

JUSTICE PRESS RELEASE

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'A cloak of secrecy over our civil courts': Court of Appeal to hear appeal against use of secret evidence in civil claim for damages against government

On Monday, 8 March, the Court of Appeal will begin hearing the appeal of seven UK residents in a civil claim for damages against the British government for alleged complicity in their torture overseas. The appellants include Moazzem Begg, former detainee in Guantanamo, and Binyam Mohamed.

The appeal concerns a preliminary ruling of the High Court that the government could, in principle, rely on a 'closed defence' and secret evidence in defending the claim. This would mean that, rather than a hearing in open court, the government would be able to rely on secret evidence in closed hearings. The claimants and their lawyers would not be entitled to see the government's secret evidence. Instead, special advocates would be appointed to act for the claimants in the closed sessions. The High Court accepted the government's argument that this procedure would be fairer and less expensive than the traditional Public Interest Immunity procedure.

Until now, the use of so-called 'closed hearings' has been limited to proceedings authorised by Act of Parliament, e.g. before the Special Immigration Appeals Commission (SIAC) or in control order cases before the High Court. If upheld, the High Court ruling would mean that any civil court would, in principle, be able to use secret evidence and special advocates whenever a case concerned government information that was too sensitive to be disclosed in public.

Eric Metcalfe, JUSTICE's director of human rights policy, said:

The government wants to drive coach and horses through long-standing common law principles of open justice and public interest immunity.

If upheld, this ruling would lead to a cloak of secrecy descending over our civil courts.

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Notes to editors

1. JUSTICE and Liberty have been granted leave to intervene in the appeal, and will make oral submissions on Tuesday, 9 March. JUSTICE and Liberty are represented pro bono in the appeal by John Howell QC and Jessica Boyd of Blackstone Chambers. A PDF copy of the written submissions is attached.
2. In June 2009, JUSTICE published *Secret Evidence*, a 238 page report detailing how the use of so-called 'closed proceedings' and special advocates have spread throughout the civil justice system since they were first introduced by the Special Immigration Appeals Commission Act 1997. PDF copies of the report are available on request.
3. A central issue in the appeal is the law governing 'public interest immunity' ('PII'). This is a long-standing legal principle governing the disclosure of sensitive government information in civil and criminal cases. In civil cases, PII requires the judge to decide which sensitive government material needs to be disclosed in the interests of justice, and which material is too sensitive to disclose. If information is too sensitive to be disclosed, it cannot be used by either party. PII was the focus of the Scott Report following the Matrix Churchill case. It also played a central role in the recent *Binyam Mohamed* decision.
4. It is a widespread misconception that special advocates are only used in closed proceedings involving secret evidence. They are also sometimes appointed in PII proceedings to assist the court in determining whether information can be disclosed, e.g. as in the *Binyam Mohamed* case. The use of special advocates in PII proceedings is very different from their use in closed proceedings involving secret evidence. The government typically opposes the appointment of special advocates in PII proceedings, but strongly favours their use for closed proceedings. This is because closed proceedings enable the government to use evidence in court while keeping it secret. In PII proceedings, however, if the court rules that government is too sensitive to disclose, it cannot be used by the government or anyone else in the court proceedings that follow.