The main significance of this case is that it marks a step along the road towards making assisted suicide legal – a destination which many people, including the writer of this note, believe to be desirable. But the reasoning it contains has wider implications for the criminal law that are disquieting.

In the first place, the argument that succeeded in this case is equally applicable to other criminal offences in which Article 8 is also engaged; and indeed to offences that engage Articles 9, 10 and 11 as well, because these too specify that any interference with the rights that they protect must be "in accordance with the law". Complicity in suicide could be the first of many broad but rarely-prosecuted offences which the DPP must cut down to size by issuing an "offence-specific" prosecution policy.

But behind this lies a second and more basic issue. Is it really compatible with the rule of law that, when an Act of Parliament makes a certain form of behaviour a criminal offence, the DPP should in effect decriminalise it, in whole or in part, by saying when it will and will not be prosecuted? The orthodox answer, forcibly expressed by the Court of Appeal in the judgment which the House of Lords reversed, is "no": once Parliament has created an offence, only Parliament has the authority to redraw its boundaries so that it catches fewer people in its net. For any other organ of the State to attempt to do so is to infringe the first rule of the constitution, which is the supremacy of Parliament.

That the highest court should rebel against the orthodox view is, in a sense, quite understandable. In recent years Parliament, driven by the executive, has got into the habit of expanding criminal liability in all directions with little or no thought, and almost completely out of the habit of contracting it. And when authority is over-used like this, respect for it is dented. As the revolutionaries said about the authority of the French ruling classes before 1789: "*Vouz l'avez perdu en en abusant.*"

J.R. SPENCER

STOP PRESS: KAFKAESQUE PROCEDURES ARE UNFAIR

IN *R* v. *The Chancellor of Cambridge* (1723) 1 Stra. 557, it was observed that "even God himself did not pass sentence upon Adam, before he was called upon to make his defence". The importance of affording accused individuals such opportunities – and of disclosing adverse evidence in order that they may be fully exploited – is hard-wired into our criminal justice system. But there has recently been protracted litigation, culminating in the House of Lords' decision in *Home*

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Secretary v. *AF (No. 3)* [2009] UKHL 28, [2009] 3 W.L.R. 74, over the extent to which similar safeguards should attend the imposition upon suspected terrorists of "control orders" under the Prevention of Terrorism Act 2005 ("PTA"). Such orders may entail far-reaching consequences, including curfews, that can amount to something "not far short of house arrest", as Lord Hope put it in *AF*.

The PTA requires High Court oversight of ministerial decisions to impose control orders. The court's role is to scrutinise the minister's views that reasonable grounds exist for suspecting the individual of involvement in terrorism-related activity and that the order is necessary for public protection. The PTA and rules of court made thereunder provide for the withholding from the suspect of "closed" evidence the disclosure of which would not be in the public interest; the exclusion of the suspect and his legal representative from the "closed" part of the proceedings; and his representation in such proceedings by a "special advocate" forbidden to communicate with the suspect and his representative following receipt of the closed evidence.

The central question in *AF* was whether it was possible, consistently with the fair hearing guarantee in Article 6(1) of the European Convention on Human Rights, for suspects to be told of allegations only in general terms, the details being treated as closed material. The fact that one appellant had simply been told that an investigation had shown him to have "a considerable jihadi pedigree" and to have taken part in "terrorist training and activities" indicates the potentially Kafkaesque nature of this procedural regime. In *Home Secretary* v. *MB* [2007] UKHL 46, [2008] A.C. 440, a majority held that the involvement of a special advocate was in principle capable of assuaging any disadvantage flowing from non-disclosure: Lord Brown thought that such a procedure would be unfair only in "wholly exceptional" cases. But an extended panel of nine Law Lords departed from that view in *AF*. Baroness Hale, influenced by submissions by serving special advocates, acknowledged that, in *MB*, she had been "far too sanguine" about their ability to represent suspects with sufficient effectiveness to render the process fair. Thus it was held that a suspect must always be given enough information to enable him to instruct his special advocate so as to facilitate an effective challenge to the case against him. This might require the provision of details that would compromise national security, requiring the Government to weigh up whether disclosure constitutes a smaller risk than the absence of a control order. Three aspects of the *AF* decision merit discussion.

First, an important influence was the judgment of the Grand Chamber of the European Court of Human Rights in *A* v. *UK* [2009] ECHR 3455/05 (noted [2009] C.L.J. 245). Here, a regime concerning extra-judicial detention of suspected terrorists that was procedurally

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very similar to the one considered in *AF* was held to violate due process rights. Lord Hoffmann regarded that decision as "wrong" and capable of "destroy[ing] the system of control orders which is a significant part of this country's defences against terrorism". In contrast, several of the judges accepted that Strasbourg had got it right: Lord Hope said that "denunciation on grounds that are not disclosed is the stuff of nightmares" and that "[t]he rule of law in a democratic society does not tolerate such behaviour". And all nine Law Lords in *AF* agreed that, although the Human Rights Act 1998 ("HRA") requires them only to "take into account" Strasbourg jurisprudence, the Grand Chamber's decision was in effect determinative. Any other approach would have placed the UK in breach of its international obligations: as Lord Rodger put it, "Strasbourg has spoken, the case is closed."

Secondly, to the extent that the decision in *AF* was animated by considerations other than the perceived need to fall into line with Strasbourg, it is striking that an instrumental conception of procedural fairness was dominant. In his leading speech, Lord Phillips rejected any clear distinction between "procedural fairness" and "procedure that produces a fair result", opining that the point of fair procedures is increasing the likelihood of a just outcome. Attenuating due process rights is thus acceptable provided that it does not unduly compromise the capacity of the procedure to deliver a fair *result*. What, then, of evidence that is incontrovertibly inculpatory: is disclosure required when it would make no difference? According to *AF* it is; but the position adopted by Lord Phillips (with whose speech all but two of the other judges expressed agreement) was premised upon practical considerations such as the risk of wrongly concluding that untested evidence is unanswerable and the need for a system that is *perceived* to be fair. This fails to acknowledge that the worth of procedural fairness consists not only in its instrumental capacity for delivering good outcomes, but in its inherent value as a reflection of the dignity of the individual. Even if it was possible to be sure that non-disclosure would make no difference and would not undermine public confidence, there would remain a dignitarian argument – albeit not necessarily an insurmountable one – for telling the suspect what he was accused of.

Thirdly, the outcome in *AF* was the "reading down" of the relevant PTA provision under section 3 of the HRA – which requires legislation to be read compatibly with certain ECHR provisions whenever possible – the appellants' cases being remitted to the High Court for further consideration. Thus, when non-disclosure would be incompatible with the right to a fair trial, courts must now treat as inapplicable the requirement under the PTA to accede to Ministerial requests to withhold evidence whenever satisfied that disclosure would run counter to the public interest. Given that in the PTA Parliament spelt out in detail the

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procedure to be used in control order cases, this constitutes a bold use of the courts' power under section 3 of the HRA (albeit one that the Government signalled it preferred over a declaration of incompatibility under section 4). However, the option of reading down the relevant PTA provisions only existed in the first place because, as Lord Scott observed, the government had not been prepared publicly to accept that the control order system, operating as it would wish it to, "may require the curtailment of fair hearing rights and to face up to … the political consequences of that acceptance". Of course, as a matter of domestic constitutional law, it remains possible for the Government to procure the enactment of legislation undercutting something as basic as the right to a fair hearing: but the HRA means that it must now convince Parliament to nail its colours very firmly to the mast if such legislation is to have its desired effect.

MARK ELLIOTT

PROTECTING THE RIGHT TO RESPECT FOR FAMILY LIFE IN "FOREIGN" CASES

INTERNATIONAL law provides that states have control over the expulsion of aliens. Since the decision of *Soering* v. *UK* (1989) 11 E.H.R.R. 439, the Strasbourg Court has developed jurisprudence that tempers this rule in certain limited circumstances. In so-called "foreign" cases, as described in *R. (on the application of Ullah)* v. *Special Adjudicator* [2004] 2 A.C. 323, the applicant's claim is that Convention rights will be infringed as a result of treatment the expelled alien is likely to suffer in the receiving foreign country. But how far should the responsibility of a state party to the ECHR extend? The significant decision of the House of Lords in *EM (Lebanon) (FC)* v. *Secretary of State for the Home Department* [2008] UKHL 64, [2008] 3 W.L.R. 931 addressed this issue in the context of Article 8 ECHR, the right to respect for family life, and Article 14, the right to non-discrimination. Their Lordships held that in this exceptional case, the prospect of a flagrant denial of the right to respect for family life of a mother and child precluded their return to Lebanon.

EM appealed from an order of the Court of Appeal dismissing her appeal against the decision of the Secretary of State for the Home Department that she and her son, AF, must be returned to Lebanon. The appellant, a Lebanese national, and AF had fled Lebanon in 2004 and claimed asylum. After a violent marriage, the appellant divorced her husband and the child remained in her care until he reached seven years of age. Shari'a law, as applied in Lebanon, then transfers the physical custody of the child to the father or a male member of his

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