IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 80982/12

BETWEEN:

Adeel Muhammad & Ramzan Muhammad

Applicants

- and –

Romania

Respondent

- and –

Amnesty International

Intervener

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENER

Introduction

1. These submissions are presented on behalf of Amnesty International (the 'Intervener') pursuant to the leave to intervene granted by the President of the Grand Chamber on 29 May 2019, in accordance with Rule 44 § 3 of the Rules of Court. The Intervener will make submissions on the importance of fair, adversarial proceedings in which both parties have access to the relevant evidence. The primary focus will be on the use of classified material in 'closed' judicial proceedings (i.e. proceedings in which one party and their representative of choice are excluded for reasons of national security) a practice the Intervener strongly opposes.[1] In so doing, the Intervener shall address (A) access to justice and effective remedies, and the related requirements in terms of access to evidence; and (B) the specific human rights related risks associated with the use of closed judicial proceedings in removal proceedings, including as they pertain to non-refoulement.

A. Access to justice and effective remedies

2. It is the Intervener's primary submission that the right to an effective remedy for claims of human rights violations incorporates the right of access to a fair procedure. We respectfully submit that such a right would be violated by a procedure allowing a case to be decided in whole or in part relying on or otherwise taking into consideration information, including representations and arguments, that have not been disclosed to the non-government party and his or her representative of choice. A non-government party's interest in disclosure of evidence regarding violations of Convention rights always outweighs any purported national security or other similar public interests in its non-disclosure. Accordingly, the Intervener has long opposed procedures whereby classified material can be examined and relied on by a court in the absence of the concerned non-government party to a case, and by which they are not able to adequately instruct counsel to challenge the evidence which is not in their favour.[2]

[1] For the purposes of this definition, the Intervener interprets the meaning of 'proceedings' broadly so as to include all occurrences where classified material is used by one party without disclosure to the other.
[2] The Intervener's opposition to closed proceedings has been steadfast, see for example Amnesty International 'Left in the Dark: The Use of Secret Evidence in the United Kingdom', https://www.amnesty.org/en/documents/EUR45/014/2012/en/.

Closed proceedings hinder justice being done and being seen to be done

3. One of the central pillars of a fair hearing is the open administration of justice.[3] The principle of open justice acts as an essential safeguard of the fairness and independence of the judicial process, ensuring that the administration of justice is open to public scrutiny, which in turn provides a means of protecting and maintaining public confidence in the justice system.[4] By rendering the administration of justice visible, publicity contributes to the achievement of the aim of a fair trial.[5]

4. Though the International Covenant on Civil and Political Rights (ICCPR) allows for the exclusion of the press and public in certain circumstances for reasons of national security, this is permissible only to the extent that it is strictly necessary. The UN Human Rights Committee considers Article 14 of the ICCPR (right to equality before courts and tribunals and to a fair trial) in its General Comment No. 32; nowhere in its discussion of the possibility of excluding the public on grounds of national security does the Human Rights Committee discuss any possibility that litigants or their counsel could be validly excluded.[6]

Closed proceedings are irreconcilable with adversarial proceedings and equality of arms.

5. The use of closed proceedings is irreconcilable with the principles of adversarial proceedings and equality of arms. Equality of arms "means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other

[3] See *Malhous v Czech Republic*, (App no. 33071/96), 12 July 2001; *Bakova v Slovakia*, (App no. 47227/99), 12 November 2002; *Pretto and Others v Italy*, (App no. 7984/77), 8 December 1983; *Barberà, Messegué and Jabardo v Spain*, (App no. 10590/83), 6 December 1988; *Yakovlev v Russia*, (App no. 72701/01), 15 March 2005; *B and P v United Kingdom*, (Apps no. 36337/97 and 35974/97), 24 April 2001.

[4] See, in this regard, UN Special Rapporteur on counter-terrorism and human rights report of 6 August 2008, (UN Doc A/63/223) and UN Human Rights Committee, General Comment No. 32 (UN Doc CCPR/C/GC/32), para 67.

[5] *Pretto and others v Italy*, (App no. 7984/77), 8 December 1983. This principle was also reflected in the Courts of England and Wales by the House of Lords in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28, para 63 "If the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust."

[6] UN Human Rights Committee, General Comment No. 32; see also the judgment in the case of *Romanova v Russia*, (App no. 23215/02), 11 October 2011, where the European Court of Human Rights considered a case where an entire criminal trial had been held *in camera*, with only part of the trial and appeal judgments having been delivered in public (it appears the defendant and her lawyers were not excluded from any part of the trial). In finding the exclusion of the public in the circumstances to have violated article 6 of the Convention, the Court observed: "it may be important for a State to preserve its secrets, but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity."

unfairness to the defendant", and "that each side be given the opportunity to contest all the arguments and evidence adduced by the other party."[7] This Court has held that the principle of equality of arms - one of the elements of the broader concept of a fair trial - requires each party to be given a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.[8]

6. Where a party to a case is afforded the opportunity to present their case in the absence of their opponent and the latter does not have full access to the evidence they are facing, it is inconceivable that the two sides can be considered to have equality of arms.[9] Indeed, where the material presented in closed proceedings contains an accusation of wrongdoing, the person concerned will not know what they are suspected of and so cannot make a riposte and provide a detailed explanation.[10]

7. Further, requiring a judge to adjudicate on a proceeding in which one party has been excluded, in all or in part, requires that the judge put in question their role by supposing what the excluded party may have argued.[11] As well as being at odds with the duties of judicial impartiality and the requirement of adversarial proceedings, to which an adversary is integral, doing so is also a nugatory exercise.

8. In *Al-Nashif v. Bulgaria* this Court held that "even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial

[7] UN Human Rights Committee, General Comment No. 32, para 13. See also *Dudko v. Australia*, (Communication No. 1347/2005); *Jansen-Gielen v. The Netherlands*, (Communication No. 846/1999), para 8.2; *Äärelä and Näkkäläjärvi v. Finland*, (Communication No. 779/1997). See further Principle A(2)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); *Prosecutor v Tadić* (IT-94-1-A) ICTY Appeals Chamber (15 July 1999) paras 43-44.

[8] *Nideröst-Huber v. Switzerland*, (App no. 18990/91) 18 February 1997, para 23; *Dağtekin and Others v. Turkey*, (App no. 70516/01) 13 December 2007, paras 32-35.

[9] For support for this proposition see for example: *Užukauskas v. Lithuania*, (App no. 16965/04) 6 July 2010, paras 48-51; *Dağtekin and Others v. Turkey*, (App no. 70516/01) 13 December 2007, paras 32-33: "It further notes that the right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision"; *Edwards and Lewis v United Kingdom*, (Apps no. 39647/98 and 40461/98) 27 October 2004.

[10] *Regner v. Czech Republic* (App no. 35289/11) 19 December 2017, Joint Partly Dissenting Opinion of Judges Raimondi, Sicilianos, Spano, Ravarani and Pastor Vilanova, pg 44.

[11] See *Regner v. Czech Republic*, (App no. 35289/11) 19 December 2017, Partly Dissenting Opinion of Judge Serghides at para 110: "If a judge is to appear independent and impartial, he or she cannot assume the role of the advocate of one party while leaving that party in the dark about the accusations against him or her and rendering the lawyer's handling of the case meaningless, as happened in the present case. A judge who does this risks violating the right to an adversarial trial and the principle of equality of arms as well as the right to be tried by an independent and impartial court."

proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information."[12] As stated above, the examination of, and reliance on, classified material in the absence of the non-government party and their representative of choice, must be rejected. The victim party's interest in disclosure of evidence regarding violations of Convention rights should always outweigh any purported national security or other similar public interests in its non-disclosure. While *other types of information* may possibly be concealed in order to protect concrete, genuinely legitimate and compelling national security or other similar public interests, such information must never be *relied on or otherwise taken into consideration* in any way in proceedings and decisions relevant to claims of human rights violations. Domestic judicial systems that allow for such a procedure, even with the appointment of security cleared counsel as friends of the court, have aptly been described by domestic human rights bodies as "Kafkaesque" and "not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but … very much against basic notions of fair play as the lay public would understand them."[13]

9. Although it did not go far enough, the Court of Justice of the EU ('CJEU') has highlighted the importance and implications of the adversarial principle. In *ZZ v. the United Kingdom*, the CJEU indeed held that the adversarial principle required that "the person concerned [be] informed, in any event, of the essence of the grounds on which a decision ... is based". Not even "the necessary protection of State security" could have "the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress ineffective."[14] Likewise, in *Kadi*, the CJEU reiterated that while "the right to have access to the file [is] subject to legitimate interests in maintaining confidentiality [of classified information] ... the person concerned *must be able to ascertain the reasons upon which the decision taken in relation to him is based* ... to make it possible for him to defend his rights in the best possible conditions."[15] This is in keeping with this Court's determinations in *A and Others v United Kingdom* and *Sher and Others v United*

[12] *Al-Nashif v. Bulgaria*, (App no. 50963/99) 20 June 2002, para 123.
[13] UK Parliament, Joint Committee On Human Rights: Nineteenth Report https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15709.htm, para 210.
[14] *ZZ v. the United Kingdom*, (Case C-300/11) 4 June 2013, para 65.
[15] *European Commission and Others v. Yassin Abdullah Kadi*, (joined cases C-584/10 P, C-593/10 P and C-595/10) 18 July 2013, paras 99-100, emphasis added.

Kingdom, in both of which it was held that the applicant requires sufficient disclosure to be able to meet the allegations made against them.[16]

10. Equality of arms and the right to adversarial proceedings are at the very core of just judicial proceedings, as enshrined throughout the Convention, be it through Article 6, 13, or Article 1 of Protocol 7 – which shall be addressed further below.

Closed proceedings impede the right to an effective remedy

11. This Court's case law has repeatedly made clear that for a remedy to violations of Convention rights to be *effective*, it "must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions of the authorities of the respondent state".[17] Thus, the level of procedural guarantees provided by the remedy in question is directly relevant when determining whether the remedy is "effective". As outlined above, where closed proceedings are utilised, a party is denied access to adversarial proceedings and equality of arms, and so cannot be considered to have *effective* access to a remedy.

12. It is also worth noting that, under the ICCPR (which is binding on all state parties to the Convention), the importance of preserving the right to an effective remedy in all circumstances, including in cases raising national security considerations, is such that it has been recognised by the UN Human Rights Committee as equally applying in situations of emergency.[18] In addition to underscoring that procedural adjustments that would deny a victim access to an effective remedy can never be justified in any circumstances, the necessary consequence of this statement is that *without a valid derogation* in a state of emergency a State has little if any flexibility to introduce "adjustments to the practical functioning of its procedures governing judicial or other remedies".[19]

[16] *A. and Others v. the United Kingdom*, [GC] (App no. 3455/05) 19 February 2009*; Sher and others v United Kingdom*, (App no. 5201/11) 20 October 2015, para 149.
[17] *El-Masri v the Former Yugoslav Republic of Macedonia*, (App no. 39630/09) 13 December 2012, para 255; *Al-Nashiri v Poland*, (App no. 28761/11) 28 July 2014, para 546; *Husayn (Abu Zubaydah) v Poland*, (App no. 7511/13) 24 July 2014, para 540; *Nasr and Ghali v Italy*, (App no. 44883/09) 23 May 2016, para 331.
[18] UN Human Rights Committee, States of Emergency (Article 4) - General Comment 29, para 14.
[19] *Ibid*.

Closed proceedings hinder protection from arbitrariness

13. In *Al-Nashif v. Bulgaria*, the Court reiterated the importance of protection from arbitrariness, notwithstanding the national security context:

    "there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention. It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power."[20]

14. In *A. v. Australia*, the Human Rights Committee observed that:

    "the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice."[21]

15. In *Malone v. the United Kingdom*, the Court rightly observed that "[e]specially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ..."[22] Closed proceedings are especially susceptible to be used as a mask for arbitrary decisions of the executive, or as a measure which induces the judiciary into making decisions arbitrarily. It is submitted that proceedings are inherently arbitrary where a person is subject to a decision made by a court, or by another authority, before which they are unable to access and challenge the evidence being used to defeat their claim. Further, barring the victim party from challenging or otherwise commenting on information known only to the state and the court to which it submits the information fundamentally undermines the probative value of any such information.

Closed proceedings are irreconcilable with the requirement of a reasoned judgment

16. This Court has long recognised that the proper administration of justice requires that judgments of courts and tribunals should adequately state the reasons on which they are based.[23] This is in accordance with the requirements of international law, which are

[20] *Al-Nashif v. Bulgaria*, (App no. 50963/99) 20 June 2002, paras 119-123, citing *Amann v. Switzerland* [GC], (App no. 27798/95) 16 February 2000, paras 55-56; *Rotaru v. Romania* [GC], (App no. 28341/95) 4 May 2000, paras 55-63; *Hasan and Chaush v. Bulgaria* [GC], (App no. 30985/96) 26 October 2000; *Klass and Others v. Germany*, (App no. 5029/71) 6 September 1978.
[21] *A v. Australia*, (Communication No. 560/1993) para 9.2.
[22] *Malone v. the United Kingdom*, (App no. 8691/79) 26 April 1985, para 67.
[23] *Ibrahimov and Others v. Azerbaijan*, (App no. 69234/11) 11 February 2016, para 103; *García Ruiz v. Spain* [GC], (App no. 30544/96) 21 January 1999, para 26.

unambiguous in this regard.[24] As stated above, UN Human Rights Committee General Comment No. 32 provides no mechanism for the exclusion of parties and their counsel, and provides as regards judgments that "even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children."[25] No similar exception is made for the protection of national security. Where national security material is examined and relied upon by the court the 'essential findings, evidence and legal reasoning'" need to be properly reflected in the judgment available to the parties and the public.

17. The use of closed proceedings is at odds with the requirements of a reasoned judgment, because the actual basis for the decision made will not be properly reflected in the judgment available to the parties and the public. Consequently, such proceedings severely undermine a key safeguard against arbitrariness and fundamental requirements of fair proceedings.

B. <u>The specific human rights related risks associated with the use of closed judicial proceedings in removal proceedings</u>

The requirements of Article 1 of Protocol 7

18. It is submitted that Article 1 of Protocol 7 ('Article 1') imports into removal decisions procedural protections, as outlined above and below, with which closed proceedings are irreconcilable. In outlining the rationale for this submission, the Intervener draws upon the principles already set out in this intervention.

19. Firstly, Article 1 requires that an alien "shall not be expelled therefrom except in pursuance of a decision reached in accordance with law…". Contained within this protection is the requirement that the law be accessible, foreseeable, and provide

[24] See, for example, Section A(2)(i) of the Principles on Fair Trial in Africa; Article 74(5) of the ICC Statute; Article 22(2) of the Rwanda Statute; Article 23(2) of the Yugoslavia Statute.
[25] UN Human Rights Committee, General Comment 32, para 29.

protection from arbitrary decision making.[26] Accordingly, the protections from arbitrary decision making, set out above, apply, with which closed proceedings are irreconcilable.[27]

20. Secondly, and also contained within the first line of Article 1, is a requirement that a decision to remove a person be subject to adversarial proceedings. In *Ljatifi v. The Former Yugoslav Republic of Macedonia* this Court held that:

> "even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to *some form of adversarial proceedings* before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary."[28]

21. It is submitted that the requirement of equality of arms is inextricably linked to the requirement of fair adversarial proceedings, and so this Court has in the present case the opportunity to clarify that Article 1 requires not only adversarial proceedings but also equality of arms between the parties to those proceedings. It would be a nonsensical interpretation of the Convention that requires a person facing removal to have access to legal representation, but provides that those legal representatives can be placed at a disadvantage vis-à-vis the state through the absence of a requirement of equality of arms through adversarial proceedings. The UN Human Rights Committee is clear that "[i]nsofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and

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[26] *Ljatifi v. The Former Yugoslav Republic of Macedonia*, (App no. 19017/16) 17 May 2018, para 33: "Since the word "law" refers to domestic law, the reference to it, as in all the provisions of the Convention, concerns not only the existence of a legal basis in domestic law, but also the quality of the law in question: it must be accessible and foreseeable and also afford a measure of protection against arbitrary interference by the public authorities with the rights secured in the Convention (citation omitted)."

[27] See, for example, *Kaushal and Others v. Bulgaria*, (App no. 1537/08) 2 September 2010, paras 29-30.

[28] *Ljatifi v. The Former Yugoslav Republic of Macedonia*, (App no. 19017/16) 17 May 2018, para 35, emphasis added. See also *C.G. and Others*, (App no. 1365/07) 24 April 2008.

tribunals as enshrined in article 14, paragraph 1, [of the ICCPR] and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable."[29]

22. Thirdly, in providing a requirement that the person be allowed to provide "reasons against his expulsion,"[30] and in requiring recourse to adversarial proceedings, it is implicit that the determining authority, be it the state in the first instance or the court on review, should itself be required to provide reasons for its own determination. If, at first instance, the state authority issuing an order for removal were not required to provide reasons and disclose relevant material to the individual, the right of review in Article 1(1)(b) would be rendered meaningless as that individual would not be able to meet the case against them. As discussed above, this Court has long recognised that the proper administration of justice requires that judgments of courts and tribunals should adequately state the reasons on which they are based.[31] In the context of Article 1 the Court has held that a review of a removal decision was insufficient where it was no more than a "purely formal examination, with the result that the first applicant was not able to have his case genuinely heard and reviewed in the light of reasons militating against his expulsion".[32] Without a reasoned judgment there is no safeguard to guarantee compliance with this requirement.

23. Finally, it is submitted that in the context of national security removals, protection from arbitrariness is of the utmost importance, this being a sphere in which intelligence assessments based on speculation can lead to executive overreach at the expense of human rights.

Closed proceedings in non-refoulement cases

24. The Intervener wishes to highlight the particular risk of closed proceedings being used in cases possibly involving a risk of refoulement, such as removal proceedings. This Court has rightly taken a unequivocal line on the importance of protection from the risk of Convention Article 3 violations in removal cases.[33] In dismissing government arguments

[29] UN Human Rights Committee, General Comment 32, para 62.
[30] Article 1(1)(a) of Protocol 7 of the ECHR.
[31] *Ibrahimov and Others v. Azerbaijan*, (App no. 69234/11) 11 February 2016, para 103; *García Ruiz v. Spain* [GC], (App no. 30544/96) 21 January 1999, para 26.
[32] *C.G. and Others v. Bulgaria*, (App no. 1365/07) 24 April 2008, para 74.
[33] *Soering v. The United Kingdom*, (App no. 14038/88) 7 July 1989, paras 90-91; *Vilvarajah and Others v the United Kingdom*, (App no 13163/87) 30 October 1991, para 103; *H.L.R. v. France*, (App no. 24573/94) 29 April 1997, para 34; *Jabari v. Turkey*, (App no. 40035/98) 11 July 2000, para 38; *Salah Sheekh v. the Netherlands*, (App no. 1948/04) 11 January

that the alleged terrorism related offences of the accused lessened the need for protection from torture, this Court held in *Saadi v Italy* that "As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3."[34]

25. It is submitted that, just as the prohibition of torture and other ill-treatment under Article 3 is absolute and unwavering, irrespective of the accused's alleged conduct, so too are the procedural safeguards against the risk of Article 3 violations. Such is in keeping with the jurisprudence of the Human Rights Committee, which has held that "… where one of the highest values protected by the ICCPR, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture."[35] If the prohibition of torture and other ill-treatment is absolute, so too must be the safeguards against it - irrespective of the alleged conduct of the accused. It must be stressed that in the context of national security the risk of Article 3 violations is high, as demonstrated by this Court's own jurisprudence in this area.[36] Accordingly, removal decisions in the context of national security must be scrutinised by the courts applying the same "rigorous scrutiny" applicable in any other case where there is a real risk of refoulement.[37]

26. Closed proceedings in removal cases fatally impair a court's ability to apply rigorous scrutiny in determining whether a person faces a real risk of torture or other ill-treatment. To deny a person alleging that they face a real risk of an Article 3 violation the ability to effectively scrutinise and challenge the evidence being used to refute their claim, undermines the absolute and unwavering protection from Article 3 violations.

2007, para 135; *Chahal v. United Kingdom*, (App no. 22414/93) 15 November 1996; *Saadi v Italy*, (App no. 37201/06) 28 February 2008.

[34] *Saadi v Italy*, (App no. 37201/06) 28 February 2008, para 123, citing *Chahal*, para 79; *Indelicato v. Italy*, (App no. 31143/96) 18 October 2001, para 30; *Ramirez Sanchez v. France* [GC], (App no. 59450/00) 4 July 2006, paras 115-16.

[35] *Ahani v Canada*, (Communication no. 1051/2002) para 10.6; The Committee proceeded to find at paragraph 10.7 a violation of the ICCPR on the basis that the author had insufficient access to the material being used against him and that "the author may have been able to make out the necessary level of risk if in fact he had been allowed to submit reasons on the risk of torture faced by him in the event of removal, being able to base himself on the material of the case presented by the administrative authorities against him in order to contest a decision that included the reasons for the Minister's decision that he could be removed." See also The Global Principles on National Security and Right Information (Tshwane Principles), Principle 10(b).

[36] See, inter alia, *Chahal v United Kingdom,* (App no. 22414/93) 15 November 1996; *Saadi v Italy,* (Application no. 37201/06) 28 February 2008; *Husayn (Abu Zubaydah) v. Poland*, (App no. 7511/13) 24 July 2014; *Al Nashiri v. Poland* (App no. 28761/11) 24 July 2014; *El-Masri v The Former Yugoslav Republic of Macedonia* (App no. 39630/09) 13 December 2012.

[37] *Jabiri v Turkey*, (App no. 40035/98) 11 July 2000, para 39.