. The issues are:

    a) Does article 6(1) of the European Convention on Human Rights ("the Convention") apply to the claim for judicial review? and, if it does,

    b) Are the claimants entitled to disclosure in accordance with the standard set in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269 ("*AF (No 3)"*)?

    The Divisional Court answered 'no' to each question.

The factual background

3. On 6 July 2010, the then Prime Minister, the Rt Hon David Cameron MP, announced that the Rt Hon Sir Peter Gibson would chair an independent inquiry to investigate the allegations ("the Gibson Inquiry"). The Gibson Inquiry would not be fully public because some information would need protection, but it would be able to consider all the relevant material. The Gibson Inquiry then began its preparatory work.

4. On 12 January 2012, the Metropolitan Police announced a criminal investigation into allegations concerning the rendition and mistreatment of two Libyan nationals (Messrs al-Saadi and Belhaj). On 18 January 2012, the Lord Chancellor and Secretary of State for Justice, the Rt Hon Kenneth Clarke QC MP, announced that the Gibson Inquiry could not start formally until the end of the police investigation. He said that the Government intended to have "an independent, judge-led inquiry" once the investigation was over, to "establish the full facts and draw a line under these issues".

5. Sir Peter's report on his inquiry's preparatory work ("the Gibson Report") was published in December 2013. The Government's response was to say that it would be wrong for an inquiry to be held into matters which the police were still investigating. It invited the Intelligence and Security Committee of Parliament ("the ISC") to look into issues raised by the Gibson Report. After the ISC inquiry and the police investigation, the Government would be able to take a final view on whether a further judicial inquiry was necessary.

6. On 9 October 2018, the ISC published two reports: "Detainee Mistreatment and Rendition: 2001-2010", and "Detainee Mistreatment and Rendition: Current Issues". The Government published its response to those reports on 22 November 2018. On 18 July 2019, the Minister for the Cabinet Office, the Rt Hon David Lidington MP,

announced that the Government had decided not to hold an inquiry because the various steps which had been taken had led to improved policies and practices.

The claim

7. The claim was lodged on 9 October 2019. The claimants invoke article 3 of the Convention, and the positive procedural obligation to hold an effective independent investigation into allegations of torture and ill-treatment. The claimants argue that that procedural obligation binds the Government in this case, and that the decision not to hold an inquiry breaches it. They contend also that the decision is irrational because the steps taken by the Government were not a sufficient reason for abandoning a public inquiry into the allegations.

8. In defence of the claim, the Prime Minister wishes to rely on material which cannot be disclosed without damaging the interests of national security. Hilliard J granted permission to apply for judicial review on 25 November 2019 and Special Advocates have since been appointed. The closed process, which has been stayed pending resolution of the preliminary issues, will be governed by the provisions of the Justice and Security Act 2013.

9. The decision on the preliminary issues would help to define, in due course, the scope of the disclosure which the Prime Minister will have to make to the claimants in the judicial review proceedings.

The Human Rights Act 1998

10. Section 1(1) of the 1998 Act defines "the Convention rights". They are set out in Schedule 1. They include articles 3 and 6. In interpreting Convention rights, a court must "take into account" the materials listed in section 2(1). Those include judgments and decisions of the European Court of Human Rights ("the Strasbourg Court") (section 2(1)(a)).

11. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. "Public authority" includes "any person certain of whose functions are of a public nature but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament" (section 6(6)).

12. Section 7 is headed "Proceedings". Section 7(1) enables a person who claims that a public authority has acted, or proposes to act, in a way which is made unlawful by section 6(1) to bring proceedings against that authority in the appropriate court or tribunal (defined in section 6(2)) or to rely on the Convention rights in any legal proceedings, but "only if he is (or would be) a victim of the unlawful act". Section 7(3) provides that if proceedings are brought on an application for judicial review, "the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act". By section 7(7), a person is a victim of an unlawful act "only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in [the Strasbourg Court] in respect of that act".

13. Article 34 of the Convention provides:

> "Individual applications
>
> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

14. Article 34 can be contrasted with article 33, which permits any of the contracting parties to refer to the Strasbourg Court "any alleged breach of the provisions of the Convention and the Protocols thereto" by another contracting party.

15. Article 3 provides:

> "Prohibition of torture
>
> **Article 3**
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

16. Article 6(1) has a civil and a criminal limb. It provides:

> "Right to a fair trial
>
> **Article 6**
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Both are set out in Schedule 1 to the 1998 Act.

The Judgment of the Divisional Court

The scope of article 6

17. The court noted that the phrase "civil rights and obligations" has an autonomous meaning under the Convention. Some rights which would be seen as public law rights in England and Wales fall within article 6(1) if "the outcome is decisive for private rights and obligations" (*Ferrazzini v Italy* (2002) 34 EHRR 45, para 27). Claims made in public law proceedings do not necessarily engage article 6 (para 14). Some involve the "hard core of public-authority prerogatives" referred to in para 29 of *Ferrazzini* (a tax dispute did not come within article 6). The Divisional Court referred to *Maaouia v*

France (2001) 33 EHRR 42: immigration decisions do not determine civil rights even when someone is resisting an adverse immigration decision by relying on Convention rights, as is very common (para 15). The test for deciding whether article 6 is engaged is "the nature of the proceedings and not the articles of the Convention which are alleged to be violated" (*RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110, at para 175).

18. The court deduced four propositions from its review of authority.

    a) Civil rights can be described as "rights in private law": *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295, para 79).

    b) A decision by a public authority which is decisive of the enforceability of a contract governed by private law determines a civil right (*Alconbury*, para 80, citing *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455).

    c) A personal claim for compensation, including a claim for compensation for ill treatment by agents of the state, is a claim about a civil right (*Aksoy v Turkey* (1997) 23 EHRR 553 (para 92)).

    d) A right protected by the 1998 Act may be a civil right in so far as its breach would amount to a statutory tort (*QX v Secretary of State for the Home Department* [2020] EWHC 1221 (Admin); [2020] 3 WLR 914, paras 42-44, per Farbey J).

19. The court concluded that article 6(1) is not engaged in procedures that do not determine civil rights and obligations "in the sense of adjudicating upon and making a dispositive legal determination of rights", referring to para 45 of *QX*, and citing para 61 of Al-*Fayed v United Kingdom* (1994) 18 EHRR 393. The result must be "directly decisive" of a civil right and obligation (*Le Compte, Van Leuven and De Meyer v Belgium* (1982) 4 EHRR 1, para 47).

AF (No 3)

20. The court noted that *AF (No 3)* was a challenge to a control order made under the Prevention of Terrorism Act 2005. The issue was whether the closed material procedure complied with article 6. The House of Lords applied *A v United Kingdom* (2009) 49 EHRR 625. In that case the Grand Chamber of the Strasbourg Court had considered a similar procedure (reviews of orders made under the Anti-terrorism, Crime and Security Act 2001, which gave the Secretary of State power to detain people suspected of terrorism with a view to their deportation). The case concerned the right to liberty, and indefinite periods of detention. In that context, the Strasbourg Court said that article 5(4) imported "substantially the same fair trial guarantees as article 6(1) in its criminal aspect" (judgment, para 217).

21. The Government submitted in *AF (No 3)* that a less stringent standard applied to control orders, because the proceedings were civil in character. Lord Phillips did not consider that the Strasbourg Court would draw that distinction in relation to the minimum disclosure which was necessary for a fair trial. He applied the reasoning of the Grand

Chamber in *A v United Kingdom* and held, at para 22, that a controlee must be given enough information about the allegations against him to enable him to give effective instructions in relation to those allegations. He need not be given details, or the sources of the evidence on which the allegations were based. If the open material consisted only of general assertions and the case against him was based solely or to a decisive degree on closed material, the requirements of a fair trial would not be satisfied, no matter how cogent the closed material might be.

22. The Divisional Court noted (para 23) that where executive action against a claimant affects his liberty, the case against him cannot turn solely or decisively on closed material. The court added that the *AF (No 3)* standard of disclosure has subsequently been applied to asset-freezing orders, directions to banks pursuant to the Counter-Terrorism Act 2008, and to terrorism prevention and investigation measures (TPIMs) under the Terrorism Prevention and Investigation Measures Act 2011. The authorities are summarised in *Bank Mellat v Her Majesty's Treasury (No 4)* [2015] EWCA (Civ) 1052; [2016] 1 WLR 1187 at para 22. They were all examples of measures which were "highly restrictive…with very serious effects".

23. By contrast, the court noted that in cases which do not involve executive action against a person, the courts have held there may be a fair trial without disclosure which complies with *AF (No 3)*. In *Tariq v Home Office* [2011] UKSC 35; [2012] 1 AC 452, the claimant challenged the removal of his security clearance and his suspension from his employment on the grounds of national security. He claimed that he had been discriminated against on the grounds of his race and religion. Lord Mance, at para 27, distinguished between the claimant's case and the *Bank Mellat (No 4)* examples. He referred to *AHK v Secretary of State for the Home Department* [2009] EWCA (Civ) 287; [2009] 1 WLR 2049, in which the Court of Appeal, in a challenge to a refusal of naturalisation, did not apply *AF (No 3)*. Lord Mance said that the balance referred to in para 217 of *A v United Kingdom* depended on the circumstances of the case. A case in which the state sought to detain, or virtually to detain, a person was different from a case in which a person was pursuing a claim for discrimination against which the state was trying to defend itself. Lord Dyson observed that the courts were entitled to balance the rights of the individual against other interests (judgment of Lord Dyson, paras 139-40 and 147).

24. The court also referred, at para 27, to *Kiani v Secretary of State for the Home Department* [2015] EWCA (Civ) 776; [2016] QB 595. The requirements of article 6 depend on the context. It cited two cases which referred to a "sliding scale" or a "spectrum" of disclosure obligations (*R (AZ) v Secretary of State for the Home Department* [2017] EWCA (Civ) 35; [2017] 4 WLR 94, para 29, and *K v Secretary of State for Defence* [2017] EWHC 830 (Admin)). The court concluded that the approach must depend on the context and on the facts and could consider both what is at stake, and what is needed to dispose fairly of the litigation.

25. The court concluded the right to a "lawful decision by the executive" did not give rise to a civil right for the purposes of article 6(1) (see paragraphs 79 and 80 of *Alconbury*). The application for judicial review was made on public law grounds. Even if it were assumed that a breach of the investigative duty inherent in article 3 could, in principle, give rise to individual rights, the claimants would not, in any public inquiry, be asking for a determination of their own article 3 rights. They would, instead, be relying on allegations about breaches of the article 3 rights of other people. The claimants were

not "victims" of violations of article 3. It followed that no duty to investigate article 3 breaches was owed to the claimants as victims. It was difficult to see how that claim had anything to do with the claimants' civil rights (para 41).

26. The claimants could not invoke article 6(1) on behalf of people who were not connected with the proceedings (para 43).

27. The court nonetheless considered what standard of disclosure would be required by article 6 in this case. The court did not accept that, even if article 6 applied, it required *AF (No 3)* disclosure. No-one's liberty was at stake. The refusal of a public inquiry did not give rise to a deprivation of liberty, or to anything similar to such deprivation. The question was whether the court should extend *AF (No 3)* to this case. That involved a balance: see *Tariq*. There was a public interest in holding the Government to account. On the other hand, the claimants were not being subjected to executive action based on allegations against them.

28. The court rejected the submission that *Secretary of State for the Home Department v Mohamed and CF* [2014] EWCA (Civ) 459; [2014] 1 WLR 4240 decided that *AF (No 3)* disclosure obligations applied to a case in which no allegations were made against a claimant. Para 16 of the judgment confirmed that *AF (No 3)* obligations applied in control order and TPIM proceedings both to the Secretary of State's case against the controlee and to any positive case which he makes against the control order (in that case, an application to strike out the measure as an abuse of process).

29. The court considered what was necessary for the fair disposal of the proceedings. It pointed out that the disclosure process had not yet begun, that Special Advocates would be able to probe the Prime Minister's case and that the process would be supervised by the court (paras 48 – 54).

The Grounds of Appeal

30. There are two grounds of appeal:

    a) The court erred in holding that article 6 does not apply to the claim. The Secretary of State did not argue that the claimants are not "victims" for the purposes of the 1998 Act, yet that was the basis of the court's analysis. The claimants have an enforceable civil right to an effective investigation under article 3, which is actionable under the 1998 Act as a claim for breach of statutory duty. Article 6(1) is therefore engaged.

    b) The court erred in its approach to *AF (No 3)* which applied in this case because article 3 is a fundamental right, there is a need for public confidence in the system of justice and because the claimants cannot give effective instructions to the Special Advocates without *AF (No 3)* disclosure.

31. In response to an order by Carr LJ, the Secretary of State lodged a Respondent's Statement in opposition to the notice of appeal which included an assertion that the Secretary of State had positively argued that the claimants were not victims. That was the court's understanding (see para 34 of the judgment below).

Submissions on the appeal

The Claimants

32. Mr Jaffey QC submits that the claimants are victims for the purposes of article 34 of the Convention. The Strasbourg Court applies that concept flexibly. He relied on *Lizarraga v Spain* (2007) 45 EHRR 45 and two cases about secret surveillance, *Klass v Germany* (1979-80) 2 EHRR 214 and *Zakharov v Russia* (2016) 63 EHRR 17. He also relied on *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* (2014) 37 BHRC 423. He submits that those decisions support a broad principle that if there is no identifiable victim in a position or prepared to make a claim, then, in order to give Convention rights effect, the Strasbourg Court would be flexible in its application of the concept of victim. That principle applied in this case. That court would regard the claimants as victims who could thus rely on the positive investigative obligation imposed on the United Kingdom by article 3 to bring any abuses to light. It would be unacceptable if alleged breaches of article 3 in which the United Kingdom was complicit could not be fully investigated.

33. He submits that article 6(1) should also be given a wide interpretation. The traditional distinction between public law and private law was not determinative. *Ferrazzini* shows that the Convention is a living instrument which must be interpreted in the light of contemporary conditions. A claim that article 3 had been breached would result in a determination of civil rights. He relied on various authorities, including *QX*, para 44. The claimants put their case in their skeleton argument in this way: "[They] have an enforceable civil right to an effective investigation into the violation of Article 3. Article 6 therefore applies to the claim".

34. The claimants' principal factual concern is that AA, a witness from the Secret Intelligence Service, has said in a statement that a review in October 2018 identified 15 cases in which it was arguable that there was an unmet investigative obligation, although the Prime Minister's defence to the claim argues that there is no longer any unmet investigative obligation. The claimants contend that they are entitled to disclosure in those cases of "sufficient information to make a meaningful response to the argument that there is now no unmet investigative duty". Mr Jaffey submits that the Divisional Court was wrong to conclude that, even if article 6 applies, the claimants are not entitled to an irreducible minimum of disclosure about those cases despite any damage to national security. He contends that *Mohamed and CF* shows that disclosure will be ordered in line with *AF (No 3)* even when the case does not concern allegations against the claimant. The claimants are especially well qualified to help a court find out the truth but need more information to do so. The claimants stress the importance of such disclosure to maintaining confidence in the administration of justice.

The Prime Minister

35. Sir James Eadie QC submits that the claimants were not victims, as that term has been explained in the decisions of the Strasbourg Court. The surveillance cases are distinguishable and *Campeanu*, which was an exceptional case on its facts, does not stand for any wide general proposition. This claim would not result in the determination of a civil right, and, therefore, article 6(1) could not apply. That left, at most, a claim to enforce a public law obligation to hold a public inquiry, which was not a claim which would determine a civil right. On any view, the court's approach to the question

whether the claimants were entitled to disclosure complying with *AF (No 3)* was correct, for the reasons it gave.

Discussion

36. The central question is whether the claim, relying as it does on article 3 of the Convention, will determine the civil rights of these claimants. The prior question is whether the claimants can rely upon article 3 in these judicial review proceedings. To do so the claimants must show that they are "victims" for the purposes of article 34 of the Convention. We shall return to whether the public law *Wednesbury* challenge determines a civil right.

37. These proceedings have been brought in the public interest, rather than to vindicate the personal interests of Reprieve or the two claimant Members of Parliament. Are they nonetheless victims as that word is interpreted by the Strasbourg Court?

38. The claimants suggest that any decision by a court in a claim relying on Convention rights necessarily amounts to a determination of the civil rights of the party who relies on them. Therefore, they submit that it follows that any decision on their claim will amount to a determination of their civil rights.

39. Convention rights are not free-floating entities which are available to and enforceable by anyone who disagrees with a decision of a public authority on the grounds that it breaches, or may breach, somebody's Convention rights. Convention rights have effect in the law of England and Wales to the extent provided for by the 1998 Act. Therefore, the starting point is not article 3, or article 6(1), but that Act. The claimants' case is that the Prime Minister breached section 6(1) of the 1998 Act in deciding not to hold a judicial inquiry, thereby failing to comply with the positive investigative obligation imposed by article 3. The effect of section 7(1) and (7) of the 1998 Act is that a person can bring a claim founded on a Convention right, and only has standing in an application for judicial review, "if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the [Strasbourg Court] in respect of that act". The clear purpose of section 7 of the 1998 Act is to permit, and only to permit, a victim to litigate an alleged breach of Convention rights. It is only if the litigant is a victim that the Convention right in question can arguably be a "civil right" of his for the purposes of article 6(1).

40. There are two broad groups of cases in which the Strasbourg Court has decided that a person who does not allege, or cannot show, that he himself has directly suffered a breach of a Convention right can nevertheless bring a claim in Strasbourg.

41. The first group of cases concerns secret surveillance. The context of the most recent case to which we were referred, *Zakharov*, was possible interception of mobile telephone communications by the Russian state. The applicant could not show that his communications had been intercepted. Instead he claimed that the relevant legislation itself, rather than a specific interception of his communications, was an interference with his article 8 rights. In para 164 of its judgment, the Strasbourg Court noted that the Convention does not provide for an *actio popularis*. In general, its task is not to review legislation in the abstract, but to decide whether laws which were applied to the applicant violated the Convention. A person must be able to show that he is 'directly affected' by the measure complained of. This was indispensable but was not to be

applied in a mechanical way. The Strasbourg Court then reviewed the cases about secret surveillance. In paras 171-172, it clarified the circumstances in which an applicant "can claim to be the victim of a violation of article 8 without having to prove that a secret surveillance measure had in fact been applied to him". Before an applicant would be able to claim that the mere existence of secret surveillance measures made him a victim for the purposes of article 34, the court would take into account the scope of the relevant legislation and the availability of safeguards at national level. It held that Russian law was defective in some respects and gave rise to the risk of arbitrary conduct. The law did not provide for adequate judicial supervision and safeguards against abuse. This was a breach of article 8 which directly affected the applicant so that he should be treated as a victim.

42. This line of cases provides no analogy with the circumstances of this claim.

43. The second group of cases includes three broad types: (a) direct victims who have died in circumstances which engage article 2 (the right to life) in which others, such as their close relatives, can bring a claim; (b) applicants who have raised complaints of breaches of other articles of the Convention but who have died during proceedings; and (c) claims brought by a representative organisation on behalf of actual or likely victims (such as *Lizarraga*).

44. Mr Jaffey relied most strongly on *Campeanu*. Even the title of the case is instructive. The applicant was the *Centre for Legal Resources on behalf of Valentin Campeanu* pursuing a discrete claim on behalf of an individual. This decision is not authority for any general principle; and certainly not for a principle that, to make the Convention effective, a person who cannot point to any violation of his own rights should nevertheless qualify as a victim where none has come forward, or can be identified, but there is some evidence that there might be possible victims somewhere in the world. As the Strasbourg Court itself recognised, *Campeanu* was an exceptional case. Mr Campeanu was a victim of apparent, and documented, breaches of article 3. He lacked the capacity to make a claim for himself while he was alive. He had then died. The state had breached its obligation to appoint a person to represent his interests while he was alive. The applicant organisation had contact with the victim while he was alive and had then acted on his behalf in domestic proceedings without objection from the Romanian authorities. It had been recognised as his *de facto* representative. This decision of the Strasbourg Court does not establish that were the claimants to make an application relying on the investigative obligation under article 3, it would recognise them as victims for the purposes of article 34 of the Convention.

45. A person who is alive and who has suffered article 3 ill treatment knows what he has suffered. He might not know who inflicted that treatment. At most, such a person might be able to rely, by analogy, on the surveillance cases, to argue against a contracting state, or several contracting states, that he is a victim but does not know who the perpetrator was. There is no guarantee that the Strasbourg Court would recognise such a speculative claim. But that potential claim, by a direct victim of ill treatment, is stronger than the claimants' case. They have not suffered ill treatment arguably prohibited by article 3. They do not represent a person unable to speak for himself who has.

46. To recognise the claimants as victims of an alleged violation of the procedural obligation under article 3 in this case would mark a significant development of the

Strasbourg case law and, as such, is not a step that a domestic court should take. That said, we do not consider it likely that the Strasbourg Court would recognise these claimants as victims of any violation of article 3. To do so would introduce a right of private individuals and organisations to bring claims in the public interest, something that the court has set its face against save in very limited circumstances.

47. We conclude that the claimants are not victims of any violation of article 3 for the purposes of article 34 of the Convention. The effect of section 7(1) of the 1998 Act is that they cannot bring a claim that the Prime Minister has acted in way which is made unlawful by section 6(1). Moreover, the effect of section 7(3) is that, in so far as the judicial review claim rests on such an allegation (by not complying with the investigative obligation imposed by article 3) the claimants do not have standing to bring that claim.

48. We do not underestimate the importance of 'the right to the truth' in the context of allegations of breaches of article 3 (see para 191 of *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 23). But the 1998 Act does not confer that right as an enforceable right on the public at large. It confers it, rather, on the victim of the alleged breach of article 3, and only such a victim.

49. If the claimants are not victims for the purposes of section 7 of the 1998 Act, the basic premise of Mr Jaffey's argument falls away. The claim will not decide whether they have suffered the statutory tort of a breach of section 6(1) of the 1998 Act. An article 3 investigation would not itself determine any civil rights or obligations.

50. It has been assumed in the underlying proceedings that the claimants have standing to argue that the decision was irrational at common law. Whether that assumption is right is not before us. But assuming it to be correct, the next question is whether article 6 applies to that challenge. The claim, formulated in this way, is a pure public law claim. It does not affect, let alone is it decisive of, any civil right of the claimants. They do not have a civil right to require the Prime Minister to make a lawful decision whether to hold an inquiry into alleged complicity in unlawful rendition, detention and mistreatment.

51. The irrationality challenge is of a type which falls squarely within the "hard core of public authority prerogatives" referred to by the Strasbourg Court in para 29 of *Ferrazzini*. There is, we consider, an analogy between this case and the situation described by the Strasbourg Court in para 218 of *Tunc v Turkey* (application no. 24014/05; 14 April 2015), where article 6 was held not to apply to proceedings seeking to challenge a decision not to prosecute someone in connection with a killing.

52. We conclude that the Administrative Court will not be making any "determination of [the] civil rights and obligations" of the claimants when deciding the irrationality challenge.

53. The Divisional Court determined whether, even if article 6 applied, disclosure was necessary in line with the standards of *AF (No 3)*. We shall do the same. This case is as much about seeking to force the Government to disclose to the claimants, and thus into the public domain, material seen by Sir Peter Gibson and the ISC as it is about the decision under challenge itself. The focus on article 6 and thus *AF (No 3)* is necessary only to avoid the possibility that disclosure will be made to Special Advocates but not

into the public domain. Under the Justice and Security Act 2013 material damaging to national security is not disclosed beyond the Special Advocates. When article 6 is in play (or its analogue when article 5(4) is in issue) the Strasbourg Court has determined that national security must give way in some limited circumstances.

54. We do not accept Mr Jaffey's submission that *Mohamed and CF* decides that *AF (No 3)* disclosure should apply in a legal context in which the state is not making any allegation against the claimant, and not applying any coercive measures to him. *Mohamed and CF* was a case in which the Secretary of State had imposed TPIMs on the appellants. They argued that the TPIMs could only have been imposed as a result of their illegal detention in, and rendition from, Somaliland, and were thus an abuse of process. The Court of Appeal decided that *AF (No 3)* disclosure obligations applied to the Secretary of State in relation to the claimants' application to strike out the TPIMs for abuse of process. This was because of the close connection between the validity of the TPIMs and the abuse of process application (see, in particular, paras 16 and 19 of the judgment of the Court of Appeal). This was an unusual case. It is not authority for a wide proposition that, outside the field of coercive measures such as TPIMs, a claimant is entitled to disclosure meeting the *AF (No 3)* standard in a case in which no allegations are made against him, but he wishes the court to investigate allegations of misconduct by the authorities.

55. We agree with the Divisional Court, and accept Sir James' submission, that the purpose of *AF (No 3)* disclosure is to enable a claimant to give effective instructions to Special Advocates so that the most effective challenge can be made to the allegations which underlie the coercive measure in question (whether it be a control order, a TPIM, or a freezing order). That purpose does not apply here. The claimants complain that without disclosure they cannot give effective instructions to the Special Advocates; but those instructions would not concern any allegations against the claimants and would not enable the Special Advocates to challenge or to rebut any such allegations. We reject Mr Jaffey's submission that the court applied "a restrictive and unprincipled gloss" to *AF (No 3)*. On the contrary, we consider that the judgment below demonstrates an accurate understanding of the principle in *AF (No 3)*, and its limits.

Conclusion

56. The claimants in the judicial review proceedings are not "victims" for the purposes of section 7 of the 1998 Act and, in consequence, cannot rely upon the alleged violation of the procedural obligation under article 3 of the Convention to challenge the decision not to hold a judicial inquiry. The civil limb of article 6 does not apply to these proceedings. Disclosure of the sort envisaged in *AF (No 3)* would not be necessary even were these proceedings governed by article 6. We dismiss this appeal