

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 24 and 27 July 2009

**Before**

**THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)**

**(SITTING ALONE)**

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AB

APPELLANT

MINISTRY OF DEFENCE

RESPONDENT

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Transcript of Proceedings

**JUDGMENT**

REVISED

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## **APPEARANCES**

For the Appellant

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and  
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(of Counsel)  
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For the Respondent

MR ADAM TOLLEY  
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## **SUMMARY**

### **National Security**

Order for hearing in private pursuant to rule 54 (2) of the **Employment Tribunals Rules of Procedure** upheld – Observations as to correct approach to applications for hearings in private in the interests of national security and as to procedure to be followed

**THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)**

1. The Claimant is a member of the armed forces. He is of Asian ethnic origin. He has brought proceedings against the Secretary of State for Defence claiming that he has been subjected to racial discrimination, including victimisation and harassment. The substantive hearing of his case is due to commence in the Employment Tribunal on 7 September this year. As long ago as 9 July last year Employment Judge Latham, then the Regional Employment Judge for London Central, made an order under rule 54 (2) of the **Employment Tribunals Rules of Procedure** that the hearing of his claim should take place in private. (He also made some other directions, or at least indications of likely directions, as to less drastic measures pursuant to rule 54 (2), such as the redaction of the Minister's documents, but those are not in themselves controversial.) At the end of last week I heard the Claimant's appeal against that order. I need not take time to explain why the appeal has taken so long to come on, but in view of the delay to date and the imminence of the vacation I have not thought it right to reserve my judgment save over the weekend.

2. I heard part of the appeal in private pursuant to rule 30A (2) of the **Employment Appeal Tribunal Rules 1993** (as amended). Likewise part of this judgment will have to be in closed form: however, I have segregated the closed part into a separate section at the end.

3. I have had helpful submissions from Mrs Jane Russell, leading Mr Jude Bunting, for the Claimant and from Mr Adam Tolley for the Respondent.

4. I need not set out the underlying facts in any detail. The Claimant's case falls essentially into two parts. The first is that while he was on active service overseas, as a member of a specialist unit, over a period of two months in early 2007 he was subjected to bullying, both in

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the form of physical assaults and offensive remarks, from fellow servicemen, which he claims was on racial grounds and thus constituted both direct racial discrimination contrary to sections 1 (1) (a) and 4 of the **Race Relations Act 1976** and racial harassment contrary to s. 4 (2A) of the Act. Secondly, he complains of inadequacies in the way that his subsequent complaints of ill-treatment were dealt with following his return to this country in mid-2007. It seems, although the pleading is not entirely clear, that these are said to constitute victimisation.

5. Rule 54 is in the following terms:

**“54 National security proceedings**

**(1) A Minister of the Crown (whether or not he is a party to the proceedings) may, if he considers it expedient in the interests of national security, direct a tribunal or Employment Judge by notice to the Secretary to:-**

- (a) conduct proceedings in private for all or part of particular Crown employment proceedings;**
- (b) exclude the claimant from all or part of particular Crown employment proceedings;**
- (c) exclude the claimant's representative from all or part of particular Crown employment proceedings;**
- (d) take steps to conceal the identity of a particular witness in particular Crown employment proceedings.**

**(2) A tribunal or Employment Judge may, if it or he considers it expedient in the interests of national security, by order**

- (a) do in relation to particular proceedings before it anything which can be required by direction to be done in relation to particular Crown employment proceedings under paragraph (1);**
- (b) order any person to whom any document (including, any judgment or record of the proceedings) has been provided for the purposes of the proceedings not to disclose any such document or the content thereof:-**
  - (i) to any excluded person;**
  - (ii) in any case in which a direction has been given under sub-paragraph (1)(a) or an order has been made under sub-paragraph (2)(a) read with sub-paragraph (1)(a), to any person excluded from all or part of the proceedings by virtue of such direction or order; or**
  - (iii) in any case in which a Minister of the Crown has informed the Secretary in accordance with paragraph (3) that he wishes to address the tribunal or Employment Judge with a view to an order being made under sub-paragraph (2)(a) read with sub-paragraph (1)(b) or (c), to any person who may be excluded from all or part of the proceedings by virtue of such an order, if an order is made, at any time**

**before the tribunal or Employment Judge decides whether or not to make such an order;**

**(c) take steps to keep secret all or part of the reasons for its judgment.**

**The tribunal or Employment Judge (as the case may be) shall keep under review any order it or he has made under this paragraph.**

**(3) ...**

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

6. By regulation 16 (2) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** (to which the Rules form schedule 1), in cases where an order is made under rule 54 the additional provisions of schedule 2 apply. I need not however set out those provisions here since no point arises on them. They include provision in an appropriate case for employment of the special advocate procedure. I take this opportunity to note that this is not a case where the use of that procedure has been thought necessary - that is to say, there is no wish on the part of the Minister to conceal from the Claimant or his advisers (subject to certain undertakings which have not proved problematic) any matter on which he wishes to rely before the Tribunal. Thus some of the more acute problems which can arise in national security cases are not in play in these proceedings. I should note also, though it is self-evident, that no direction has been given by the Minister under para. 1 of rule 54.

7. Accordingly, the question for the Judge in considering whether to make an order under 54 (2) was whether he considered it “expedient in the interests of national security” to order that the hearing take place in private. I will return in due course to what that phrase means, but I should start with the question of what material was before the Judge relevant to that question. This was in fact very limited. The claim had been presented on 18 March 2008. The account of the Claimant’s alleged treatment in the claim form was quite sparse. It was largely confined to a summary account of certain specific incidents of bullying. It referred only in the most

general terms to the nature of the Claimant's work, and it gave no operational detail of any kind beyond the names and ranks of the colleagues of whose conduct he complained. (This is in no sense a criticism - on the contrary - but the degree of detail in the pleading is relevant to the exercise which the Judge had to perform.) The response contained nothing of substance on the facts, because, as was explained, the matter was being formally investigated with a view to the possibility of court martial proceedings against the alleged perpetrators, and while that process was going on those advising the Respondent had almost no access to the facts. For that reason the Judge, on the same occasion as he made the order appealed against, directed a stay; and it was in fact only in April this year that an amended response was served (and presumably that, shortly thereafter, though I have not been given any details, directions were given for disclosure and witness statements). The Minister did not adduce any evidence in support of the application; nor indeed, as I understand it did counsel (not Mr Tolley), put in any written submissions. However, her oral submissions are summarised in the Judge's written Reasons. Broadly, her case was that the nature of the work on which the Claimant was engaged was very sensitive and that disclosure either of the nature of the work itself or in any event - it is not quite clear which - of the *modus operandi* of the unit would be highly prejudicial to the effectiveness of that work, such that it might have to be abandoned altogether; and thus that disclosure would create a real risk to the lives of either the servicemen doing that work or of the others whose safety it was intended to promote. It was acknowledged that disclosure of prejudicial information in evidence-in-chief could be prevented by redaction of sensitive material in the published versions of the witness statements (which the Claimant does not appear to have opposed). But the submission was that the problem would inevitably occur in cross-examination. It is not clear from the Judge's summary whether it was counsel's submission that the nature of the issues on which cross-examination would be required was such that prejudicial disclosure was bound to occur, or only that there was a risk of it occurring as a result of incautious questions or answers. That uncertainty may itself reflect the fact that

the detailed issues were, for the reasons I have given, inevitably at that stage wholly unanalysed. There appears also to have been a concern about the identification of individual witnesses and whether anonymisation in the context of a public hearing would give sufficient protection. The Claimant's response was to emphasise the cardinal importance as a matter of principle of a public hearing, reference being made in particular to article 6 of the **European Convention of Human Rights**, and to submit that, as the Judge put it at para. 13 of the Reasons:

**“all the people involved were used to handling secret information, and although it was accepted that there could be very serious consequences if matters did come out at the hearing nonetheless because of the experience of handling such matters they would be properly controlled”.**

8. The Judge's conclusions on the basis of that material and those submissions were as follows:

**“15. In determining this matter, the test to be applied by the Regional Employment Judge (given that there was no direction from a Minister but a Rule 54 application) was whether or not it was considered by the Employment Judge deciding this matter, in this case the Regional Employment Judge, expedient in the interest of National Security to make such an Order. The Regional Employment Judge was mindful of the fact that in the concluding sentence of Rule 54(2) any Tribunal or Judge as the case may be had to keep under review any Rule 54 Order that was made under those provisions. Unlike normal review procedures therefore, this was an obligation that was constantly upon any Judge or Tribunal in the Employment Tribunals dealing with this matter once a Rule 54 Order had been made. The Regional Employment Judge was also conscious that if a Rule 54 Order was so made, then the provisions of Schedule 2 of the Rules came into effect.**

**16. In concluding that such an Order should be made (and as recorded in the separate record of the Orders made at the Case Management Discussion held on 9 July 2008) the Regional Employment Judge took into account:**

- (1) The area where these operations took place being an active field of engagement at the present time and at the time of the acts of discrimination complained of in the Claim Form.**
- (2) That the Claimant was indeed, a member of [the unit in question] and that the majority of the witnesses concerned were also either former or active Members of [that unit].**
- (3) That there was a risk to the life of potential witnesses and/or the Claimant which had to be seriously considered if there was a leakage of information, names etc.**
- (4) That if there was a leakage of any information with regard to tactics, techniques etc, then this could compromise and indeed, possibly severely compromise the operational effectiveness of the unit concerned and would itself be a breach of National Security provisions.**

**(5) If there was a leakage, a period of training of new personnel and techniques may well be required.**

**(6) To suggest that matters could be safely controlled by way of redactions of witness statements and documents only or by the additional anonymising of witnesses did not take away the risk to National Security that the Regional Employment Judge believed could exist in a Hearing such as this being held in public, either in part or in whole.**

**(7) The requirement that advocates for the Claimant would need themselves to be cleared or produce appropriate undertakings supported the seriousness of the position adopted in this case in relation to National security.**

**(8) That even though most of the people involved in such matters were themselves used to dealing with secret information, nonetheless it was not in itself a protection against National Security breaches for this to be the situation.**

**(9) There was a risk of sensitive information both as to people and as to tactics and techniques that could be disclosed in a public Hearing. There was the risk to life [sic] had to be acknowledged by the Regional Employment Judge and which may arise as a result of any such breach bearing in mind the secret nature of the work being carried or that had been carried out by the people concerned.**

**17. In all those circumstances, the Regional Employment Judge was so satisfied that it was expedient in the interest of National Security for an Order to be made under Rule 54.”**

9. It is the Claimant’s case that the Judge was wrong in law to reach that conclusion. He contends that the Judge failed to appreciate how high a threshold had to be met in order to justify an order that a hearing be conducted in private and that if he had done so he could not have found that the Minister had shown sufficient grounds for such an order. To a considerable extent, however, that debate has become academic because things have moved on. For the purpose of this appeal Mr Tolley has put in a witness statement from a solicitor in the Ministry, a Mr Jonathan Ziegel, amplifying the concerns felt by the Minister and setting out in more detail their basis; and Mr Tolley has himself taken matters somewhat further in his oral submissions. In many circumstances that would be immaterial: in principle the question for this Tribunal on an appeal is whether the Judge was right to make the order that he did on the material before him. If he was not, the appeal should be allowed; and if the Minister wished to rely on fresh evidence or submissions, the right course would be for him to go back to the Judge and seek - the decisions in questions being interlocutory in character - a reconsideration in

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accordance with the principles discussed in **Hart v English Heritage** [2006] ICR 655. However, no objection was taken to the introduction by Mr Tolley of the material in question, and indeed the Claimant put in a short witness statement in response. Argument proceeded on the basis that I should myself decide, so far as I felt able, what order under rule 54 (2) was appropriate on the material before me, as I am entitled to do under section 35 (1) of the **Employment Tribunals Act 1996**. That was plainly a sensible approach in the circumstances of the present case because the hearing is now only six weeks away, and it would do no-one any favours for me simply to remit the case for further consideration by the Employment Judge. In addition, both parties were evidently anxious to have some guidance on the issues of principle about the effect of the formula in rule 54 (2) “if he considers it expedient in the interests of national security”.

10. Accordingly I will myself consider the question of what order should be made on the basis of the material and submissions before me. But I should emphasise that that would not necessarily be the appropriate course in every case.

11. Having said that, I wish to observe, in case it is of assistance in future cases, that I do not think that it was entirely satisfactory that the Judge should have made his ruling at such an early stage in the proceedings. The CMD at which the issue was raised was shortly after “close of pleadings”, and the actual order was made at a follow-up CMD only a month later. At that stage, as I have said, the scope of the issues had not really emerged. It is true that - somewhat surprisingly in view of the position subsequently adopted - the Claimant’s solicitors had themselves initially sought a direction for the hearing to be held in private. And even if they had not done so it was plainly sensible that the question whether directions were required under rule 54 (2) should at least have been raised at an early stage. But - to anticipate what I shall have to say about the law - the justifiability of an order for a hearing in private needs to be

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assessed on the basis of a clear understanding of what matters are likely to have to be canvassed in evidence; and the material available at the CMD was so limited that it was impossible for the Judge to form any clear view about that. The result was that his reasoning was necessarily at a level of considerable generality (though in fairness to him I should observe that he may also have exercised a degree of self-censorship in the detail into which he thought it appropriate to go). It would in my view have been preferable to limit any directions under rule 54 (2) to matters that were uncontroversial and/or that had to be dealt with at that early stage, and to revisit the question of whether the substantive hearing should be in private at a further CMD once witness statements had been exchanged, when the extent of any sensitive evidence should have been capable of being established with some precision. One possible, course which I was told has been adopted in at least one other case of this kind, would be to require the respondent to identify in a schedule the facts which were said to be sensitive, together with its proposals as to the steps necessary to prevent their disclosure; and for the Claimant to be required to identify in response on an item-by-item basis whether it was accepted that the fact in question required protection, and if so what (if any) alternative proposals it had as to the form of such protection: so elaborate a procedure would not necessarily be appropriate in every case but it illustrates the kind of exercise that in one form or another has to be done. In the analogous context of disclosure of sensitive documentary material, the Court of Appeal in **Coles v Barracks** [2007] ICR 60 has emphasised the undesirability of trying to deal prematurely with problems of this character. It is true that by virtue of the final sentence of rule 54 (2), which provides that any order made under the rule shall be kept under review, any order made for the hearing to be conducted in private can never be more than provisional and thus that an order made at an early stage could always be revisited. But it must be better in principle to decide whether to make an order at all only at the stage where the tribunal is in a position to do so on full information, so that applications for review will be appropriate only if there has been some genuinely unforeseen change of circumstances.

12. In making those observations I do not wish to be unduly critical of the Judge. The question was raised before him at an early stage by, as I have noted, both parties, and I do not get the impression that either party argued for the issue to be deferred. I make the point only for the guidance of tribunals in future cases.

13. I turn to the substantive question for decision. I should start by saying something about the law. I heard full argument, with extensive citation of authority, about the precise effect of the phrase which governs rule 54 (2) “[if] a tribunal or employment judge ... considers it expedient in the interests of national security”.

14. Mr Tolley submitted that it was well-established that the term “expedient”, which is not uncommonly found in statute, connotes something less than “necessary”. He referred me in particular to the judgment of the Court of Appeal, given by Lord Woolf CJ, in **R (Gillan) v Metropolitan Police Commissioner** [2005] QB 388, where the Court was concerned with the power given to senior police officers by s. 44 (3) of the **Terrorism Act 2000** to authorise constables to stop and search vehicles or pedestrians where they consider it “expedient for the prevention of acts of terrorism” to grant such authorisation: the Court said at para. 31 that the word “expedient” should be given “its ordinary meaning of advantageous”.

15. Mrs Russell submitted that that approach set, at least in the present context, too low a hurdle. She submitted that the effect both of the strong common law presumption in favour of open justice and of the jurisprudence of the European Court of Human Rights in relation to Article 6, and indeed Article 10, of the Convention was that any exception to the rule that hearings should take place in public should only be permitted where that was *necessary* for the purpose of the particular public interest relied on - in the present case national security. So far

as the domestic authorities are concerned, she referred me to **Scott v Scott** [1913] AC 417, **Attorney-General v Leveller Magazine Ltd** [1979] AC 440, **R v Legal Aid Board ex parte Kaim Todner** [1999] QB 966 and **Re S** [2005] 1 AC 593. I do not think it necessary to refer to or set out particular passages from these judgments. They are very well-known and there is no doubt as to the propositions for which they are authority. As for the Convention, I should first set out the terms of Article 6 (1), which reads as follows:

**“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 interest 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.”**

(I need not set out the terms of Article 10 because it is less central to the argument.) The decisions of the European Court of Human Rights to which Mrs Russell referred me included **Rowe & Davis v United Kingdom** [2000] 30 EHRR 1 and **Diennet v France** [1995] 21 EHRR 554: there were several others, but those were the most material for present purposes. She submitted that in the light of those two streams of authority it was necessary to read the term “expedient” as meaning more than simply “advantageous” and as importing a test of necessity in line with that required by the domestic authorities. She submitted that there was no difficulty in “reading up” the language of rule 54 (2) in this way.

16. Mrs Russell also referred me to the decision of the House of Lords in **Re Officer L** [2007] 1 WLR 2135 in which it was held that there was no breach of Article 2 of the Convention in an order that a police officer should give evidence, without the protection of anonymity, to a public inquiry in Northern Ireland, notwithstanding his claim that to do so would expose him to the risk of death or injury by way of reprisal. Lord Carswell in his

opinion emphasised that Article 2 was only engaged where the risk to life was “real and immediate”, which on the facts of that case it was not. I do not regard this authority as particularly helpful as regards the issues in the current case. It was concerned only with a specific question about the compellability of a witness and the availability of Article 2 on the facts of the case as a reason why he should not be compelled.

17. Mr Tolley responded that the approach embodied in Mrs Russell’s submissions was too broad-brush. Carefully analysed, the structure of both the domestic jurisprudence and that based on Article 6 was that cases where national security was engaged were recognised as a freestanding legitimate exception to the rule of open justice. The observations to be found in the case-law relied on by Mrs Russell, to the effect that exceptions to the rule were permissible only where it was strictly necessary, were concerned with other kinds of exception beyond the specific categories identified in Article 6 or in domestic legislation or the case-law. That was apparent from the structure of Article 6 itself, where the legitimacy of excluding the public “in the interests of national security” is expressly recognised. None of the cases in the European Court of Human Rights cited was concerned with national security. As for the domestic position, he referred me to a passage in the speech of Lord Diplock in the **Leveller** case at p. 450 C-D where a clear distinction is made between “statutory exceptions” to the rule of open justice and other cases where the court itself may make exceptions to the extent that it “reasonably believes ... necessary in order to serve the ends of justice”.

18. I am bound to say that I did not find this debate particularly helpful. Even if Mr Tolley is right – as, for what it is worth, I think he is - that cases involving national security are recognised as a discrete category of exception, or potential exception, to the rule of open justice, it does not follow that no exercise of judicial judgment is required in cases falling within that exception; and in that exercise the importance of the principle of open justice must

be a factor to be taken into account. Indeed Mr Tolley accepted as much. If that is right, the fact that rule 54 (2) employs the term “expedient” cannot rightly be read as diminishing the weight due to the principle of open justice. Conversely, even if Mrs Russell is right that exceptions to the rule must always be justified on a test of “necessity”, what does that really tell us ? There is no doubt a conceptual difference between “expedient” and “necessary”, but in this context what is “necessary” is inevitably a matter of judgment and not an absolute. At most, the difference between the parties’ positions seems to me to be one of emphasis about a distinction which is not capable of objective measurement.

19. What is in any event clear from the numerous authorities cited to me is that they contain no explicit consideration of the correct approach to be taken where a party asks the court to make an exception to the rule of open justice in the interests of national security. For the reasons that I have given there is a limit to the useful guidance that can be given. However, I think that it is possible to say the following:

- (1) Any exception to the rule of open justice has to be justified. It is, as emphasised in all the cases to which I have referred, a strong rule and any justification has accordingly to be cogent.
- (2) It is uncontroversial that the interests of national security are capable of justifying such an exception. But, as a matter of principle, in any case where the exception is invoked, and specifically in the case of an application under rule 54 (2), the court or tribunal must make a judicial assessment of whether they do so in the particular case. That will in principle involve striking a balance between, on the one hand, the seriousness of the prejudice to national security which is asserted, and the degree of risk that that prejudice may occur if the exception sought is not made; and, on the other, the extent of the infringement of the principle of open justice embodied in the rule and the risk of prejudice to the public

interest or the interests of the individual in the particular case. On ordinary principles, the more serious the infringement of the principle the greater the prejudice, or risk of prejudice, needed to justify it: thus it will be easier to justify, say, the anonymisation of witnesses or the redaction of documents than the conducting of an entire hearing in private.

- (3) Thus far the exercise would appear to be an application of the principle of proportionality of a conventional kind; and one where, because of the importance of the principle of open justice, there is a heavy burden on the party seeking the restriction. But that is not the whole picture. “The interests of national security” constitute a factor of a rather particular nature. Where those interests are indeed genuinely engaged the stakes are high: they will involve real risks to the national interest generally and, typically, real risks (of a more or less direct nature) to the lives of members of the armed forces or the security services or of others. An established risk of such outcomes must of its nature weigh heavily in the opposite balance against the principle of open justice, important though that is. Of course sometimes it will not be self-evident that any such asserted risk is indeed present or is serious. In such a case, however, the tribunal needs to be aware that the risks in question will often be of a kind which it is not well-placed to assess - even if, which will itself often be disproportionate or unrealistic, appropriate direct evidence relating to the risk could be adduced before it. Tribunals therefore need to approach the task of assessing the risk with a clear understanding of the inherent limitations in their ability to do so.
- (4) Those cautionary observations do not mean that the proportionality exercise is unnecessary or that it can only have one outcome whenever an application for measures under rule 54 (2) is made. Tribunals can and should not abdicate their responsibilities to make the necessary assessment whenever national security is invoked. But they do mean that it will be necessary for tribunals to approach any such application with a recognition

of the weight which must necessarily be accorded to any real risk to the interests of national security and of the limits to the assessment of that risk which it may realistically be possible to carry out.

It may be that it was with these points in mind that the draftsmen chose the word “expedient” rather than “necessary”. But, whether that is so or not, I believe that the question whether an order under rule 54 (2) should be made should be approached in accordance with the foregoing guidance.

20. Directing myself accordingly, I turn to the facts of the present case. It has to be said that even now, with the hearing only some six weeks away, I am less well-placed than I would wish to be to make a final assessment. I have not seen either any witness statements or any of the documents which it is proposed should be put before the Tribunal. I have, however, as I have already said, been given a witness statement from a solicitor in the Ministry of Defence, and that has been supplemented by the submissions of Mr Tolley. I received that material in the part of the hearing before me that I conducted in private, and I must consider its details in the closed part of this judgment. In the open part, all that I will say is that for the reasons there given I am satisfied that it is expedient to the interests of national security that any part of the hearing which deals with the Claimant’s service overseas should be held in private. If this had been a case of alleged conduct of a kind which did not require reference to the details of the Claimant’s work it would have been a different matter. But I have been persuaded that there are aspects of the facts which are bound to feature in the evidence which do indeed carry a real risk of prejudice to operations of the kind on which the Claimant was engaged in his overseas service.

21. Part of the Claimant's complaint, as I have said, deals with his treatment following his return to the United Kingdom. Insofar as that can practicably be dealt with in public, I believe that it should be. I say that primarily on the straightforward basis that, on the material before me, none of the evidence relating to that period appears to be prejudicial, or potentially prejudicial, to national security. But my view is reinforced by the point made by Mrs Russell that there is a public interest in exposing how complaints of discrimination in the armed forces are handled, even if the details of the particular incident cannot be addressed in a public hearing. I do not however propose to make any final decision on this point. I am not in a position on the material before me to judge whether the evidence and submissions relevant to the later period can proceed without reference to the sensitive evidence necessarily generated in relation to the earlier period. I would hope that it could be, even at the cost of some inconvenience to the structure of the hearing; but that decision is best made by the Tribunal itself at the start of the hearing (if no earlier CMD is required), exercising the express power of review given by rule 54 (2). I would also hope that it is in any event something on which the parties may be able to reach agreement.

22. There is one other observation which I can and should make in the open part of this judgment. The Minister's concerns involved not only the risk of prejudice to the effectiveness of the operations on which the Claimant was engaged but also the risk to individual servicemen if they were identified as taking part in those operations. If, as I have decided, the relevant part at least of the hearing is in private, such a risk does not arise, but there was some discussion before me of what steps could have been taken if it did. If the only objection to a public hearing had been the risk of the identification of individual witnesses, consideration would have had to be given to whether the interests of national security, and of the vulnerable witnesses, could be properly protected by lesser steps such as their anonymisation or by measures of the

kind familiar in the criminal courts to protect vulnerable witnesses from being physically seen in court. I need not however consider that possibility further.

23. I accordingly dismiss this appeal.