

# Expulsion of EU Citizens on the Basis of Secret Information: Article 47 of the EU Charter on Fundamental Rights Requires Disclosure of the Essence of the Case

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## Abstract

*This article discusses the judgment of the Court of Justice (CJEU) in ZZ v. Secretary of State for the Home Department. The CJEU held in this judgment that Article 47 of the EU Charter of Fundamental Rights requires that the essence of the grounds of the decision to restrict an EU citizen's right to free movement on national security grounds is disclosed. According to the Court, this requirement cannot be second to the protection of the Member State's national security. The article argues that the judgment in ZZ is relevant for other fields of EU law where secret information plays a role. Furthermore, it examines how the CJEU's judgment relates to the ECtHR's case law and what the requirement to disclose the essence of the case entails.*

## I Introduction

The detention and expulsion of foreign terrorist suspects has become widespread within the EU. Such measures are usually based on intelligence provided by secret services, which is not or partly disclosed to the individual concerned for national security reasons. The use of secret information (including the grounds of the decision and the facts and evidence underlying these grounds) makes it extremely difficult for the individual concerned to refute the allegations against him. This is problematic because in many migration cases fundamental rights, such as the EU right to free movement, the right to liberty, the right to family life or the prohibition of *refoulement* are what is at stake.

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This article discusses the judgment of the Court of Justice (CJEU) in *ZZ v. Secretary of State for the Home Department*.<sup>1</sup> This judgment concerns a decision taken by the authorities of the United Kingdom to restrict an EU citizen's right to free movement which was based on secret information. The CJEU ruled that the right to an effective remedy guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) requires an effective judicial review of such a decision. Most importantly, the CJEU makes clear that the essence of the grounds underlying the decision must always be disclosed to the individual concerned. According to the Court the 'necessary protection of State security'<sup>2</sup> cannot have the effect of denying the person concerned his right to be heard' and, therefore, his right to an effective remedy.<sup>3</sup>

This article will start with a brief description of the facts and national proceedings (section 2). Section 3 summarises the judgment of the CJEU. Finally section 4 analyses the CJEU's judgment and focuses on three issues:

1. The applicability of the interpretation of Article 47 of the Charter given in *ZZ* to other fields of EU law;
2. The relation of the judgment in *ZZ* to the case law of the European Court of Human Rights (ECtHR);
3. The requirement to disclose the 'essence' of the grounds of the decision.

## 2 Facts and Proceedings before the National Court

*ZZ* has dual French and Algerian nationality and legally resided together with his family in the UK from 1990-2005. While *ZZ* was staying in Algeria in 2005, the UK Secretary of State decided to cancel his right of permanent residence. When *ZZ* returned to the UK in 2006, the Secretary of State refused him admission on grounds of public security on the basis of Article 27 of Directive 2004/38/EC.<sup>4</sup> *ZZ* was accused of involvement in activities of the Armed Islamic Group network and in terrorist activities in 1995 and 1996. *ZZ* was deported to Algeria, but he appealed the decision to refuse him

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<sup>1</sup> CJEU Case C-300/11 *ZZ v. Secretary of State for the Home Department* [2013]. This case was also discussed by the author in an annotation in *AB Bestuursrechtspraak* no. 2013/374. This article is partly based on this annotation.

<sup>2</sup> The CJEU uses the term 'State security'. In this article the terms 'State security' and 'national security' are used interchangeably.

<sup>3</sup> *Ibid.*, para. 65.

<sup>4</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 229/35. Art. 27 states that 'Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health'.

admission to the UK before the Special Immigration Appeals Commission (SIAC). The Secretary of State refused to disclose to ZZ the information underlying the contested decision. Therefore ZZ was assisted by two special advocates during the appeal proceedings. These security-cleared lawyers have access to the secret information in the case-file. They plead for the disclosure of secret information and submit arguments against the decision on behalf of their client. However after they have seen the secret information they are no longer allowed to communicate with their client.<sup>5</sup> The SIAC held open and closed sessions (without ZZ and his lawyers, but in the presence of the special advocates). It finally dismissed ZZ's appeal in an 'open' judgment and a 'closed' judgment, which was only disclosed to the Secretary of State and ZZ's special advocates. The SIAC acknowledged in its judgment that 'little of the case' against ZZ had been disclosed to him and that the information which had been disclosed did not concern 'the critical issues'. ZZ appealed the SIAC's decision before the Court of Appeal. This court found that SIAC's open and closed judgment read together contained findings of fact and reasoning which were easily sufficient to support the conclusion that ZZ posed a threat to public security. However the Court of Appeal had doubts as to whether the rights of the defence of ZZ had been sufficiently respected during the proceedings. For this reason it asked the CJEU whether the EU right to an effective remedy requires that an EU citizen, who is excluded on grounds of public policy and public security grounds, is informed of the essence of the grounds against him, even if this would be contrary to the interests of State security.<sup>6</sup>

### 3 Court of Justice's Judgment

The Court of Justice takes several procedural rights and principles into account when answering this question. The right to an effective remedy guaranteed by Article 47 of the Charter and reflected in Article 31 of Directive 2004/38/EC played a central role. Article 47 of the Charter refers to the rights of the defence which includes the principle of adversarial proceedings. This principle entails that 'the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them.'<sup>7</sup> Directly linked to the right to an effective remedy is the right to know the reasons for a decision. The reasons for a decision enable a person 'to defend his rights in the best possible

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<sup>5</sup> See for more information on special advocate procedures *eg* J Ip, 'The Rise and Spread of the Special Advocate' [2008] *Public Law*, 717.

<sup>6</sup> *ZZ v. Secretary of State for the Home Office* [2011] UK Court of Appeal (Civil Division) T2/2008/1997 [2011] EWCA Civ 440.

<sup>7</sup> CJEU Case C-300/11 *ZZ v. Secretary of State for the Home Office* [2013], para. 55.

conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court.<sup>8</sup> At the same time, the reasons of the decision make it possible for the court to effectively review the lawfulness of this decision. Article 30(2) of Directive 2004/38/EC provides that an EU citizen and/or his family members must be informed ‘precisely and in full’ of the grounds which constitute the basis of the decision to restrict their freedom of movement. An exception to this rule can only be made in the interest of State security.

The non-disclosure of information underlying a decision to one of the parties should be considered a limitation to the right to an effective remedy guaranteed by Article 47 of the Charter. The CJEU allows such limitations, provided that they respect the essence of this right and are ‘necessary and genuinely meet objectives of general interest recognised by the European Union’.<sup>9</sup> The protection of State security and international relations should be considered such objectives of general interest.<sup>10</sup>

The CJEU derives a set of requirements from Article 47 of the Charter for judicial review by national courts of decisions taken under Article 27 of Directive 2004/38/EC which are (partly) based on secret information. First the national court should carry out an independent review of the ‘existence and validity’ of the reasons given by the national authority for non-disclosure of information underlying the contested decision. The national authority needs to prove that ‘State security would in fact be compromised by precise and full disclosure’ to the person concerned of the grounds of the decision and of the related evidence.<sup>11</sup> If the court finds that the national authority failed to do so, it should give the authority the opportunity to disclose the missing grounds and evidence to the person concerned. If the authority refuses, the court should examine the legality of the decision only on the basis of the open material. The CJEU makes it clear that the national authority may not refuse disclosure of grounds or evidence to the national court. The court must be able to review the legality of the decision examining both all of the grounds as well as the related evidence on whose basis the decision was taken.<sup>12</sup>

If the national court concludes that the non-disclosure of (part of) the grounds and/or evidence on which the decision is based is justified, certain procedural safeguards should be put in place. The State interest to keep certain information secret should be balanced against the procedural rights of the

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<sup>8</sup> *Ibid.*, para. 53. The CJEU here refers to its settled case law concerning the EU principle that decision must be reasoned, not to Art. 41 of the Charter which also guarantees this right.

<sup>9</sup> *Ibid.*, para. 51.

<sup>10</sup> *Ibid.*, para. 54. See also CJEU Joined Cases C584/10 P, C593/10 P and C595/10 P *European Commission et al v. Yassin Abdullah Kadi* [2013], para. 125.

<sup>11</sup> CJEU Case C-300/11 *ZZ v. Secretary of State for the Home Office* [2013], paras 58 and 60-62.

<sup>12</sup> *Ibid.*, para. 59.

person concerned. The national court should ensure that the interferences with the exercise of the right to an effective remedy are limited to those which are ‘strictly necessary’ and that the adversarial principle is complied with ‘to the greatest possible extent’.<sup>13</sup> The court should ‘have at its disposal and apply techniques and rules of procedural law’ which accommodate the State interest in protecting State security on the one hand and the procedural rights of the person concerned on the other.<sup>14</sup> Most importantly the CJEU considers that the person concerned ‘must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based’. In the CJEU’s view, non-disclosure of the essence of the grounds of the decision would deny the person concerned his right to be heard and, as a result, render his right of redress as provided for in Article 31 of Directive 2004/38/EC ineffective.<sup>15</sup>

The CJEU distinguished between the grounds of the decision and the evidence underlying those grounds. It considered that ‘disclosure of that evidence is liable to compromise State security in a direct and specific manner’.<sup>16</sup> For that reason the public interest in protecting State security should be accorded more weight when applying the balancing test to the non-disclosure of evidence than to non-disclosure of the grounds of a decision. The national courts should assess whether and to what extent the restrictions of the rights of the defence arising from a failure to disclose the evidence or grounds of the decision affect the ‘evidential value of the confidential evidence’. The CJEU does not give the national courts any guidance on how this should be done.

## 4 Analysis

### 4.1 General Applicability of the Requirements under Article 47 of the Charter

In ZZ the CJEU interprets Articles 30(2) and 31 of Directive 2004/38/EC<sup>17</sup> in light of Article 47 of the Charter. It sets important procedural standards for the use of secret information in cases in which the freedom of movement of EU citizens and/or their family members is restricted on grounds

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<sup>13</sup> *Ibid.*, paras 64 and 65.

<sup>14</sup> *Ibid.*, para. 57.

<sup>15</sup> *Ibid.*, para. 65.

<sup>16</sup> *Ibid.*, para. 66.

<sup>17</sup> Art. 31 states that ‘the persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health’.

of public security. The question arises whether these standards also apply outside the context of free movement of EU citizens.<sup>18</sup> In particular it is important to know whether these standards are also applicable to other migration cases falling within the scope of EU law, such as asylum or family reunification cases.<sup>19</sup> Those cases lack the protection of Article 6 ECHR, which provides similar guarantees as Article 47 of the Charter (see further under 4.2).

First of all it is important to note that in ZZ the CJEU applies the standards it developed in other fields of EU law to national proceedings concerning the restriction of free movement of EU citizens. In particular the CJEU refers several times to the judgment of *Kadi and Al Barakat* which concerned a decision of the Council and the Commission to freeze the funds of an organisation suspected of terrorist activities. Article 47 thus sets similar standards with regard to the use of secret information for proceedings on the national and EU level.<sup>20</sup> The UK Secretary of State had argued before the Court of Appeal that the *Kadi* standards could not be applied to national decisions to exclude or deport a person on national security grounds.<sup>21</sup>

In ZZ the CJEU, for the first time, found that EU law requires the disclosure of the essence of the grounds on which a decision is based. This standard is arguably part of the core of Article 47 of the Charter<sup>22</sup> and may therefore also be applicable outside the context of free movement of EU citizens. Neither the specific EU legislation applicable nor the nature of the EU rights at stake in ZZ seem to have played a decisive role in the CJEU's decision. The text of Article 30(2) of Directive 2004/38/EC sets a high standard requiring that the persons concerned be informed 'precisely and in full' of the grounds underlying the decision. It only allows exceptions to this rule in the interest of State security. However the CJEU does not derive the requirement to disclose the essence of the grounds of the decision from this provision. In its key considerations at paragraphs 64 and 65 the CJEU only refers to 'the need to comply with Article 47 of the Charter'. Nor does the CJEU mention in ZZ that the fundamental freedom of movement of EU citizens was at stake and that for that reason disclosure of the essence of the case is required. The judgment in ZZ therefore does not indicate that Article 47 of the Charter offers less protection in other

<sup>18</sup> The scope of application of the requirement of disclosure of the essence of grounds of the decision has been the subject of debate in the UK. See *ZZ v. Secretary of State for the Home Department* [2011] UK Court of Appeal (Civil Division) T2/2008/1997, [2011] EWCA Civ 440. See also with regard to security vetting cases *Home Office v. Tariq* [2011] UK Supreme Court 35.

<sup>19</sup> These cases are governed by the Qualification Directive (2011/95/EU) and the Family Reunification Directive (2003/86/EC).

<sup>20</sup> In CJEU Joined Cases C584/10 P, C593/10 P and C595/10 P *European Commission et al v. Yassin Abdullah Kadi* [2013], eg paras 125-129 the CJEU makes extensive references to ZZ.

<sup>21</sup> *ZZ v. Secretary of State for the Home Department* [2011] UK Court of Appeal (Civil Division) T2/2008/1997, [2011] EWCA Civ 440, para. 22.

<sup>22</sup> See CJEU Case C-300/11 *ZZ v. Secretary of State for the Home Department* [2013], para. 51. Compare the opinion of Lord Kerr in *Home Office v. Tariq* [2011] UK Supreme Court 35, para. 118-119.

fields of EU law, including migration cases involving only third country nationals (non-EU citizens). It should be noted that such migration cases also often involve fundamental rights, such as the prohibition of *refoulement*, the right to asylum or the right to family life.<sup>23</sup> For that reason, it is not very likely that in these cases the CJEU would not require disclosure of the essence of the grounds of the decision.

At the same time some caution is called for. The nature of the rights at stake and the context in which the decision is taken is relevant for the assessment of whether there is an infringement of Article 47 of the Charter.<sup>24</sup> Therefore it should not be excluded that the CJEU deems a lower level of protection acceptable in cases in which, for example, less severe interferences with EU fundamental rights are concerned.

#### 4.2 Relation with the Case Law of the European Court of Human Rights

In its judgment in *ZZ* the CJEU does not refer to the case law of the European Court of Human Rights (ECtHR).<sup>25</sup> This is striking because the European Convention of Human Rights (ECHR) and the case-law of the ECtHR are important sources of inspiration for the interpretation of EU fundamental rights.<sup>26</sup> The rights of the defence guaranteed by Article 47 of the Charter are based on Article 6 ECHR.<sup>27</sup> Therefore one would have expected the CJEU to take into account the ECtHR's case-law under Article 6, which provides important standards with regard to the use of secret information.<sup>28</sup> Particularly important is the ECtHR's Grand Chamber judgment in *A and others* which concerned a complaint against the indefinite detention of foreign terrorist suspects in the United Kingdom.<sup>29</sup> The ECtHR ruled that 'in view of the dramatic impact of the lengthy – and what appeared at that time to be indefinite

<sup>23</sup> See respectively Arts 4 and 19, 18 and 7 of the Charter.

<sup>24</sup> See *eg* CJEU Joined Cases C584/10 P, C593/10 P and C595/10 P *European Commission et al v. Yassin Abdullah Kadi* [2013], para. 102. See also AM Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford, Hart Publishing 2014), section 4.5.

<sup>25</sup> AG Bot in his Opinion of 12 September 2012 with the *ZZ* case did make extensive references to the ECtHR's case-law.

<sup>26</sup> Art. 6(3) TEU. The Charter specifically states that it reaffirms the rights included in the ECHR and following from the case law of the ECtHR. See also Art. 52(3) of the Charter.

<sup>27</sup> See the explanations relating to the Charter of Fundamental Rights (2007/C 303/02) OJ 14 December 2007, C 303/32.

<sup>28</sup> See for an overview of the case law AM Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford, Hart Publishing 2014), section 10.5.

<sup>29</sup> ECtHR 19 February 2009, *A and others v. United Kingdom*, Appl no 3455/05. The complaint before the ECtHR was based on Article 5(4) ECHR which provides procedural guarantees in detention cases. The General Court in T85/09 *Yassin Abdullah Kadi v. Commission* [2010], para. 176 did refer to *A and others*.

– deprivation of liberty on the applicants’ fundamental rights’ Article 5(4) ECHR should import substantially the same fair-trial guarantees as the criminal limb of Article 6(1) ECHR.<sup>30</sup> In *A and others* as in *ZZ*, a special advocate procedure before the SIAC had been applied. The ECtHR held that the allegations against a terrorist suspect contained in the open material must be sufficiently specific in order to enable him to defend himself against these allegations and to give effective instructions to the special advocate. Article 5(4) ECHR would be violated where ‘the open material consisted purely of general assertions and SIAC’s decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material’.<sup>31</sup>

According to the case law of the ECtHR migration cases fall outside the scope of Article 6 ECHR and are only protected by Article 13 ECHR.<sup>32</sup> The ECtHR requires a lower level of procedural protection under Article 13 ECHR than under Article 6 ECHR. The ECtHR held with respect to Articles 8 and 13 ECHR that ‘there must be *some form of adversarial proceedings* before an independent body competent to review the reasons for the decision, *if need be with appropriate procedural limitations* on the use of classified information’ (emphasis added).<sup>33</sup> The ECtHR has not considered under Article 13 ECHR that disclosure of sufficiently specific allegations is required.<sup>34</sup>

The CJEU in its judgment in *ZZ* sets requirements which are worded in similar terms as those applied by the ECtHR under the criminal limb of Article 6 ECHR. The CJEU considers that any interferences with the right to effective judicial protection should be limited to ‘that which is strictly necessary’.<sup>35</sup> The obligation to disclose the essence of the grounds of the decision resembles the obligation set out in *A and others* to disclose sufficiently specific allegations against a person in the open material. The CJEU thus seems to disagree with Advocate General Bot who did not think ‘that Article 47 of the Charter requires the analogous application of guarantees as rigorous as those under Article 6(1) of the ECHR in its criminal aspect to disputes concerning expulsion measures’.<sup>36</sup>

<sup>30</sup> ECtHR 19 February 2009, *A and others v. United Kingdom*, Appl no 3455/05, para. 217.

<sup>31</sup> *Ibid.*, para. 220.

<sup>32</sup> ECtHR 5 October 2000, *Maaouia v. France*, Appl. No. 39652/98, para. 40.

<sup>33</sup> ECtHR 6 December 2007, *Liu and Liu v. Russia*, no 42086/05, para. 59.

<sup>34</sup> In ECtHR 17 January 2012, *Othman v. the United Kingdom*, Appl. no. 8139/09, paras 218-225, the ECtHR refused to apply the *A and others* criteria to a case concerning the extradition of a person from the UK to Jordan. In this case the national courts discussed in a closed session the process by which a Memorandum of Understanding (MoU) between the UK and Jordan was agreed. The ECtHR held that the requirements under Art. 13 ECHR should apply. It found of particular relevance that in *Othman* the secret information did not concern allegations against the applicant (as was the case in *A and others*).

<sup>35</sup> CJEU Case C-300/11 *ZZ v. Secretary of State for the Home Office* [2013], para. 64. Compare ECtHR 19 February 2009, *A and others v. United Kingdom*, Appl no 3455/05, para. 205. See also ECtHR 16 February 2000, *Fitt v. United Kingdom*, Appl no 29777/96, para. 45.

<sup>36</sup> CJEU Case C-300/11 *ZZ v. Secretary of State for the Home Office* [2013], Opinion AG Bot, para. 111.

However, the CJEU does not explicitly state this in its judgment. If the requirements following from the criminal limb of Article 6 ECHR are indeed being incorporated in Article 47 of the Charter and can be applied to all migration cases, Article 47 of the Charter offers a significantly higher level of protection than the ECHR.

#### 4.3 The Requirement to Disclose the Essence of the Grounds of the Decision

The CJEU makes clear in ZZ that judicial review of the secret information and the application of techniques which accommodate the procedural rights of the individual, such as the special advocate system in the United Kingdom, are not sufficient to guarantee the individual's rights of the defence. The essence of the grounds of the decision must always be disclosed, even if the State finds that this would endanger national security.<sup>37</sup> Here the CJEU departs from the opinion of Advocate General Bot who stated that the rights of the defence and effective judicial protection must not be such that they discourage the Member States from taking measures to guarantee public security. He referred to the EU's obligation under Article 3(2) TEU to offer its citizens an area of security in which the prevention and combating of crime are ensured. 'Consequently, it is not acceptable to claim ... that where a Member State considers that the disclosure of the essence of the grounds is contrary to State security, it would only have the choice of making the expulsion and disclosing the grounds of public security justifying that decision or simply forgoing the expulsion of the person concerned.'<sup>38</sup> The CJEU did accept that the evidence underlying the grounds of the decision remains confidential if necessary to protect national security.<sup>39</sup> Accordingly, national security may only affect the *manner* in which the essence of the grounds of the decision is disclosed.<sup>40</sup>

Why is the disclosure of the essence of the grounds of a decision so important that it cannot yield to national security? Why does judicial review of the secret information underlying the decision not suffice? In ZZ (and many other cases concerning terrorist suspects) the individual was considered a threat to public security on the basis of secret information concerning his (potential) conduct. ZZ was the only person that potentially had the information necessary to put

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<sup>37</sup> This is also how the UK Court of Appeal interpreted the CJEU's judgment. *ZZ v. Secretary of State for the Home Department* [2014] UK Court of Appeal (Civil Division) T2/2008/1997, [2014] EWCA Civ 7, in particular paras 18, 23 and 27.

<sup>38</sup> CJEU Case C-300/11 *ZZ v. Secretary of State for the Home Department* [2013], Opinion AG Bot para. 80.

<sup>39</sup> The distinction between evidence and grounds was also made by the UK Supreme Court in *Secretary of State for the Home Department v. AF* [2009] UKHL 28, para. 65-66.

<sup>40</sup> See *ZZ v. Secretary of State for the Home Office* [2014] UK Court of Appeal (Civil Division) T2/2008/1997, [2014] EWCA Civ 7, para. 25.

forward an alternative, innocent explanation of certain facts. The SIAC which received the secret information underlying the decision could review whether the secret information sufficiently supported the decision. However it was not in a position to challenge the facts.<sup>41</sup> The same applied to the special advocate representing the individual in the closed part of the proceedings. He was not allowed to speak to his client after he had seen the confidential information underlying the decision and therefore could not receive the necessary instructions.<sup>42</sup> Lord Kerr of the UK Supreme Court in the *Al Rawi* case pointed to the fact that '[e]vidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial.'<sup>43</sup>

A question which the CJEU did not answer in *ZZ* is what information constitutes the essence of a case. Nor in EU sanction cases has the CJEU explicitly addressed this question, but it has given some guidance as to the information that should be disclosed in order to comply with the duty to state reasons. It takes into account whether a measure was adopted in a context which was known to the person concerned and which enables him to understand the scope of the measure concerning him.<sup>44</sup> Furthermore the CJEU looks at the level of detail of the open grounds for the decision. Naming dates, places, names of persons with whom the individual had contact, and the nature of the conduct he is accused of help the individual to defend himself against the allegations against him.<sup>45</sup> The same approach was taken by the ECtHR in *A and others*. The ECtHR mentions as an example of a sufficiently specific allegation that a person has attended a terrorist training camp at a stated location between stated dates. '[G]iven the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation'.<sup>46</sup> In the case of *ZZ* it was clear that the essence of the case had not been disclosed. The UK Court of Appeal in a judgment of 24 January 2014 followed the CJEU's

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<sup>41</sup> See also *Secretary for the Home Department v. AF* [2009] UKHL 28, para. 63.

<sup>42</sup> See for the challenges which special advocates face representing their clients eg M Chamberlain, 'Special advocates and procedural fairness in closed proceedings' (2009) 28 *Civil Justice Quarterly*, 314.

<sup>43</sup> *Al Rawi and others v. the Security Service and others* [2011] UKSC 34, para. 93.

<sup>44</sup> CJEU Case C-417/11 P *Council v. Bamba* [2012], paras 54-55.

<sup>45</sup> CJEU Case C-417/11 P *Council v. Bamba* [2012], paras 57-58. The CJEU held that insufficiently detailed information was disclosed in CJEU Joined Cases C584/10 P, C593/10 P en C595/10 P, *Commission et al v. Kadi* [2013], para. 141.

<sup>46</sup> ECtHR 19 February 2009, *A and others v. United Kingdom*, Appl. no. 3455/05, para. 220.

judgment and remitted the case to the SIAC for fresh determination, applying the principles in the CJEU's judgment.<sup>47</sup>

#### 4.4 Final Remarks

The judgment in *ZZ* shows that Article 47 of the Charter offers important procedural rights, which similarly apply to all cases falling within the scope of EU law on the EU and the national level. The CJEU held in *ZZ* that the essence of the grounds of the decision to restrict an EU citizen's right to free movement on national security grounds must be disclosed to the person concerned. The CJEU made clear that this right cannot be second to the State's interest in the protection of national security. The requirement to disclose the essence of the grounds of the decision potentially also applies to decisions concerning other fields of EU law which are (partly) based on secret information, including migration cases involving third country nationals. Future case law needs to show whether the CJEU will indeed oblige Member States to disclose the essence of the grounds of the decision in such cases.

The judgment in *ZZ* also demonstrates that the CJEU does not always make it clear whether and how it is inspired by the ECtHR's case law where it interprets EU fundamental rights. In *ZZ* the CJEU seems to incorporate the requirements with regard to the right to adversarial proceedings guaranteed by Article 6 ECHR in Article 47, but does not refer to the relevant case law of the ECtHR. The judgment in *ZZ* makes clear that in particular in migration cases, which do not fall within the scope of Article 6 ECHR, Article 47 provides a higher level of protection than the ECHR.

The CJEU does not explain in *ZZ* which information constitutes the essence of the grounds of the decision. Some guidance can be found in the CJEU's case law with respect to EU sanction cases. Further guidelines for national courts can be expected in future case law on this issue.

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<sup>47</sup> *ZZ v. Secretary of State for the Home Department* [2014] UK Court of Appeal (Civil Division) T2/2008/1997, [2014] EWCA Civ 7, paras 35-40.