a JUSTICE report

SECRET EVIDENCE

Advancing access to justice, human rights and the rule of law

Secret Evidence

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EXECUTIVE SUMMARY

- It is a basic principle of a fair hearing that a person must know the evidence against him.

- This core principle of British justice has been undermined as the use of secret evidence in UK courts has grown dramatically in the past 10 years.

- Secret evidence can now be used in a wide range of cases including deportations hearings, control orders proceedings, parole board cases, asset-freezing applications, pre-charge detention hearings in terrorism cases, employment tribunals and even planning tribunals.

- Defendants in some criminal cases are now being convicted on the basis of evidence that has never been made public. Criminal courts have issued judgments with redactions to conceal some of the evidence relied upon. Evidence from anonymous witnesses has also been used in hundreds of criminal trials and is widespread in ASBO hearings.

- Since they were first introduced in 1997, almost 100 special advocates – lawyers prohibited from communicating with those they represent – have been appointed. Indeed, the government itself does not know how many special advocates have been appointed.

- This report calls for an end to the use of secret evidence. Secret evidence is unreliable, unfair, undemocratic, unnecessary and damaging to both national security and the integrity of Britain's courts.

- In its place, this report sets out a series of recommendations that include the strengthening current disclosure procedures by the creation of public interest advocates to replace special advocates in PII claims; increasing the transparency of existing court procedures; and ending reliance on 'reasonable suspicion' in such proceedings as deportation and control orders.

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Please note that the views expressed in this report, responsibility for any mistakes, and the analysis and conclusions drawn, are those of JUSTICE alone. This report was prepared using information entirely in the public domain.

This report was written by Eric Metcalfe, JUSTICE's director of human rights policy. It was researched by JUSTICE policy interns Emer Murphy, Emily Rayner, Hayley Smith, Hermione Williams, Camilla Graham Wood and Arezou Yavarianfar.

INTRODUCTION

1. The idea of a fair hearing is as old as western civilization itself.

2. In a scene in the *Eumenides* written by Aeschylus sometime before 458 BC, the goddess Athena is called to sit in judgment on Orestes who is accused by the Furies of murdering his mother, Clytemnestra. After hearing the accusation, Athena declares that 'there are two sides to this dispute. I've heard only one half the argument'.[1] In Seneca's play more than four centuries later, Medea decries the unfairness of Cleon's decision to exile her from Corinth: 'he who decides something without hearing the other side is not just, even if he makes a just decision'.[2] An eighteenth century judge of the King's Bench followed Aeschylus in attributing to the idea of a fair hearing a divine origin:[3]

> The laws of God and man both give the party an opportunity to make his defence, if he has any …. Even God himself did not pass sentence upon Adam before he was called upon to make his defence.

3. This principle of *audi alteram partem*, or 'hear the other side', has been a cornerstone of our system of justice for several hundred years. And although the practice has often fallen far short of the ideal (c.f. the Court of Star Chamber), for several hundred years it has been well understood that the right to be heard means more than merely the opportunity to state one's case. It includes the right to confront one's accuser; to know and to challenge the evidence given by the other side. As Lord Denning said, '[i]f the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him'.[4]

4. It should be self-evident, therefore, that the use of secret evidence by any court runs utterly contrary to the idea of a fair hearing. For most people, the unfairness of secret evidence is so obvious and instinctive that it is unnecessary to explain further. Instead, it is something that people would associate with the closed hearings of the McCarthy era, the proceedings of the Inquisition or the works of Kafka. It may therefore come as something of a surprise to many people to learn that the UK – a country so long associated with the idea of fairness and so renowned for the integrity of its justice system – has in the past decade become a pioneer in the use of secret evidence in its courts.

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[1] *Eumenides*, 435.

[2] 'Qui statuit aliquid parte inaudita altera, aequum licet statuerit, haud aequus fuit', *Medea,* 199-200.

[3] Dr Bentley's case (1723) 1 Stra 557 at 567 per Fortescue J.

[4] *Kanda v Government of Malaya* [1962] AC 322 at 337.

5. Since 1997, Parliament has passed legislation allowing secret evidence to be used in a wide range of courts and tribunals. It has also sanctioned the courts' use of anonymous evidence in criminal cases. In addition, the courts themselves have adopted special procedures for the use of closed hearings. Not only are defendants prevented from knowing the evidence against them but the special advocates who are appointed to represent them in secret hearings are prohibited from discussing the closed evidence with them. Elsewhere, terrorism trials are being held in secret, with judges issuing redacted rulings that prevent the media and the public from knowing all the evidence in the case. In one case, a High Court judge declared that a defendant had received a fair hearing despite not knowing any of the evidence against him.

6. Collectively, these measures have led to an explosion of secret proceedings in an ever-increasing number of cases, from employment tribunals and parole board hearings, to control order cases in the High Court and deportation on national security grounds before SIAC. This report therefore seeks to detail the use of secret evidence in UK law:

    - **Part 1** of this report sets out the core principles of the right to a fair hearing, including the right to be heard, the right to confront one's accuser and the right to equality of arms. It also identifies the core legal guarantees contained in articles 5(4) and 6 of the European Convention on Human Rights;

    - **Part 2** looks at the use of secret evidence in civil proceedings. Tracing the evolution of secret evidence through SIAC, control orders into the broader civil justice system, this Part sets out the many different kinds of cases in which secret evidence can now be lawfully used;

    - **Part 3** looks at criminal proceedings, including the use of secret evidence in pre-charge detention hearings in terrorism cases, anonymous evidence in criminal trials, intercept material and the development of the law relating to public interest immunity. It also identifies a growing trend towards closed criminal trials, from which the media and the public are excluded;

    - **Part 4** examines the use of special advocates - lawyers appointed to act on behalf of a defendant in closed proceedings. This Part charts the origin of special advocates, shows how their numbers have grown over the past decade, and points to key limitations on their effectiveness as a substitute for a fair hearing in open court;

    - **Part 5** sets out the core arguments against the use of secret evidence and presents a series of recommendations for reform.

KEY TERMS

7. Although the focus of this report is the law concerning secret evidence, it is written with a general audience in mind. This section therefore sets out some key terms, particularly for the benefit of non-lawyers.

Closed evidence and secret evidence

8. 'Evidence' means material used by a court to determine certain facts that are at issue in a case. Typically, one party will have the burden of proving those facts to the required standard of proof. There are two standards of proof in English law: the criminal standard (beyond a reasonable doubt) and the civil standard (on the balance of probabilities).

9. This report refers to material as 'secret evidence' where it is put forward by one party and used by the court, but is not ultimately disclosed to the other party.[5] Although the other party will usually know of the existence of the evidence, it is secret in the sense that its contents are not known. This is normally referred to in judgments as 'closed evidence' or 'closed material'.

Closed hearings

10. A closed hearing is a hearing in which the court considers closed or secret evidence. It involves the exclusion of one party, as well as members of the public and the press. It is a hearing that is both *ex parte* and *in camera*.

Ex parte *hearings*

11. An *ex parte* hearing is a hearing held by a court in the absence of one of the parties. It can either be held with or without the other party being notified.

12. Among the most common kinds of *ex parte* hearing is an application for a warrant (in criminal cases) or an application for an injunction (in civil cases). The reason for not giving notice to the other party is often to avoid some immediate harm that might arise if they had knowledge of the application, e.g. fleeing the jurisdiction, or liquidating property liable to be seized, etc.

13. *Ex parte* hearings are a clear departure from the adversarial model of justice. Their obvious unfairness is offset by the fact that they are typically interim proceedings dealing with a preliminary matter as a matter of urgency. Other than closed hearings using secret evidence,

they are never used to determine facts and the party who is not present will almost always have an opportunity to contest any evidence put forward in open court. Applications to withhold unused material are also typically dealt with on an *ex parte* basis.[6]

Hearings in camera

14. A hearing *in camera* is one in which both parties are present but from which the public and press are excluded. This may be ordered by the court for a number of reasons, including national security, and the protection of private or family life.[7] Like *ex parte* hearings, hearings *in camera* raise concerns about fairness, particularly in light of the principle that 'justice should not only be done but appear to be done'.[8] The increasing tendency of courts to exclude public and press, particularly in criminal cases on national security grounds, is discussed in Part 3 of this report.[9] Nonetheless, there is a critical distinction between, on the one hand, a hearing *in camera* from which the press and the public are excluded but which both parties are present and have all the evidence disclosed to them, and, on the other hand, a closed hearing from which the press, public and even the defendant and his lawyers are excluded.

15. Although *camera* is Latin for chamber, hearings *in camera* are not to be confused with hearings 'in chambers', which are simply hearings held in a less formal setting (typically the judge's private chambers). Members of the public and the press may attend hearings in chambers, but unlike hearings in open court they may only attend with the permission of the judge.[10] A hearing in chambers is private, a hearing *in camera* is essentially secret.

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[5] Technically, 'evidence' only refers to material that makes more likely or less likely a fact in issue. This would not include, for example, the submissions of the parties. In practical terms, however, 'secret evidence' also includes other material which is heard by the court but kept secret from the other party.

[6] See e.g. *R v Keane* (1994) 1 WLR 746 at 750G per Lord Taylor of Gosforth CJ: 'We wish to stress that ex parte applications are contrary to the general principle of open justice in criminal trials. They were sanctioned in *Davis, Johnson and Rowe* solely to enable the court to discharge its function in testing a claim that public interest immunity or sensitivity justifies non-disclosure of material in the possession of the Crown. Accordingly, the ex parte procedure should not be adopted, save on the application of the Crown and only for that specific purpose'.

[7] See e.g. part of the right to a fair trial under Article 6(1) of the European Convention on Human Rights provides that 'judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests 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'. See also the very similar provisions of the right to a fair trial under Article 14(1) of the International Covenant on Civil and Political Rights.

[8] *Hobbs v Tinling and Company Limited* [1929] 2 KB 1 at 33 per Lord Sankey LC. See also *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ: 'it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

[9] See below pp 157-168.

[10] See *Hodgson and others v Imperial Tobacco and others* [1998] 2 All ER 673 at 686 per Lord Woolf MR.

Undisclosed material

16. In many cases, both civil and criminal, one party will be privy to, or have in its possession, information or material that is potentially *relevant* to a case but which it chooses not to put forward as evidence.

17. For example, a police investigation in a drugs importation case may run over many months, involving dozens of suspects and hundreds of potential witnesses. However, prosecutors may ultimately decide to charge only a handful of suspects because those are the cases with the best chance of securing convictions. It may well be that only a small proportion of the material gathered over the course of the investigation is needed as evidence in court.

18. Similarly, parties in a civil case such as a commercial or property dispute may have large amounts of material that is potentially relevant to the legal proceedings but which they do not wish to rely upon in court.

19. To prevent injustice being caused by one party withholding potentially relevant material from the other, the law imposes certain duties of disclosure in both criminal and civil cases. In criminal cases, the prosecution is under a duty to disclose any material that weakens its own case or strengthens that of the defence.[11] In civil cases, both parties are under a duty to disclose documents under their control which adversely affect either their own case or that of another party or supports that of another party.[12]

20. However, in both civil and criminal cases, parties may also apply to the court for permission to *withhold* disclosure of relevant unused material from the other party. In criminal cases, the prosecution may apply on public interest immunity grounds to withhold relevant undisclosed material from the defence.[13] This may include, for example, information concerning the identity of informants, the involvement of an undercover police officer or details of surveillance techniques. In civil cases, parties can also apply for permission to withhold material on the grounds that disclosure would damage the public interest,[14] e.g. because the documents in question contains material subject to legal professional privilege, because it contains

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[11] Section 3(1)(a) of the Criminal Procedure and Investigations Act 1996 Act (as amended by section 32 of the Criminal Justice Act 2003): the prosecution must disclose any material 'which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused'.

[12] See the provision for standard disclosure under Civil Procedure Rule Part 31.6. Further specific disclosure may be required under 31.12. See e.g. *R v Lancashire CC ex parte Huddleston* [1986] 2 All ER 941 at 945 re the 'duty to make full and fair disclosure' (per Donaldson MR).

[13] 'Public interest immunity' is also the term given to the grounds relied upon by the government in civil cases concerning the non-disclosure of relevant material.

[14] CPR rule 31.19(1).

confidential commercial information, or – where the government is a party – because it reveals sensitive details about matters of national security, for example. In both criminal and civil cases, it is for the court to decide whether to grant permission for the material to be withheld.

21. Because relevant undisclosed material is sometimes kept secret from one party and because it is also shown to the court (because it is the court that permits it to be withheld), it is often discussed in the context of – and sometimes confused with - 'secret evidence'. However, the crucial distinction is that undisclosed material is *not* evidence because it is not used by the court to determine facts in a case.[15] The essential test of whether a case involves secret evidence or not is whether both parties have seen and had an equal opportunity to challenge *all* the evidence that is considered by the court in making its decision. So long as the defendant has disclosure of all the evidence that is used by the court, then no question of the *use* of secret evidence arises.

22. This is not to say that the refusal to disclose relevant material is not deeply problematic. Any case in which one party has secret information that is highly relevant to deciding the facts in issue, but seeks to withhold that information from the court and the other party, is bound to raise fundamental questions about the fairness of the proceedings. As we will see, the principles and procedures for determining whether undisclosed material should be disclosed to a party closely resemble those for hearing secret evidence. Indeed, the government has frequently tried to confuse the issue, defending the use of secret evidence by pointing to decisions of the European Court of Human Rights that have approved the withholding of undisclosed material.

Departures from open evidence: anonymity, redaction and gisting

23. Distinguishing between evidence given in open court and secret evidence used in closed proceedings is not always as clear cut as it may seem. In between these two poles are various methods involving evidence given in open court, but with some critical aspect of it kept secret, so that one party does not know the full details.

24. Hence a variety of witness protection measures have developed over the past nineteen years, including witnesses giving evidence behind screens, with their voices electronically modified, and – at the most extreme – without the defence being told their true identity.

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[15] See e.g. *Secretary of State for the Home Department v AHK and others* [2009] EWCA Civ 287 per Clarke MR: 'It follows that the CPR contemplate the court looking at documents produced by only one side, although it is fair to say that this is only in the context of disclosure and not in the context of a document upon which reliance is placed. It may also be added that a judge who looks at particular documents for interlocutory purposes may think it right not to take part in a determination of the merits'.

25. The use of hearsay evidence – a witness giving evidence of something another person said in order to prove the truth of its contents – is also a departure from evidence given in open court. Although in most cases, the source of the original statement will always be identified, there has been increasing use of anonymous hearsay in a number of cases, particularly in applications for anti-social behaviour orders. In cases involving the use classified material, such as before SIAC and the High Court in control order cases, intelligence assessments which include anonymous hearsay are frequently used in closed evidence.

26. Increasing use has also been made of documents in open court that have been redacted to conceal details. In several cases, even judgments handed down by the court itself have been redacted. At its most extreme, instead of being redacted a document may be withheld altogether and a summary or 'gist' provided in its place. This process of 'gisting' is common in cases involving public interest immunity applications but also in cases involving the consideration of secret evidence.

27. The fairness of such methods depends on the relevance of what is being withheld, and how that withheld material is used by the court. It will not always be inappropriate, for instance, for a redacted document to be used as evidence in a criminal trial, so long as the court is sure that the redacted material contains nothing of relevance to the case. In other cases, however, the unfairness of using anonymous hearsay or a gist of a withheld document will be tantamount to using secret evidence, because the defendant is effectively denied the opportunity to challenge it in open court.

PART 1: THE RIGHT TO A FAIR HEARING

28. The right to a fair hearing is one of the oldest guarantees known to the common law.[16] It is part of the law of every democratic country[17] and is one of the core rights in international human rights law.[18]

29. On closer inspection, the right to a fair hearing is actually a package of rights organised under a common set of principles. Some guarantees apply to both civil and criminal proceedings. Others are specific to criminal trials only. Not all are engaged by the use of secret evidence, however, and this Part sets out only the key rights and principles relevant to the issue. These rights and principles can be found in the common law, statute law, the European Convention on Human Rights, international human rights law and international criminal law. As we will see, however, the ultimate source for both European and international principles is most often the English common law.

30. Although the right to a fair hearing is protected in UK law under both common law, statute and the European Convention (by way of the Human Rights Act 1998 ('HRA')), it is important to bear in mind that all of these can ultimately be overridden by a contrary Act of Parliament. In particular, although the HRA requires British courts to interpret legislation consistently with the Convention and allows courts to declare legislation incompatible with Convention rights, it is a widely-held misconception that the HRA allows the courts to strike down inconsistent primary legislation. Neither a declaration of incompatibility by a British court under the HRA nor an adverse judgment of the European Court of Human Rights against the UK have any effect on the legality of Acts of the Westminster Parliament.[19]

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[16] See e.g. Magna Carta, Ch 39: 'No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, *except by the lawful judgement of his equals or by the law of the land*' [emphasis added]. As Sir Edward Coke noted in his commentary (Coke 2 Inst. p46) the 'law of the land' meant 'to speak it once for all, by *the due course and process of law*' [emphasis added]'.

[17] See e.g. articles 7 and 9 of the Declaration of the Rights of Man and the Citizen 1789; the Sixth Amendment of the US Constitution; article 37 of the Japanese Constitution 1946; article 111 of the Italian Constitution 1947; articles 22 and 39A of the Indian Constitution 1948; article 103 of the German Basic Law 1949; s7 of the Canadian Charter of Rights and Freedoms 1982; article 55 of the Brazilian Constitution 1988; s25 of the New Zealand Bill of Rights Act 1990; articles 46-51 of the Russian Constitution 1993; s35(2) of the South African Bill of Rights 1996.

[18] See e.g. Article 10 of the Universal Declaration of Human Rights 1948; article 6 of the European Convention on Human Rights 1950; article 14(1) of the International Covenant on Civil and Political Rights 1966; and article 47 of the EU Charter of Fundamental Rights and Freedoms 2000.

[19] Section 4(6)(a) of the HRA provides that a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'. By contrast, neither the Scottish Parliament nor the Welsh

The right to be heard

31. The Roman law principle *audi alteram partem* ('hear the other side') was accepted early on by English jurists as a one of the rules of natural justice and a fundamental principle of the common law. Francis Bacon echoed Seneca when he described it as follows:[20]

> For injustice it is plain, and cannot be denied, that we hear but the one part: whereas the rule *audi alteram partem* is not of the formality, but the essence of justice: which is therefore figured with both eyes closed but both ears open: because she should hear both sides and respect neither. So if we should hap to give a right judgment, it might be 'justum' but not 'juste', without hearing both parties.

Writing after the Restoration, Sir Matthew Hale included it among his rules of judging: 'That I suffer not to myself to be prepossessed with any judgment at all till the whole business *and both parties be heard*'.[21] Blackstone, a century later, referred again to 'that rule of natural reason expressed by Seneca' as:[22]

> A rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed: the Roman law requiring a citation at the least; and our own common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned.

32. Other eighteenth century commentators were equally clear about the importance of *audi alteram partem*. John Jay, the first US Secretary of State, described it as 'one of the first principles of justice [that] should never be neglected in judicial proceedings',[23] while the French statesman Mirebeau heralded it as 'the only mode for coming at the truth'.[24] As one nineteenth century English judge noted:[25]

> it has long been a received rule in the administration of justice, that no one is to be punished in any judicial proceeding, unless he has had an opportunity of being heard.

Assembly may make devolved legislation that is incompatible with Convention rights: section 107(1) of the Government of Wales Act and section 29(2)(d) of the Scotland Act 1998.

[20] 'A report of the Spanish Grievances', *Works of Francis Bacon*, vol 5 (1826).

[21] Barnett, *Life and Death of Sir Matthew Hale*, 35. Emphasis added.

[22] Commentaries, Bk 4, Ch 20, p280.

[23] Report of Secretary Jay relative to the capture of the Sloop Chester, *The Diplomatic Correspondence of the United States of America* (US State Department, 1833) at 474.

[24] Letter 63, *Mirebeau's letters during his residence in England* (1832).

[25] *In re Hammersmith Rent-charge* (1849) 4 Ex. 87, 96, 154 Eng. Rep. 1136 at 1140 per Park B.

33. Its importance too is confirmed by modern constitutions and constitutional courts. The US Supreme Court endorsed the centrality of *audi alteram partem* as part of the due process guarantee in its 1958 judgment in *Caritativo v California*:[26]

> *Audi alteram partem* - hear the other side! - a demand made insistently through the centuries, is now a command, spoken with the voice of the due process clause of the 14th Amendment, against state governments, and every branch of them - executive, legislative, and judicial - whenever any individual, however lowly and unfortunate, asserts a legal claim …. The right to be heard somehow by someone before a claim is denied, particularly if life hangs in the balance, is far greater in importance to society, in the light of the said history of its denial, than inconvenience in the execution of the law. If this is true when mere property interests are at stake ... how much more so when the difference is between life and death?

34. The Canadian Supreme Court similarly cited *audi alteram partem* as a core principle of justice:[27]

> The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions. The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context.

35. The principle continues to be applied regularly in British courts, especially in proceedings on judicial review.[28] As the earlier quote from Lord Denning makes clear,[29] the right to be heard entails not simply the right of each party to make representations, but the opportunity to

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[26] *Caritativo v. People of State of California* 357 US 549 (1958) per Frankfurter J.

[27] *LLA v AB* [1995] 4 SCR 536 at 27 per L'Heureux-Dubé. See also the decision of the Canadian Supreme Court in *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350 at para 53 per McLachlin CJ: '[l]ast but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it'.

[28] For a commonplace example see *R (Clark-Darby) v Highbury Magistrates* [2001] EWHC Admin 959. The claimant complained that the magistrates' decision to make a liability order against her for failure to pay council tax was 'a breach of the rules of natural justice and of one of the fundamental principles of the common law audi alteram partem' because she had 'no knowledge of the hearing and therefore no opportunity of appearing in order to present her case and to contest the making of the order' (para 6). The judge Sir Richard Tucker concluded that 'there was a breach of natural justice since the claimant was not aware of the date of the hearing and was deprived of her opportunity of appearing and opposing the making of the order. It would be unjust to allow the order to stand' (para 18).

[29] *Kanda v Government of Malaya*, n4 above. Denning continued: '[The accused man] must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them'.

comment upon and, as appropriate, challenge all the evidence before the court. This means not only the right of each party to know the evidence relied upon by the other party but also the opportunity to comment upon any material which might be relied upon by the judge. As Lord Justice Upjohn said in a civil case in 1963:[30]

> It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial.

36. In a 1996 case before the House of Lords, Lord Mustill similarly identified as a 'first principle of fairness' the proposition that:[31]

> each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer.

37. These latter judgments stress the importance of *aude alteram partem* not only in terms of fairness to the party affected, but in terms of the integrity of the courts themselves as places

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[30] *Re K* [1963] Ch 381, 405-406. On appeal, Lord Devlin expanded upon Upjohn's 'ordinary principles of a judicial inquiry', noting that 'they include the rules that all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given only upon evidence that is made known to all parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice' ([1965] AC 201 at 238). See also *Ridge v Baldwin* [1964] AC 40 at 113-114 per Lord Morris of Borth-y-Gest: 'It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: *Kanda v Government of Malaya*. My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case'; and see also *Hadmor Productions v Hamilton* [1983] 1 AC 191 at 233 per Lord Diplock: 'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is'.

[31] *Re D (Minors)* [1996] AC 593 at 603-604. See also Mustill's statement at 615: '[i]t is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party'.

where justice is done.[32] Most recently, the right to be heard was cited by the US Supreme Court in its ruling that a suspect detained as an enemy combatant was entitled to due process, including the opportunity to challenge the factual basis for his detention:[33]

> We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker …. 'For more than a century the central meaning of procedural due process has been clear: '*Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified*'' …. These essential constitutional promises may not be eroded.

The right to confront one's accuser

38. The right to confront one's accuser as part of the guarantee of a fair trial was already well-established in Roman times. As the King James Bible records:[34]

> It is not the manner of the Romans to deliver any man to die, before that he which is accused *have the accusers face to face*, and have licence to answer for himself concerning the crime laid against him.

39. This right of confrontation has also lain at the basis of the English common law since medieval times, even as other European countries began to rely on hearsay evidence and the testimony of anonymous witnesses across the same period. Thus Shakespeare's Richard II, asked to determine charges of treason, declares that '*face to face*, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak'.[35] At his own trial for treason, Sir Walter Raleigh famously complained that he had been denied the ordinary right to cross-

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[32] See e.g. the decision of the US Supreme Court in *Galpin v Page* (1873) 85 US 18 Wall. 350 at 368-9 per Field J: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered'. See also Field J's remarks in *Windsor v McVeigh* (1876) 93 US 274 at 277: 'Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal'.

[33] *Hamdi v Rumsfeld* 542 US 507 (2004) at 533 per Justice O'Connor [emphasis added]. The majority quoted in part from the 1863 Supreme Court ruling in *Baldwin v Hale* 68 US 223 at 233. The quote continues: '[c]ommon justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence'.

[34] Acts 25: 16. Emphasis added.

[35] Act I: i: 15-17. Emphasis added.

examine Lord Cobham, whose sworn confession (obtained under torture) was the key evidence against him:[36]

> Good my Lords, *let my accuser come face to face, and be deposed*. Were the case but for a small copyhold [a deed of land], you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!

40. Raleigh at least knew the identity of his accuser. Worse still was the position of his contemporaries appearing before the Court of Star Chamber, whose procedures made it a byword for tyranny and injustice for centuries afterwards:[37]

> It dispensed with the jury. It evaded the Common Law rule against the use of torture. It collected information through its own subordinate officials, and by written depositions taken in privacy, and not through evidence given and tested in open court. It could place accused persons on oath, and lead them to incriminate themselves on their own admissions, and indeed without their being aware of the precise charges to be brought against them. The most potent procedural device employed by the Council

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[36] Jardine, 1 Criminal Trials 389-520 at 427. Emphasis added. See also e.g. the trial of William Bird in the Old Bailey for murder, 9 September 1742, in which the defendant in cross-examination called upon the witness to: 'Look at me, the Law says the Accuser and the Accused shall look face to face' (Old Bailey online; ref no. t17420909-37). It was not until the twentieth century that this entitlement to literal 'face to face' confrontation was qualified. In *R v Smellie* (1919) 14 Cr App R 128 that the Court of Appeal rejected the proposition that 'a prisoner is entitled at common law to be within sight and hearing of all the witnesses throughout his trial'. 'If the judge considers that the presence of the prisoner will intimidate the witness', the Court held, 'there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter' (130). See also e.g. the House of Lords judgment in *R v Camberwell Green Youth Court* [2005] UKHL 4 discussing the use of video-link evidence and other special measures for child witnesses under the Youth Justice and Criminal Evidence Act 1999.

[37] D Keir, *Constitutional History of Modern Britain 1485-1951* (5th ed, 1955), at 21. See also e.g. Blackstone, *Commentaries*, Bk 2, Ch 19, p267: 'The just odium into which this tribunal had fallen before its dissolution has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice, except such as on account of their enormous oppression are recorded in the histories of the times'; Maitland, *Constitutional History of England* (1908) at 263: 'There can, I think, be little doubt that the Star Chamber was useful and was felt to be useful. The criminal procedure of the ordinary courts was extremely rude; the Star Chamber examining the accused, and making no use of the jury, probably succeeded in punishing many crimes which would otherwise have gone unpunished. But that it was a tyrannical court, that it became more and more tyrannical, and under Charles I was guilty of great infamies is still more indubitable. It was a court of politicians enforcing a policy, not a court of judges administering the law. It was cruel in its punishments, and often had recourse to torture. It punished jurors for what it considered perverse verdicts; thus it controlled all the justice of the kingdom'. Of the modern reputation of Star Chamber, see e.g. the reference of Windeyer J in the High Court of Australia to 'a persistent memory in the common law of hatred of the Star Chamber and its works' *Rees v Kratzmann* (1965) 114 CLR 63 at 80; the judgment of the US Supreme Court in *Faretta v California* (1975) 422 US 806 at 821-22 per Stewart J: 'the Star Chamber has, for centuries, symbolized disregard of basic individual rights'. Most recently, Lord Bingham noted its reputation in his judgment on the use of anonymous witnesses in *R v Davis*: 'The Court of Star Chamber, popular at first, came over time to attract the same popular loathing as the Inquisition, its procedures regarded as foreign, cruel, oppressive and unfair' ([2008] UKHL 36 at para 5).

> for this purpose was the writ sent out under the Privy Seal. Issued without registration or enrolment, and thus easily kept secret, this writ had never been easy to subject to constitutional checks. The recipient was not required to meet any precisely formulated accusation, but to attend before the Council, and answer concerning certain causes there to be laid before him. Disobedience was dealt with by reinforcing the writ with a subpoena, contempt of which was punishable by imprisonment at the Council's discretion.

41. Star Chamber was of course abolished by the Long Parliament in 1640 and the reluctance of the Convention and Cavalier Parliaments to reverse this act helped cement the common law position in favour of open evidence. As one English judge put it in 1696, 'our constitution is that the person shall see his accuser'.[38] More generally, the right to confront one's accuser became understood as a more general right to cross-examine all adverse witnesses, both in criminal and civil proceedings. Thus by 1720, the Court of Chancery declared in a dispute over fishing rights:[39]

> the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method of discovering of the truth.

42. Such was the importance of the common law right that it was given constitutional protection by many of the former British colonies in North America following their independence. The 1776 Virginia Constitution for instance provided:[40]

> That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and the witnesses…

The Sixth Amendment to the US Constitution adopted in 1791 included the accused's right in all criminal cases 'to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him'. Over time, this right has formed the basis for the broader right of a party in any proceedings – civil or criminal - to know the evidence against him. As Chief Justice Warren said in 1959 in a case involving an engineer's loss of security

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[38] Fenwick's case 13 How. St. Tr. 537, 591-592 (H. C. 1696) per Shower J.

[39] *Duke of Dorset v Girdler* (1720) Prec. Ch. 531-532, 24 ER 238.

[40] Article 8 of the Virginia Constitution, 12 June 1776. See also e.g. article 9 of the Constitution of Pennsylvania, 28 September 1776; article 7, Constitution of North Carolina, 18 December 1776; and article 10 of the Constitution of Vermont, 8 July 1777, all of which follow the language of the Virginia constitution.

clearance on the basis of undisclosed evidence that had deprived him of the opportunity to work on defence contracts:[41]

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that, where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.

43. The common law right to confront one's accuser shaped not only US fair trial guarantees but also the constitutional law of all common law countries and, in the 20th century, the development of international human rights law and international criminal law. Among the fair trial guarantees of the Nuremberg proceedings, for instance, was the right of a defendant to:[42]

> present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

44. British lawyers, headed by Sir David Maxwell Fyfe QC – former deputy UK prosecutor at the Nuremberg trials and later Lord Chancellor – also played a central role in drafting the 1950 European Convention on Human Rights ('ECHR') and the right to a fair hearing under Article 6 of the Convention includes the right of 'everyone charged with a criminal offence' to:[43]

> examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

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[41] *Greene v McElroy* (1959) 360 US 474 at 496. See also e.g. *Pointer v Texas* (1965) 380 US 400 at 405 per Black J: 'There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law'.

[42] Article 16(e) of the Charter of the International Military Tribunal at Nuremberg, 1945.

[43] Article 6(3)(d). As Lord Rodger later noted in *R v Camberwell Green Youth Court* [2005] UKHL 4 at para 10: 'the introduction of article 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused'.

45. This formulation was adopted virtually word-for-word by the drafters of the 1966 International Covenant on Civil and Political Rights,[44] and was also incorporated in many of the British-drafted constitutions of Commonwealth countries prior to their independence. So, for instance, the Jamaica (Constitution) Order in Council 1962 includes the right of all persons 'charged with a criminal offence' to:[45]

> examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

46. The same protection has been subsequently been recognised in many of the constitutional human rights instruments of other common law countries, including the New Zealand Bill of Rights Act 1990[46] and the South African Bill of Rights 1996.[47] It is also found in the statute of the International Criminal Court, guaranteeing to accused persons the right:[48]

> To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

47. In 1986, the New Zealand Court of Appeal rejected the suggestion that competing interests could restrict a defendant's right to cross-examine the witnesses against him.[49] As Sir Ivor

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[44] The right to a fair hearing under Article 14(3)(d) ICCPR includes the right of everyone 'in the determination of any criminal charge against him' to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.

[45] Section 20(6)(d). With little modification, this is the same formulation used in the most recent constitutions drafted by the Foreign and Commonwealth Office – see e.g. the Falkland Islands Constitution Order 2008 (2008/2846), section 6(2)(8) of the constitution provides the right of all persons 'charged with a criminal offence' to 'to examine in person or by his or her legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecution'.

[46] Section 25(f): 'Everyone who is charged with an offence has … [t]he right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution'.

[47] Section 35(3)(i): 'Every accused person has a right to a fair trial, which includes the right … to adduce and challenge evidence'.

[48] Article 67(1)(e) of the Rome Statute of the International Criminal Court. See also the identical language in article 21(4)(e) of the statute for the International Criminal Tribunal for the Former Yugoslavia; article 20(4)(e) of the International Criminal Tribunal for Rwanda; and article 17(4)(e) of the statute for the Special Court of Sierra Leone.

[49] *R v Hughes* [1986] 2 NZLR 129.

Richardson said, 'the right to confront an adverse witness is basic to any civilised notion of a fair trial'.[50] Most recently, the core principle was reiterated by Lord Bingham in the House of Lords case of *R v Davis* in 2008, concerning the use of anonymous witnesses:[51]

> It is a long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.

The right to an adversarial trial and equality of arms

48. Closely tied to the right to be heard are the right to adversarial proceedings and the right to equality of arms between the parties. Both are implicit common law values that have become part of the right to a fair hearing under article 6 ECHR. And in both instances, they reinforce the entitlement of each party to challenge the other side's evidence in open court and – in criminal cases – the duty of prosecutors to disclose unused material to the defence.

49. In the UK context, the relationship between the right to be heard and the right to an adversarial trial is rarely spelt out, most obviously because the common law mode of trial has always been adversarial and, after the decline of the ecclesiastical and prerogative courts, the sole mode of trial available in English law.[52] Thus the right to be heard has, under the common law, always meant the right to be heard in an adversarial setting.[53] Similarly, although equality of arms did not emerge as a formal legal principle until relatively recently,[54]

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[50] Ibid, at 149.

[51] [2008] UKHL 36 at para 5. The law relating to the use of anonymous witnesses is discussed in detail in Part 3 below.

[52] More inquisitorial kinds of proceedings continue to exist in UK law, primarily in inquests and the administrative law context. For discussion of secret evidence in inquests, see Part 3 below.

[53] See e.g. *Randall v The Queen* [2002] UKPC 19 (Privy Council) at paras 9-10: 'A contested criminal trial on indictment is adversarial in character. The prosecution seeks to satisfy the jury of the guilt of the accused beyond reasonable doubt. The defence seeks to resist and rebut such proof. The objects of the parties are fundamentally opposed. There may well be disputes concerning the relevance and admissibility of evidence. There will almost always be a conflict of evidence …. There is, however, throughout any trial … *one overriding requirement*: to ensure that the defendant accused of crime is fairly tried. The adversarial format of the criminal trial is indeed directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence' [emphasis added].

[54] The principle first appeared in the 1962 decision of *Ofner and Hopfinger v Austria*, which referred to 'equality of arms' as the 'procedural equality of the accused with the public prosecutor' and held it to be an 'inherent element' of the right to a fair trial under article 6 (European Commission of Human Rights, app nos 524/59 and 617/59, p78). It was subsequently confirmed that it applies to both civil and criminal proceedings: see e.g. *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213 at para 34. Although the immediate source of the term was a translation from the French *égalité des armes*, it appears the concept itself has chivalric origins: see e.g. Sir Walter Scott: 'The duellists of former times did not always stand upon those punctilios respecting equality of arms, which are now judged essential to fair combat' (Note V, Notes to Canto V of 'The Lady of the Lake', *Poetical Works*, Vol 4, 1822).

its inspiration can be found in the common law insistence upon fairness in between the prosecution and the defence. An early example of this principle can be found in the 1776 constitution of the state of New Jersey, which guaranteed: '[t]hat all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to'.[55] As Lord Devlin noted somewhat more recently:[56]

> nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.

50. By contrast, the right to an adversarial hearing and equality of arms have been more explicitly set out in the decisions of the European Court of Human Rights. Thus, according to the Court, the right to adversarial trial means: 'the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party'.[57] Similarly, the principle of equality of arms has been held to require that: 'each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage *vis-à-vis* his opponent'.[58]

51. At least part of the explanation for the Court's emphasis on the right to adversarial trial and fairness between the parties can be found in the much greater use of inquisitorial proceedings by most European countries. In practice, however, the distinction between the adversarial procedures of the common law and the more inquisitorial procedures of continental legal systems is less clear than commonly thought, and has frequently been overstated.[59] In criminal cases, the difference lies not so much in the format of trial itself but in the greater role that judges in many European countries play in overseeing the police investigation of the

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[55] Article 16, Constitution of New Jersey, 3 July 1776.

[56] *Connelly v DPP* [1964] AC 1254 at 1357.

[57] *Ruiz Mateos v Spain* (1993) 6 *EHRR* 505 (civil proceedings for restitution of expropriated property) at para 63. *Brandstetter v Austria* (1991) 15 *EHRR* 378 established the same principle in respect of criminal trials – see para 67 of that judgment. See also UN Human Rights Committee, General Comment no. 32 (21 August 2007) at para 13: 'The right to equality before courts and tribunals also ensures equality of arms. This 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 unfairness to the defendant'.

[58] *Foucher v France* (1998) EHRR 234 at para 34.

[59] See e.g. Lord Rodger in *R v Camberwell Green Youth Court* [2005] UKHL 4 at para 10: 'It is nevertheless fair to say that under the systems of criminal procedure used in Britain today it is usual for witnesses to give their evidence in open court in the presence of the accused. That form of trial is often contrasted with a Continental form of criminal proceedings where judges rather than juries determine guilt, on the basis of their free appreciation of a file of evidence compiled by an investigating judge, and where, if witnesses are questioned at trial, the questions are put by the judge rather than by the prosecution and defence lawyers. *Again, the counter-image is over-simplified, since the Continental systems vary considerably from country to country and within countries'* [emphasis added].

suspect.[60] Similarly, although the common law has often stressed the importance of fairness between the parties, the 'level playing field' has often been more illusory than real: until 1836, for instance, suspects in felony cases (other than treason) did not enjoy a right to counsel[61] and until 1898, an accused was generally forbidden from testifying on his own behalf.[62] As recently as 2005, there was no entitlement to legal aid for defendants in defamation cases until the European Court of Human Rights held that the failure to make it available breached the principle of equality of arms under article 6(1) ECHR.[63]

52. A fair trial, then, means an adversarial trial: one that involves not only each party being heard, but also being able to challenge the evidence on the other side. It requires, too, a balance between the parties, to ensure they are on an equal footing before the court. It is important to note that the principle of equality of arms does not entail equality of resources.[64] Rather it refers to the equal opportunity of each party to make his or her case.[65]

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[60] See e.g. *R v H* [2004] UKHL 3 at para 13: ''The institutions and procedures established to ensure that a criminal trial is fair vary almost infinitely from one jurisdiction to another, the product, no doubt of historical, cultural and legal tradition. In some countries provision is made for judicial oversight of criminal investigations. That is, for better or worse, entirely contrary to British practice. Instead, the achievement of fairness in a trial on indictment rests above all on the correct and conscientious performance of their roles by judge, prosecuting counsel, defending counsel and jury'.

[61] The right to counsel for those accused of high treason was introduced by the Treason Act 1695. The situation of defendants in all other felony cases was remedied by the Prisoners' Counsel Act 1836 (also known as the Trials for Felony Act); 6 & 7 Wil. 4, c.114). As Sydney Smith noted before the Act was passed: '[i]t is impossible but that a human being, in such a helpless situation, must be found guilty; for as he cannot give evidence for himself, and has not a penny to fetch for those who can give it for him, any story told against him must be taken for true (however false); since it is impossible for the poor wretch to contradict it' (*Edinburgh Review,* vol 45, p76).

[62] Until passage of the Criminal Evidence Act 1898, an accused person was deemed incompetent to testify on the basis that it was likely that they would perjure themselves. See e.g. *Hardy's case* (1794) 24 St Tr 199 per Eyre CJ at 1093: 'the presumption … is, that no man would declare anything against himself, unless it were true, but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself'. The same rule obtained in civil cases until the Evidence Act 1851. This exclusionary rule was strongly criticised by Bentham (*Introductory View of the Rationale of Evidence*, Ch 21). See further *US v Birfield* (1983) 702 F.2d 342.

[63] *Steel and Morris v United Kingdom* (2005) 41 EHRR 22 at para 72.

[64] Note, however, that article 6(3)(d) ECHR gives a specific guarantee to defendants in criminal cases 'to have adequate time and facilities for the preparation of his defence.'

[65] See e.g. *Steel and Morris*, ibid, at para 62: 'it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary'. See also e.g. *Prosecutor v Kayishema and Ruzindana* (International Criminal Tribunal for Rwanda (Appeals Chamber) Case No. ICTR-95-1-A, 1 June 2001) at para 69: 'equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources'; *Kordic and Cerkez* (International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) Dec 17 2004) at para 175: 'the right of an accused to have adequate time and facilities to prepare his or her defence does not imply that the Chambers are charged to ensure parity of resources between the Prosecutor and the Defence, such as the material quality of financial or personal resources. The right to equality of arms is not a right to equality of relief'.

53. Under the common law, the requirement of fairness between the parties is expressed, among other things, in the duty upon prosecutors to act fairly[66] and, in particular, the requirement to disclose relevant unused material to the defence:[67]

> The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed. In this context … the great principle is that of open justice. It would be contrary to that principle for the prosecution to withhold from the defendant material which might undermine their case against him or which might assist his defence.

54. This common law duty of disclosure was given statutory force by the Criminal Procedure and Investigations Act 1996. However, it has also been considered by the European Court of Human Rights in the context of the right to an adversarial trial and the principle of equality of arms. In *Rowe and Davis v United Kingdom*, for instance, the Court held that:[68]

> It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party …. In addition Article 6(1) requires, as does indeed English law … that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.

55. However, the Court was careful to stress that the entitlement to disclosure of relevant unused material was not absolute. It identified legitimate competing interests that could justify limiting disclosure in certain circumstances, including 'national security, the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime'.[69] The overriding

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[66] See e.g. *R v Banks* [1916] 2 KB 621 at 623 per Avory J: 'counsel for the prosecution throughout a case ought not to struggle for the verdict against the prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice'; *Boucher v The Queen* [1955] SCR 16 (Canadian Supreme Court) at 24-25 per Rand J: 'Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly'; *Randall*, n53 above, at para 10: 'The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice'.

[67] *R v Brown* (1998) AC 367 at 369 per Lord Hope.

[68] (2000) 30 EHRR 1 at para 60. See also *Jasper v United Kingdom* (2000) 30 EHRR 441; *Fitt v United Kingdom* (2000) 30 EHRR 480; and *Edwards v United Kingdom* (1992) 15 EHRR 417 at para 36.

[69] *Rowe and Davis*, ibid, para 61.

test, the House of Lords subsequently held, was fairness to the defence.[70] If a judge determined that disclosure of sensitive material was necessary in order for the accused to receive a fair trial, then the proper course was for the judge to order disclosure 'even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure'.[71]

The right to be informed of the accusation

56. At first glance, the right of every person charged to be informed of the accusation against him would seem to be directly relevant to the issue of secret evidence. Like the other elements of the right to a fair trial, it is one of the ancient guarantees of the common law,[72] and a constituent right in criminal cases under article 6(3)(a) ECHR which requires defendants:[73]

> to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

57. In practical terms, however, although it certainly derives from the more general principle that an accused must know the case against him in order to meet it, the specific right to know the accusation is most relevant to the preliminary stage of criminal proceedings – the entitlement to know the details of the charges and the allegations, rather than the evidence supporting them.[74] In this way, it corresponds closely to the right under article 5(2) ECHR that everyone who is arrested 'shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge'. Since it is possible to be charged without first being arrested, article 6(3)(a) ensures, amongst other things, that in every case, no person shall be charged without being notified of the details of the charges.

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[70] *R v H* , n60 above, at para 36.

[71] Ibid.

[72] See e.g. 25 Edw. III, stat, 5, c.4 (1351): 'None shall be taken by petition or suggestion made to our lord the king, or to his council, unless it be by indictment or presentation of good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by process made by writ original at the common law'.

[73] In this case, the phrase 'nature and cause of the accusation' in article 6(3)(a) is taken directly from the Sixth Amendment of the US Bill of Rights which guarantees, among other things, the right of an accused to 'be informed of the nature and cause of the accusation'.

[74] See e.g. *Campbell and Fell v United Kingdom* (1984) at para 96; *Kamasinski v Austria* (1989) at para 79: '[a]n indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him'. See also *Steel and others v United Kingdom* (1997) at para 80; and *Abramyan v Russia* (app no. 10709/02, 9 October 2008), at para 34: 'In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair'.

58. The right is therefore particularly important in order for an accused to be able to challenge the legality of charges at an early stage, as well as to prepare his or her defence before the trial: once an accused has knowledge of the charges, he or she can begin to seek disclosure of the prosecution's case supporting those charges. Accordingly, even though it is more concerned with knowledge of the charges, rather than the substance of the prosecution case itself, it is still a vital procedural protection that can be abridged by the use of secret evidence. Indeed, as we will see in Part 2, the use of secret evidence in some control order cases is so extensive that the defendants are unaware of even a single detailed allegation against them.

The presumption of innocence

59. The presumption of innocence is a cardinal feature of the common law (although, like many of its cardinal features, one with a somewhat patchy history).[75] Its particular significance to the issue of secret evidence is twofold: first, it places the burden on the prosecution of proving the facts in issue;[76] and secondly, it requires a high *standard* of proof for each of those facts: in

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[75] Although the presumption features in the 1789 Declaration of the Rights of Man and the Citizen (article 9: '[t]out homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable'), Sir Carleton Allen argued persuasively that the presumption of innocence did not exist as a formal legal principle in the common law until the 19th century: 'The Presumption of Innocence' in Allen, *Legal Duties and Other Essays in Jurisprudence* (OUP: 1931), 253-294. Nonetheless, there is evidence to suggest that there was at least a practical bias in favour of innocence in English courts as early as the 15th century, see e.g. Sir John Fortescue's famous plea that 'rather twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally': *De Laudibus Legum Angliae* (c.1470), p94.

[76] Although the general rule is that the prosecution has the *legal* burden for proving all the facts in issue, the presumption of innocence does not prevent the defence sometimes having the *evidential* burden of raising an issue as an issue of fact. In many cases, the defence may even have the *legal* burden of proving a particular issue, e.g. the defence of insanity. See e.g. *Salabiaku v France* (1988) 13 EHRR 379 at para 28: '[p]resumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law....[Article 6(2)] does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine [presumptions] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'; Ashworth and Blake, 'The Presumption of Innocence in English Criminal Law' (1996) Crim LR 306; and *R v Lambert* [2001] UKHL 37 at para 32 per Lord Steyn: '[i]t is a fact that the legislature has frequently and in an arbitrary and indiscriminate manner made inroads on the basic presumption of innocence'.

UK law, 'proof beyond a reasonable doubt'.[77] Justice Sachs set out the values behind the presumption as follows:[78]

> There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.

60. The presumption is also relevant to civil proceedings which involve allegations of criminal wrongdoing, e.g. contempt of court,[79] child abuse,[80] fraud,[81] confiscation proceedings,[82] or the

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[77] *Woolmington v DPP* [1935] AC 462 per Viscount Sankey LC at 481: 'while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence …. Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt …. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained'.

[78] *S v Coetzee and others* (1997) SA 527 (South African Constitutional Court) at para 220. See also e.g. *R v Hobson* (1823) 1 Lew. CC 261 per Holroyd J: 'The greater the crime the stronger is the proof required for the purpose of conviction' (cited in Allen, n75 above, at p 256).

[79] See *Re Bramblevale* [1970] Ch 128.

[80] See e.g. *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 586D-H, per Lord Nicholls of Birkenhead: 'The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury…'; *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 at 353-354 per Lord Bingham CJ: 'the civil standard of proof does not invariably mean a bare balance of probability, and does not mean so in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters …. In a serious case such as the present, the difference between the two standards is, in truth, largely illusory'; But see *In re B (Children)* [2008] UKHL 35 at para 15 per Lord Hoffman: 'Lord Nicholls [in *Re H*]was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities'.

[81] See e.g. *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74.

[82] See the recent judgment of the House of Lords in *R v Briggs-Price* [2009] UKHL 19 at para 41: 'The requirements of a fair trial in confiscation proceedings are not poles apart from those imposed by article 6(2) and 6(3). Where, as here, the prosecution rely on criminal offending to prove the existence of benefit, they have to prove that offending. The defendant is presumed innocent until proved guilty, albeit by the civil standard of proof'.

making of an anti-social behaviour order.[83] As we will see in Part 2, however, the application of the principle is much less clear in such proceedings as deportation hearings before the Special Immigration Appeals Commission[84] or in control order cases before the High Court,[85] despite the fact that both may involve suspicion of serious criminal activity.[86]

The right to counsel

61. Although the right to counsel is not directly engaged by the use of secret evidence, it *is* highly relevant to one of the supposed safeguards against its unfairness - the appointment of special advocates discussed in Part 4. This section therefore considers briefly the right to counsel as part of the right to a fair hearing.

62. The right to counsel has had an unsteady history in the common law: until the eighteenth century, nearly all prosecutions were brought privately, with both victims (or, where dead, their relatives) and suspects representing themselves.[87] Even after prosecutions began to be conducted by lawyers rather than laymen, it was not until the nineteenth century that most defendants in criminal trials were permitted to retain counsel to act for them throughout the course of the trial.[88] By the twentieth century, it had become generally accepted that the right to an adversarial hearing and the principle of fairness between the parties was undermined where one party was not properly represented. As Lord Devlin noted:[89]

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[83] See *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 at para 37 per Lord Steyn.

[84] See e.g. *Secretary of State for the Home Department v Rehman* [2001] 47 at para 56 per Lord Hoffman: 'the whole concept of a standard of proof is not particularly helpful in a case such as the present'. See the discussion of *Rehman* in Part 2 at para 97 below.

[85] But see *MB v Secretary of State for the Home Department* [2007] UKHL 46 at para 24 per Lord Bingham: 'I would accept the substance of AF's alternative submission: in any case in which a person is at risk of an order containing obligations of the stringency found in this case, or the cases of *JJ and others* and *E*, the application of the civil limb of article 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences'.

[86] For example, the making of a non-derogating control order under s3 of the Prevention of Terrorism Act 2005 requires the Secretary of State to reasonably suspect the controlee of being 'involved in terrorism-related activity'. As Lord Bingham noted in *MB*, ibid: '[o]n any common sense view involvement in terrorism-related activity is likely to be criminal' (para 21).

[87] The main exception were state crimes such as treason, which were prosecuted by the law officers. Similarly, treason trials were among the first to allow full participation of defence counsel.

[88] See above para 51 and accompanying footnote. Defendants *were* permitted to use counsel in relation to any pleadings on points of law, but were required to handle all matters relating to questions of fact (e.g. examination and cross examination of witnesses) themselves. See J Langbein, *The Origins of Adversary Criminal Trial* (OUP, 2003), pp26-28.

[89] 17 *The Judge* (1979) p 67.

where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down.

63. It is accepted too that the right to legal assistance extends throughout the course of legal proceedings, and not just the trial or hearing itself.[90] Today the most contentious issue is not so much the bare right of parties to have legal representation but the more awkward question of whether, and to what extent, the state is obliged to provide or pay for lawyers for those who cannot afford them. Both the European Convention on Human Rights and the International Covenant on Civil and Political Rights recognise a right to legal representation for defendants in criminal cases,[91] and virtually all western countries operate some kind of legal aid or public defender scheme to provide counsel in such cases. Although the right to counsel is a specific guarantee in criminal cases under article 6(3)(c) ECHR, the European Court of Human Rights has also held that a state's failure to make provision for free legal assistance in civil cases may – in certain cases – amount to a breach of the principle of equality of arms under article 6(1).[92] The right to counsel is, therefore, closely bound up with right of each party to have a 'reasonable opportunity' to 'present his or her case effectively before the court' and to do so 'under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary'.[93]

Article 6 ECHR

64. As noted earlier, the UK played a leading role in drafting the European Convention on Human Rights and the right to a fair hearing under article 6 in particular reflects the core fair trial guarantees of the English common law.

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[90] See e.g. *Salduz v Turkey* (27 November 2008) at para 54: the Grand Chamber noted that the 'vulnerability' of an accused at the 'investigation stage for the preparation of criminal proceedings' can 'in most cases … can only be compensated for by the assistance of a lawyer'.

[91] See article 6(3)(c) ECHR: the right to 'defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'; article 14(3)(d) ICCPR: the right to 'defend himself in person or through legal assistance of his own choosing … and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'.

[92] See e.g. *Steel and Morris*, n 63 above, at para 61: '[t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively'. See also *Airey v Ireland* (1979) 2 EHRR 305 at para 26.

[93] *Steel and Morris,* ibid, paras 59 and 62.

Article 6(1)

65. Article 6(1) provides that:

> 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.

66. As we have already seen, common law values such as the right to an adversarial hearing, the right to know the evidence of the other party, and the right to equality of arms all fall under article 6, and therefore apply in both civil and criminal proceedings.

67. It is important to make clear, though, that article 6 does not apply to every kind of civil claim – a limitation that reflects how the Convention was drafted. For lawyers from a common law background, the phrase 'civil rights and obligations' in article 6(1) would seem to cover any proceedings that affect the rights of individuals, including judicial review of administrative decisions. Many continental countries, however, treat administrative law (disputes between the individual and the state) as wholly separate from civil law (disputes between private individuals).[94] Generally speaking, therefore, the approach of the European Court of Human Rights has been that article 6 applies to administrative proceedings only where they are 'decisive' of an individual's private law rights.[95] In particular, the Court has held that article 6 does not apply to immigration and asylum proceedings because 'the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights'.[96]

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[94] See the dissenting opinion in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 at paras 19-22. See also *Begum v Tower Hamlets* [2003] UKHL 5 at para 28 per Lord Hoffman: '[t]he term ['civil rights and obligations'] was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the Convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the adjudication of private law rights and made subject to the same judicial requirements of independence, publicity and so forth. So the judicial control of administrative action was left for future consideration'.

[95] This category has, over time, been broadened considerably by the Court: see e.g. *Tsfayo v United Kingdom* [2009] 48 *EHRR* 18.

[96] *Maaouia v France* (2001) 33 EHRR 1037 at paras 35 and 37-38. The Court placed particular weight on the fact that article 1 of protocol 7 to the Convention, concluded in 1984, made specific provision for the procedural rights of non-nationals subject to expulsion. Nor do other Convention rights necessarily enable article 6 to become engaged by immigration proceedings: see e.g. *Ilic v Croatia* (App No 42389/98, 19 September 2000), 'the rights entailed in the provisions of Article 1 of Protocol No. 1 do not encompass the right for a foreign citizen who owns property in another country to permanently reside in that county in order to use his property'.

68. At the same time, the category of 'criminal' cases under article 6 is potentially broader than the UK definition. This is because the European Court of Human Rights has defined 'criminal charge' in article 6(1) mainly by reference to the 'substance' of the proceedings, rather than by reference to how they are classified in domestic law.[97] Hence, in certain circumstances, civil proceedings may attract the guarantees of articles 6(2) and 6(3) specific to criminal cases, on the basis that the proceedings are essentially criminal rather than civil in nature.[98]

69. The remainder of the first paragraph of article 6 requires that judgments must be 'pronounced publicly' but permits hearings *in camera* on certain grounds including national security, the protection of children or the private lives of the parties, or 'to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. The fair trial issues arising from the exclusion of public and press are discussed in Part 3 of this report.

Article 6(2)

70. Article 6(2) requires that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. As we have seen,[99] it is applied both by British courts and the European Court of Human Rights to reinforce the traditional common law guarantee in criminal cases.[100] However, as noted before, the Court's interpretation of 'criminal' proceedings under article 6 means that its application is not limited to criminal cases but may include any civil proceedings whose 'substance' is sufficiently criminal in nature.[101]

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[97] See *Engels v Netherlands (No 1)* (1976) 1 EHRR 647 at para 81: 'If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of [Article 6] … would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 … to satisfy itself that the disciplinary does not improperly encroach upon the criminal'. The Court then proceeded to identify 3 factors to determine whether a measure qualifies as a 'criminal charge' for the purposes of article 6: (i) the classification in domestic law; (ii) the nature of the offence; and (iii) the degree of the severity of the penalty the person risks incurring.

[98] See e.g. *Albert & Le Compte v Belgium* [1983] 5 EHRR 533 at para 30*; Wickramsinghe v United Kingdom* [1998] EHRR 338; *Irving Brown v United Kingdom* [1998] 28 EHRR CD 233; *R v Securities and Futures Authority, ex parte Fleurose* [2001] EWCA Civ 2015.

[99] See paras 59-60 above.

[100] See *R v Briggs-Price* [2009] UKHL 19 at para 24 per Lord Phillips: 'Article 6(2) does not spell out the standard of proof that has to be applied in discharging the burden of proving that a defendant is guilty of a criminal offence. It does, however, provide that he has to be proved guilty 'according to law'. This requirement will not be satisfied unless the defendant is proved to be guilty in accordance with the domestic law of the State concerned. English law draws a clear distinction between the criminal and the civil standard of proof. The criminal standard requires proof beyond reasonable doubt'.

[101] See *Engel,* n97 above.

Article 6(3)

71. Article 6(3) provides that 'everyone charged with a criminal offence has the following minimum rights:

> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

72. As we have already seen, the right to cross examine witnesses (art 6(3)(d)) and, to a somewhat lesser extent, the rights to be informed of the accusation (art 6(3)(a) and to counsel (art 6(3)(c)) are all engaged by the use of secret evidence. As we will see in Part 2, the right to adequate time and facilities under article 6(3)(b) is also relevant to the problems faced by special advocates in dealing with intelligence material and, more specifically, the practical inability of defendants in closed hearings to call expert witnesses in their defence. The right to adequate time and facilities is, like other rights under article 6, drawn from the common law right to a fair trial.[102]

Article 5(4) ECHR

73. Article 5 guarantees the right to liberty. Specifically, it applies to any person who is arrested or detained by the state. Like the right to a fair trial under article 6, it was heavily influenced by the common law – in this case, the guarantees of due process and habeas corpus.

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[102] See e.g. Lord Hope in *R v Brown*, n 67 above,: '[f]airness, so far as the preparation of the defence case and the selection of the defence witnesses are concerned, is preserved by the existing rules of disclosure and by ensuring that the defendant has adequate time and facilities for the preparation of his defence. That right, which is to be found also in Article 6.3(b) of the European Convention of Human Rights, has for long been part of our law relating to the conduct of criminal trials'.

74. In particular, article 5(4) provides that:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

75. Wherever a person is deprived of their liberty by the state, therefore, article 5(4) grants a right of access to a court to challenge the legality of his or her detention. In particular, the European Court of Human Rights has held that 'although it is not always necessary that an article 5(4) procedure be attended by the same guarantees as those required under article 6', it nonetheless must have a 'judicial character' and provide 'guarantees appropriate to the type of deprivation of liberty in question'.[103] Specifically, the Court held:[104]

> the proceedings must be adversarial and must always ensure "equality of arms" between the parties …. Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him …. This may require the court to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention …. It may also require that the detainee or his representative be given access to documents in the case-file which form the basis of the prosecution case against him…

76. For this reason, article 5(4) is often understood as a right to procedural fairness.[105] It is particularly significant because article 5(4) is engaged in certain kinds of proceedings to which – for reasons explained above[106] – the procedural guarantees of article 6 do not apply, e.g. deportation on grounds of national security and parole board hearings.

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[103] *A and others v United Kingdom* (Grand Chamber, 19 February 2009) at para 203. The Court has also held that article 5(4) may additionally require the right to counsel: see e.g. *Bouamar v Belgium* (1986) 11 EHRR 1 at 60; *Megyeri v Germany* (1993) 15 EHRR 584 at para 22(c).

[104] *A and others*, ibid, para 204. See also e.g. *RB & U (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10 at paras 175-176 per Lord Hoffman: ''[t]he requirements of article 5(4) are … little different from those of article 6'.

[105] See e.g. *R v Parole Board ex parte Smith* [2005] UKHL 1 at para 75 per Lord Hope: 'Procedural fairness is a requirement of the common law. It is not in itself a Convention requirement. But it is built into the Convention requirement because article 5(4) requires that the continuing detention must be judicially supervised and because our own domestic law requires that bodies acting judicially, as a court would act, must conduct their proceedings in a way that is procedurally fair'.

[106] See para 67 above.

PART 2: SECRET EVIDENCE IN CIVIL CASES

77. The rules of evidence in civil proceedings have always been more flexible than those in criminal proceedings. Hearsay, for instance, has historically been excluded as evidence in criminal trials,[107] but has been admissible in civil cases since the Civil Evidence Act 1995. The Civil Procedure Rules in particular give the courts broad latitude to admit material that would not pass must in a criminal case.

78. In addition, the very importance of fact-finding is often diminished in cases of judicial review, where the task of the court is less to do with proving allegations[108] and more to do with determining whether a government minister's decision was reasonable.

79. It is therefore not surprising that virtually all the secret evidence used since 1997 has been in civil and administrative proceedings rather than criminal cases. In the past twelve years, Parliament has legislated fourteen times to allow the use of secret evidence:

- The Special Immigration Appeals Commission ('SIAC');[109] 1997
- The Northern Ireland national security certificate review tribunal;[110] 1998
- The Proscribed Organisations Appeals Commission;[111] 2000
- The Investigatory Powers Tribunal;[112] 2000
- Employment tribunals;[113] 2000
- The Pathogens Access Appeals Commission;[114] 2001
- The Northern Ireland Sentences Review Commissioners[115] 2001
- The Northern Ireland Life Sentences Review Commissioners[116] 2001

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[107] There have always been a series of established exceptions, however (see e.g. Cross and Tapper on Evidence, 11th ed, pp 58-59) and the exclusionary rule has been weakened by the Criminal Justice Act 2003.

[108] See e.g. *In re B (Children)* [2008] UKHL 35 at para 2 per Lord Hoffman: 'If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened'.

[109] The Special Immigration Appeals Commission Act 1997.

[110] Section 91 of the Northern Ireland Act 1998.

[111] Section 5 of the Terrorism Act 2000.

[112] Part 6 of the Counter-Terrorism Act 2008.

[113] Section 67A(2) of the Race Relations Act 1976, as amended by section 8 of the Race Relations (Amendment) Act 2000.

[114] Section 70 of the Anti-Terrorism Crime and Security Act 2001.

[115] Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564).

[116] Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564).

- Planning tribunals;[117] 2004
- The High Court in control order proceedings;[118] 2005
- Industrial tribunals in Northern Ireland;[119] 2005
- County Courts in discrimination cases;[120] 2006
- The First Tier Tribunal and the Upper Tribunal;[121] 2007
- The High Court in asset-freezing proceedings.[122] 2008

Special advocates have also been used in:

- Freedom of Information Act claims before the Information Tribunal;
- Data protection proceedings before the High Court;
- Counter-terrorism proceedings before the High Court; and
- Immigration proceedings before the High Court.

In addition, anonymous hearsay is widely used in ASBO hearings in magistrates' courts and the government has twice attempted to enact legislation to allow secret evidence in Coroners' courts.

The Special Immigration Appeals Commission

80. The Special Immigration Appeals Commission ('SIAC') is a specialist immigration tribunal that was established by Parliament in 1997 in response to the judgment of the European Court of Human Rights in the case of *Chahal v United Kingdom*[123] and the judgment of the European Court of Justice in *R v Secretary of State for the Home Department ex parte Shingara and Radiom*.[124] The Special Immigration Appeals Commission Act 1997 was the first statutory

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[117] See sections 321, 321A, of the Town and Country Planning Act 1990; para 6A of Schedule 3 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and para 6A of the Schedule to the Planning (Hazardous Substances) Act 1990 as amended by sections 80-81 of the Planning and Compulsory Purchase Act 2004.

[118] Prevention of Terrorism Act 2005.

[119] Para 8 of Schedule 2 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SI 2005/150).

[120] Section 66B of the Sex Discrimination Act 1975 and section 59A of the Disability Discrimination Act 1995 as amended by the Equality Act 2006.

[121] Tribunal Courts and Enforcement Act 2007.

[122] Part 6 of the Counter-Terrorism Act 2008.

[123] (1996) 23 EHRR 413.

[124] [1997] 1 ECR I-3343. The European Court of Justice held that the inability of two EU nationals to challenge UK deportation and exclusion decisions on national security grounds breached their rights under Council Directive 64/221/EEC. Article 8 of the Directive granted to members of EU countries 'the same legal remedies in respect of any decision concerning entry or … expulsion from the territory, *as are available to nationals of the State*' [emphasis added]. Article 9 further required a right

provision for the use of secret evidence by a British court, and has since become the model for its use in all subsequent civil proceedings.

Chahal v United Kingdom

81. Ironically, SIAC was first introduced to *increase* the fairness of the existing system of deportation appeal. Traditionally, a foreign national subject to deportation on national security grounds of enjoyed little in the way of procedural rights. Until 1973, there was not even a system of statutory appeals for deportation in general and, once such a system was introduced, deportation on grounds of national security was excluded specifically from its scope. Instead, the Home Secretary allowed those subject to deportation on national security grounds an appeal to a special Home Office advisory panel,[125] known as the 'Three Advisors' or, more informally, the 'Three Wise Men'. Those appearing before the panel could call witnesses on their own behalf and make representations, though there was no right to legal representation. The panel was directed that:[126]

> Neither the sources of evidence nor evidence that might lead to disclosure of sources can be revealed to the person concerned, but the [panel] will ensure that the person is able to make his points effectively and the procedure will give him the best possible opportunity to make the points he wishes to bring to their notice ... Since the evidence against a person necessarily has to be received in his absence, the [panel] in assessing the case will bear in mind that it has not been tested by cross-examination and that the person has not had the opportunity to rebut it.

82. Moreover, the decision of how much information an appellant received about the case against him was made by the Home Secretary, not the panel itself. Lastly, the panel's advice was not disclosed to appellants and the Home Secretary was not bound by its conclusions in any event.[127] Although the appellant could bring actions for habeas corpus and judicial review of

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to effective judicial supervision against such decisions in any event. The Court's judgment was handed down on 17 June 1997 but was anticipated by the government even as the SIAC Bill was introduced at Second Reading two weeks earlier: see Hansard, HL Debates, 5 June 1997, col 734: 'While the Bill is mainly required in order to respond to the Chahal case, it also takes the opportunity to provide a right of appeal to the same commission for European Economic Area nationals and those otherwise exercising rights under the Treaty of Rome in those cases where there is currently no right of appeal. Those are predominantly cases involving national security considerations. That is prompted by a case currently before the European Court of Justice in which the Advocate General has delivered an opinion strongly supporting the appellants' case that European Community legislation requires an adequate legal remedy in these circumstances not provided by judicial review. The Government accept that it would be desirable to provide such a right of appeal'.

125 See statement of the Home Secretary, Hansard, HC Debates, 15 June 1971, Col 376.

126 Ibid.

127 See e.g. *R v Secretary of State ex parte Hosenball* [1977] 3 All ER 452 at 455-456 per Lord Denning MR: 'if this were a case in which the ordinary rules of natural justice were to be observed, some criticism could be directed on it. For one thing,

the Home Secretary's decision, the reviewing courts had no jurisdiction to consider the closed material as the panel did.[128]

83. It was this system that the European Court of Human Rights in the case of *Chahal* held was incompatible with the right of access to a court under article 5(4) and the right to an effective remedy under article 13.[129] The Grand Chamber judgment in *Chahal* is perhaps best-known for its ruling that the right to freedom from torture under article 3 ECHR prohibited the UK from returning the applicant, Mr Chahal, to India where he faced a 'real risk' of torture at the hands of the authorities there, notwithstanding that the UK government deemed Chahal to be a threat to national security.[130] Equally significant, however, was its ruling that existing deportation proceedings in national security cases lacked effective judicial oversight:[131]

> Because the Secretary of State invoked national security considerations as grounds for his decisions to deport Mr Chahal and to detain him pending deportation, the English courts' powers of review were limited. They could not themselves consider the evidence on which the Secretary of State had based his decision that the applicant constituted a danger to national security or undertake any evaluation of the Article 3 risks.

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the Home Secretary himself, and I expect the advisory panel also, had a good deal of confidential information before them of which Mr Hosenball knew nothing and was told nothing; and which he had no opportunity of correcting or contradicting; or of testing by cross-examination. In addition, he was not given sufficient information of the charges against him so as to be able effectively to deal with them or answer them …. But this is no ordinary case. It is a case in which national security is involved, and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a set-back …. The rules of natural justice have to be modified in regard to foreigners here who prove themselves unwelcome and ought to be deported'.

[128] See e.g. *R v Secretary of State for the Home Department ex parte Singh Chahal* (1995) 1 WLR 526 at 532 per Staughton LJ: 'we cannot determine whether the Secretary of State was right, after considering the report of the advisory panel, to reach [his] conclusions. Nor can we review the evidence …. We have to accept that the evidence justified those conclusions'. See also the judgment of McPherson J in Chahal's habeas application (Divisional Court, 10 November 1995, unreported), cited at para 43 of *Chahal v UK*: ''I have to look at the decision of the Secretary of State and judge whether, in all the circumstances, upon the information available, he has acted unlawfully, or with procedural impropriety, or perversely to the point of irrationality. I am wholly unable to say that there is a case for such a decision, particularly bearing in mind that I do not know the full material on which the decisions have been made'.

[129] *Chahal,* n123 above.

[130] Ibid, paras 79-82. Note that it was never alleged that Mr Chahal posed a *direct* threat to the security of UK. Instead, the government argued that his role in the International Sikh Youth Federation included support for extremist violence against the Indian authorities, including the conspiracy to assassinate Rajiv Gandhi on a visit to London (para 23).

[131] Ibid, para 143.

84. Nor was the procedure before the advisory panel an adequate substitute for a court.[132] Although the Court conceded that 'the use of confidential material may be unavoidable where national security is at stake', this did not mean that 'national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved'.[133] In particular, the Court suggested:

> there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.

85. What the Court was referring to here was what was – at the time – believed to be the Canadian system of special advocates: 'a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case'.[134] As we will see in Part 5 of this report, which looks in detail at the use of special advocates, there was in fact no Canadian court which used this kind of procedure and no Canadian statute that authorised it. The system that did exist in Canada at that time was substantially different from the Court's description of it.[135] However, this did not prevent the UK from developing its own special advocate procedure as part of the framework for allowing the use of secret evidence in British courts.

The 1997 Act

86. The year following the *Chahal* judgment, Parliament passed the Special Immigration Appeals Commission Act 1997. Its purpose was to give effect to the Court's judgment: the provision of an independent judicial tribunal that would have the power to review sensitive intelligence material in relation to the immigration decisions of the Home Secretary. Indeed, when it was first introduced, the Bill was praised by members on all sides of the House for its progressive approach to the issue.[136] One Opposition MP noted that it was 'not a contentious piece of

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[132] Ibid, para 130: 'although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed, the panel could not be considered as a 'court' within the meaning of Article 5(4)'. See also para 154: 'the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of article 13'.

[133] Ibid, para 130.

[134] Ibid, para 144.

[135] See Part 5 below.

[136] See e.g. Charles Wardle MP (Con, Bexhill and Battle): 'the Bill is necessary and it will have the support of the whole House', Hansard, HC Debates, 30 October 1997, Col 1063.

legislation',[137] while another predicted that it would lead to 'a process whereby human rights will be placed at the heart of all our immigration and asylum legislation' and that 'the Bill is a sign of things to come'.[138]

87. The scheme of the Act allows SIAC to hold both open hearings (in which the defendant[139] and his lawyers[140] would be present and able to participate) and closed hearings (to consider the closed evidence in the absence of the defendant and his lawyers). As may be expected, there have been no hearings before SIAC which have not involved the use of secret evidence at some point. The decision of which evidence is open and which is closed is made initially by the Secretary of State but is subject to review by SIAC which has the power to direct the disclosure of the closed evidence to a defendant where it is satisfied that its disclosure would not be contrary to the public interest.[141] However, the Secretary of State cannot be forced to disclose material.[142]

88. Section 6 of the Act provides for the appointment of a special advocate to represent the interests of the appellant in all closed hearings before SIAC.[143] The role of the special advocate in closed hearings is to make submissions and adduce evidence on behalf of the defendant and to cross-examine witnesses against him.[144] This includes making submissions to SIAC in favour of disclosing closed evidence to the defendant. However, the special advocate is forbidden from discussing any of the closed evidence with the defendant or his

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[137] James Clappison MP (Con, Hertsmere), Hansard, HC Debates, 26 November 1997, Col 1033.

[138] Richard Allan MP, Hansard, HC Debates, 26 November 1997, Col 1034.

[139] Technically an individual subject to deportation on national security grounds will be the appellant at first instance. For the sake of simplicity, consistency and ease of reference, this report uses the generic term 'defendant' to refer to any individual who is the subject of proceedings which involve some allegation of wrongdoing, e.g. deportation or the making of a control order.

[140] However, the 1997 Act deliberately made no provision for legal aid for defendants to be represented in open hearings. Instead provision was made for voluntary organisations to receive funding to provide representation: see schedule 2, para 7.

[141] Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034), para 38(1).

[142] However, if the Secretary of State refuses to do so, she will not be permitted to rely on it thereafter: see Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034) para 38(9)(a) as amended by the Special Immigration Appeals Commission (Amendment) Rules 2007 (SI 2007/1285), para 23(c): '[w]here the Commission overrules the Secretary of State's objection …. the Secretary of State shall not be required to serve that material or summary but …. the Commission may direct … that the Secretary of State shall not rely on such points in his case, or …. direct that the Secretary of State shall not rely in the proceedings on that material'.

[143] Indeed, the Secretary of State cannot rely on closed evidence without a special advocate first being appointed: para 37(2) of the 2003 rules.

[144] Ibid, rule 35.

lawyers.[145] In other words, the special advocate acts on behalf of the defendant without the defendant ever knowing the closed evidence. The special advocate procedure is discussed in much greater detail in Part 5 of this report.

89. As the case of *Chahal* showed, deportation proceedings on national security grounds typically involve two separate issues: first, whether the defendant poses a threat to the national security of the UK; and secondly, whether he would face a real risk of torture or ill-treatment contrary to article 3 if returned to his home country. During debates on the 1997 Act, several Members of Parliament expressed concern about the potential scope of secret evidence before SIAC, particularly the unfairness of using closed material in relation to the issue of whether a defendant would be tortured on his return. In answer to these concerns, the junior Home Office minister gave the following assurance to the House of Commons at Third Reading:[146]

> The hon. Gentleman asked for an assurance that matters not involving national security would not be heard in camera. *I am sorry about the double negative there, but I give him that assurance.* It is envisaged that matters would be heard in camera only when there is a need for secrecy for reasons of national security. Other matters would not be heard in camera.

90. As we will see below, however, this assurance has been breached on a number of occasions since 2005 as the government has sought to use secret evidence not only in relation to the issue of national security, but also to maintain the confidentiality of its negotiations of assurances against torture with regimes such as Jordan, Libya and Algeria.

Proceedings pre-9/11

91. The first case before SIAC came in 1999. The defendant Mr Rehman had received notice of a deportation order against him, which stated:[147]

> the Secretary of State is satisfied, on the basis of the information he has received from confidential sources, that you are involved with an Islamic terrorist organisation Markaz Dawa al Rishad (MDI). He is satisfied that in the light of your association with

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[145] Ibid, rule 36. As discussed in Part 5, rule 36(4) allows the special advocate to apply to SIAC for directions allowing him indirect communication in writing via the defendant's lawyer. However, any such communication is subject to vigorous vetting by SIAC and any objections of the Secretary of State.

[146] Hansard, HC debates, col1040. Emphasis added.

[147] *Secretary of State for the Home Department v Shafiq Ur Rehman* (2000) 3 All ER 778 at para 1.

> the MDI it is undesirable to permit you to remain and that your continued presence in this country represents a danger to national security

92. Before SIAC, the open statement of the Secretary of State's case set out the allegations against Rehman, specifically that MDI had ties to Lashkar Taiyyaba (LT), a militant group that had carried out several attacks against the Indian authorities in Kashmir, and that he himself had been involved in fund-raising and recruitment on LT's behalf.[148] Although the Secretary of State did not allege that Rehman's activities were directed anywhere other than at the Indian part of Kashmir, he was 'partly responsible' for an increase in the number of British Muslims undergoing military training abroad and that 'the presence of returned jihad trainees in the UK may encourage the radicalisation of the British Muslim community'.[149]

93. All of these allegations were denied by the defendant, and a hearing took place before SIAC. As the Court of Appeal subsequently noted, part of the hearing before SIAC 'was open to the public in the normal way', while 'part was held in private [with the defendant and his lawyers present] and part was held in closed session [i.e. with the defendant and his lawyers excluded]'.[150] The secret evidence detailing the Secretary of State's allegations against Rehman was, of course, not disclosed to him or his lawyers. Instead, a special advocate was appointed to represent him in the closed hearings. The procedure in the *Rehman* case was subsequently described by the lay member of SIAC, Sir Brian Barder, as follows:[151]

> Much of the evidence submitted to the commission by the home office and the security service in support of the home secretary's view that Rehman represented a threat to Britain's national security was heard in open hearings in the presence of the appellant and his lawyers. The home office applied for some of the other evidence, which included intelligence reports, to be seen and heard only in closed sessions from which the appellant and his lawyers would be excluded, in accordance with the procedures laid down in the act establishing SIAC. The commission accepted that some of the evidence would have to be heard in completely closed session. However, we also ruled that the less sensitive parts of the secret evidence could safely be seen and heard in 'restricted session', from which the press and public would be excluded but which the appellant and his lawyers could attend on the understanding that they were not to reveal it outside the hearing room.

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[148] Ibid.

[149] Ibid, para 20.

[150] Ibid, para 22.

[151] 'On SIAC'. *London Review of Books,* 18 March 2004. Sir Brian, former UK ambassador to Ethiopia, Poland and Benin and former high commissioner to Nigeria and Australia, was appointed as a lay member of the 3 member Commission in 1997 on the basis of 'his considerable experience of security matters' (Lord Woolf, Court of Appeal, para 17).

94. Despite the government's reliance on secret evidence against him, SIAC initially ruled in Rehman's favour. Having regard to the seriousness of the allegations against him, SIAC applied – in its words – a 'high civil balance of probabilities' and made the following findings of fact:[152]

> We are not satisfied that the [defendant] has been shown to have recruited British Muslims to undergo militant training as alleged
>
> We are not satisfied that the [defendant] has been shown to have engaged in fund−raising for the LT as alleged.
>
> We are not satisfied that the [defendant] has been shown to have knowingly sponsored individuals for militant training camps as alleged.
>
> We are not satisfied that the evidence demonstrates the existence in the United Kingdom of returnees, originally recruited by the [defendant], who during the course of that training overseas have been indoctrinated with extremist beliefs or given weapons training, and who as a result allow them to create a threat to the United Kingdom's national security in the future.

95. SIAC did accept that Rehman had provided 'sponsorship, information and advice to persons going to Pakistan for the forms of training which may have included militant or extremist training' but found no evidence that this involved 'a threat or damage to national security'. As for the government's claim that Rehman would be likely to threaten the national security of the UK in future, SIAC said that 'we have heard and seen no evidence that supports such a prediction'.[153] SIAC particularly took issue with the government's claim that Rehman could be said to constitute a threat to the national security of the UK even though his activities were entirely concerned with the Indian part of Kashmir.

96. On appeal, the Court of Appeal was itself faced with the issue of whether to hear secret evidence. Unlike SIAC, there was no express statutory power to allow the court to hear closed material or appoint a special advocate on the defendant's behalf. The court nonetheless held:[154]

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[152] Court of Appeal judgment, para 30.

[153] Ibid.

[154] Ibid, para 31.

> As it was possible that part of the hearing would have to be in closed session, Mr Blake [the special advocate who was appointed on Rehman's behalf before SIAC] appeared at the request of the court. The 1997 Act makes no provision for a special advocate on an appeal. However, it seemed to us that, if it was necessary for the court in order to dispose justly of the appeal to hear submissions in the absence of Mr Shafiq Ur Rehman and his counsel, under the inherent jurisdiction of the court, counsel instructed by the Treasury Solicitor, with the agreement of the Attorney General, would be able to perform a similar role to a special advocate without the advantage of statutory backing for this being done. A court will only hear submissions on a substantive appeal in the absence of a party in the most extreme circumstances. However, considerations of national security can create situations where this is necessary. If this happens, the court should use its inherent power to reduce the risk of prejudice to the absent party so far as possible and by analogy with the 1997 Act, Mr Blake could certainly then have provided assistance.

Despite the appointment of a special advocate, however, the Court ultimately concluded that it would be unnecessary for it to hear any of the secret evidence in Rehman's case in order to determine the appeal.[155]

97. Both the Court of Appeal and subsequently the House of Lords overruled SIAC's conclusions on the relevant law. Although both the Court of Appeal and the House of Lords accepted that SIAC was not restricted to merely reviewing whether the Secretary of State had acted reasonably,[156] but was entitled to determine the relevant facts in issue,[157] both held unanimously that SIAC had erred because it had interpreted the meaning of 'national security' too narrowly and applied a standard of proof that was too high. On the first issue, both courts held that it was reasonable for the Home Secretary to conclude that Rehman's support for activities in Kashmir could amount to a threat to the UK's national security because, in the words of Lord Woolf, 'the promotion of terrorism against any state is capable of being a threat

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[155] As the Court noted at para 48, 'this would not have been desirable'.

[156] See e.g. Court of Appeal, ibid, at para 42 per Lord Woolf MR: 'SIAC were, however, correct to regard it as being their responsibility to determine questions of fact and law. The fact that Parliament has given SIAC responsibility of reviewing the manner in which the Secretary of State has exercised his discretion, inevitably leads to this conclusion. Without statutory intervention, this is not a role which a court readily adopts. But SIAC's membership meant that it was more appropriate for SIAC to perform this role'.

[157] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 at para 11 per Lord Slynn: 'the Commission was empowered to review the Secretary of State's decision on the law and also to review his findings of fact. It was also given the power to review the question whether the discretion should have been exercised differently. Whether the question should have been exercised differently will normally depend on whether on the facts found the steps taken by the Secretary of State were disproportionate to the need to protect national security'.

to our own national security'.[158] On the second issue, both courts held that the civil standard of proof, while relevant to determining allegations of fact, was not appropriate to reviewing the Home Secretary's assessment of future risk posed by the defendant:[159]

> the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk …. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee

Not only was the civil standard of proof an inappropriate standard when reviewing the decisions of the Home Secretary in respect of the threat posed by a suspect but the Law Lords also laid particular stress on the need for the courts to 'give great weight to the views of the executive on matters of national security'.[160]

98. Like the Court of Appeal, the House of Lords elected not to review the closed evidence in Rehman's case.[161] Throughout the proceedings, neither SIAC, the Court of Appeal, or the House of Lords considered the issue of whether, due to the use of secret evidence, the defendant had had a fair hearing at first instance.[162] Instead, it appears to have been

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[158] Court of Appeal, n147 above, para 40 per Woolf MR. See also ibid, Lord Hoffman at para 53: '[SIAC] is not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security'.

[159] Lord Hoffman, ibid, para 56.

[160] Lord Steyn at para 31. See also e.g. Lord Hoffman, ibid, at para 57: '[n]ot only is the decision [whether to deport] entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission, despite its specialist membership, cannot match. Secondly, as I have just been saying, the question at issue in this case does not involve a yes or no answer as to whether it is more likely than not that someone has done something but an evaluation of risk. In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker'.

[161] Indeed, Lord Slynn cited SIAC's use of closed evidence as an additional reason for the appellate courts to give weight to its conclusions: '[o]n an appeal the Court of Appeal and your Lordships' House no doubt will give due weight to the conclusions of the Commission, constituted as it is of distinguished and experienced members, and knowing as it did, and *as usually the court will not know, of the contents of the "closed" evidence and hearing* [emphasis added]' (para 26).

[162] Neither article 5(4) or article 6 applied in Rehman's case: the former because he was not detained and the latter because article 6 does not apply to deportation proceedings: see n 96 above.

assumed without argument that because the 1997 Act had been Parliament's response to the *Chahal* judgment, the 1997 Act was therefore compatible with the requirements of ECHR. As we will see below, it would be nearly a full decade since the first hearing of SIAC in the *Rehman* case before it would be established that it was not.

99. Despite the failure to address the issue of secret evidence directly, the decision in *Rehman* nonetheless compounded the unfairness of SIAC hearings. The use of secret evidence means that a defendant's ability to challenge factual allegations is already fatally undermined, at least to the extent that it is used (the initial success of Rehman before SIAC can perhaps be attributed to the fact that much of the evidence against him was open).[163] But the decision in *Rehman* has meant that particular findings of fact are themselves much less important than the overall assessment of the Home Secretary on future risk.[164] Therefore, even if a defendant is somehow successful in rebutting a series of allegations concerning his or her previous conduct, the Secretary of State can still succeed so long as she can point to some material (closed or otherwise) to support her view that the defendant nonetheless poses a threat to national security. Following his resignation in January 2004, Sir Brian Barder – the lay member of SIAC in *Rehman* – attacked the rulings of the Court of Appeal and the House of Lords as 'hobbling' the Commission and putting it in a 'legal straitjacket'.[165]

100. Despite its victories in the Court of Appeal and the House of Lords, the Home Office decided to withdraw the deportation order against Rehman and he has remained in the UK ever since.[166] Other than Rehman's case, SIAC heard only two other appeals against deportation orders prior to the 9/11 attacks: both appeals were allowed on the grounds that the defendants would face a real risk of torture if returned to India, and the Home Secretary did not appeal SIAC's rulings.[167] Indeed, by the end of 2003 the Newton Committee of Privy

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[163] See Barder, 'On SIAC', n 151 above.

[164] See also the subsequent 2003 decision of *Ajouaou and others v Secretary of State for the Home Department* (SC/1/2002, 29 October 2003), in which SIAC rejected the submission that the Secretary of State should at least have to prove allegations of past facts to the civil standard: 'to the extent that it is correct to say that the question of whether someone is a terrorist is a question of fact, a suggested requirement that past facts or specific factual allegations be proved on the balance of probabilities would turn the need to show reasonable grounds into an obligation to prove the case on a balance of probabilities' (para 58).

[165] Barder, 'On SIAC', n151 above.

[166] Ibid; 'Had SIAC, this time differently constituted, heard the case all over again, it would probably have had to refuse [Rehman's] appeal. But we shall never know: after lengthy delay, the home office withdrew the deportation order. Apparently, the threat allegedly posed by the suspect had become one that the security authorities now judged they (and we) could live with after all'.

[167] See *Secretary of State for the Home Department v Mukhtiar Singh* (SIAC, July 2000); *Secretary of State for the Home Department v Paramjit Singh* (SIAC, July 2000). A fourth appeal in relation to an Egyptian national, Hany El Sayed Sabaei Youssef, was initiated but was subsequently withdrawn because the government was unable to secure assurances from the

Counsellors noted that 'there have been no successful deportations on national security grounds since 1997', presumably due to the absolute bar under article 3 ECHR against returning persons to country where they face a real risk of torture.[168]

Proceedings post-9/11

101. Following the 9/11 attacks, Parliament passed the Anti-Terrorism Crime and Security Act 2001. Part 4 of the Act permitted the Home Secretary to detain indefinitely without charge foreign nationals on the basis of his suspicion that they were international terrorists. Under Part 4, defendants were given a right of appeal against their detention to SIAC.[169] Between December 2001 and April 2005, more than 17 people were detained under Part 4.[170]

102. The compatibility of indefinite detention without charge under Part 4 with the ECHR was first challenged before SIAC in 2002. However, although SIAC at first instance held that the detention of foreign nationals was incompatible with the right to non-discrimination under article 14 ECHR, the compatibility of secret evidence was given only perfunctory treatment. The President of SIAC, Mr Justice Collins, concluded that the right to a fair hearing under article 6 was inapplicable as the proceedings involved the immigration detention powers of the Home Secretary. Similarly, the Court of Appeal which overturned SIAC's findings on article 14, was similarly untroubled by the use of secret evidence.[171] As the Lord Chief Justice wrote:[172]

> I agree with SIAC that the proceedings are not criminal. I would, however, accept the fact that the proceedings

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Egyptian authorities as to his safety on return: see *Re Youssef (application for Habeas Corpus)* [1999] EWHC Admin 408; *Youssef v Home Office* [2004] EWHC 1884 (QB).

[168] Report of the Privy Council Review of the Anti-Terrorism Crime and Security Act 2001 (December 2003), p54 at fn 99.

[169] SIAC's involvement was due not only to its ability to use secret evidence but also because Part 4 extended the existing power of the Secretary of State under the Immigration Act 1971 to detain persons pending their deportation to allow the detention of suspects who could not be removed because of the bar against deporting people to torture under article 3 ECHR. This, of course, required the UK to derogate from the requirements of article 5(1)(f) due to the ruling in *Chahal v United Kingdom* that suspects could only be detained where there was a reasonable prospect of their removal: see Human Rghts Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644).

[170] December 2004 was the date of the House of Lords judgment in *A and others v Secretary of State for the Home Department (No 1)* [2004] UKHL which ruled Part 4 incompatible with articles 5 and 14 ECHR. No other suspects were detained following the judgment, but 11 detainees remained in custody until April 2005 when the Prevention of Terrorism Act 2005 was passed.

[171] Note that the Court of Appeal did not itself hear closed evidence in determining the appeal on the compatibility issue – see *A, X and Y and others v Secretary of State for the Home Department* (2003) 2 WLR 564 at para 34: '[b]efore SIAC the evidence fell into two parts, the open evidence and the closed evidence. We have not seen the closed evidence. We were not invited to do so and it was not necessary for us to see the closed evidence, as this is an appeal only on law. However, it is obvious that SIAC on this first issue were entitled to come to the conclusion which they did. SIAC made no error of law'.

[172] Ibid, para 57.

before SIAC involve departures from some of the requirements of Article 6. However, having regard to the issues to be inquired into, the proceedings are as fair as could reasonably be achieved. It is true that the respondents and their lawyers do not have the opportunity of examining the closed material. However, the use of separate counsel to act on their behalf in relation to the closed evidence provides a substantial degree of protection. In addition, in deciding upon whether there has been compliance with Article 6 it is necessary to look at the proceedings as a whole (including the appeal before this Court). When this is done and the exception in relation to national security, referred to in Article 6, is given due weight, I am satisfied there is no contravention of that Article.

103. Following the Court of Appeal judgment, the first substantive appeals against detention under Part 4 were heard by SIAC: 11 in 2003 and 7 in 2004. All the decisions of SIAC in that period made use of closed hearings and secret evidence. In addition, following the making of fresh procedure rules, SIAC began the practice of issuing both closed and open judgments.[173] The following extracts give a flavour of how closed evidence is referred to in open judgments by SIAC:

> We are satisfied that [E] is a member of the TFG itself an international terrorist organisation within the scope of the 2001 Act, and that he has links with an international terrorist group. *We appreciate that our open reasons for being so satisfied are sparse. That is because the material which drives us to that conclusion is mainly closed.* We have considered it carefully and in the context of knowing the Appellant denies any involvement in terrorism or any knowing support for or assistance to terrorists. We have therefore been careful only to rely on material which cannot in our judgment have an innocent explanation.[174]

> There is ample evidence to support [P's] involvement in such fraudulent activities. The case against him is that he was doing it to raise money to further terrorist causes and to support those involved in terrorism. The material we have seen and considered, *most of it closed,* satisfies us that that case is made out.[175]

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[173] Rule 47(4) of the 2003 procedure rules, see n above, require SIAC to serve a closed judgment upon the Secretary of State and the special advocate if the open judgment does not contain full reasons for the decision. See e.g. *G v Secretary of State for the Home Department* (Appeal No SC/2/2002, 19 October 2003), para 1. Not all SIAC cases involved closed judgments, however: see e.g. *S v Secretary of State for the Home Department* (Appeal No SC/25/2003) and *I v Secretary of State for the Home Department* (Appeal No SC/13/2002).

[174] *E v Secretary of State for the Home* Department (Appeal No SC/4/2002, 29 October 2003, para 10. Emphasis added.

[175] *P v Secretary of State for the Home Department* (Appeal No SC/20/2002, 27 January 2004), para 14. Emphasis added.

> The open statements provided to justify [G's] certification do not refer to a great deal of source material and so consist mainly of assertions. *As in most of these appeals, the main part of the evidence lies in closed material and so, as we are well aware, the Appellants have been at a disadvantage in that they have not been able to deal with what might be taken to be incriminating evidence.* The Special Advocates have been able to challenge certain matters and sometimes to good effect. That indeed was the case in relation to a camp in Dorset attended by a number of those, including the [G], of interest to the Security Service. We shall come to that in due course.[176]

104. In the case of Abu Rideh, one of the few detainees under Part 4 who can be named publicly, SIAC acknowledged that it was 'acutely aware that the open material relied upon against [Rideh] is very general' and that the government's case against him depended 'in the main upon assertions which are largely unsupported'.[177] Although it ultimately dismissed his appeal, SIAC accepted that 'the open evidence taken in isolation cannot provide the reasons why'.[178] One of the open allegations against Rideh was that he had 'procured false documents and helped facilitate the movement of jihad volunteers to training camps in Afghanistan' and in open session, his counsel, Ben Emmerson QC was permitted to cross-examine Witness B, a member of the security service.[179] The following exchange highlights what had become of Rideh's right to confront the witnesses against him:[180]

> ***Witness B:*** So far as the open assertion is concerned, it is that he was involved in the facilitation of travel to training camps in Afghanistan.. There is obviously evidence to be analysed there and which is analysed in the closed material.
>
> ***Emmerson:*** Are we entitled to know what is meant by 'helping to facilitate travel'?
>
> ***Witness B:*** I am afraid again all the evidence there is closed.
>
> ***Emmerson:*** What about the allegation of the provision of false documents; is he entitled to know what is alleged against him there?
>
> ***Witness B:*** All the evidence there is closed.
>
> ***Emmerson:*** I do not think I can take this questioning any further.

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[176] *G*, n173 above, para 6. Emphasis added.

[177] *Abu Rideh v Secretary of State for the Home Department* (Appeal No SC/3/2002, 29 October 2003), para 7.

[178] Ibid, para 21.

[179] Ibid, para 7.

[180] L Scott-Moncrieff, 'Suspicion of Terrorism', *London Review of Books*, 5 August 2004.

Another exchange related to the allegation that Rideh had visited two suspected terrorists while they were remanded in custody awaiting trial in the UK.[181]

> ***Emmerson:*** Al-Zebai and al-Fawaz. You know, obviously, from the documents that you have read that Mr Abu Rideh's case is that he came to visit them in prison as a result of association between his wife and the wife of Mr al-Zebai. He was asked to give them a lift and went there, never having met them or visited them before. Is that accepted as true?
>
> ***Witness B:*** That is a question that I can only answer in the closed session I am afraid.
>
> ***Emmerson:*** You cannot tell us even if it is accepted as true or not?
>
> ***Witness B:*** No, I can't.

105. These difficulties were compounded by the fact that the witness from the Security Service who appears in SIAC cases is frequently the responsible Desk Officer rather than a direct witness, giving second or even third-hand hearsay evidence received from colleagues, informants and other sources. The security and intelligences services, moreover, are trained to gather intelligence, rather than evidence, and this means that they lack the skills that an ordinary police constable would have in preparing a case against a suspect.[182] As SIAC noted in the 2003 case of *Ajouaou* v *Secretary of State for the Home Department*:[183]

> On a number of occasions, an obvious line of inquiry was not pursued either by the police or the Security Services …. Sometimes the enquiries were not pursued for the simple reason that at the time of the investigation, there was no desire or need on the part of the services to do more than see whether a particular individual was of interest to them so that resources should be allocated to him; they were not as such collecting evidence and still less were they trying to prove a case or investigate a possible innocent explanation. It is not a question of them simply ignoring material which might assist the [defendants] because their minds would not be deflected from the track upon which they were set. *It is that by the nature of their habitual task, they deal with*

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181 Ibid. See also *Rideh,* n177 above, para 13, in which SIAC accepted that '[t]hose he met in prison he had not known previously'.

182 For further discussion of this problem see the discussion of the 2006 SIAC case in *MK v Secretary of State for the Home Department*, para 134 below.

183 *Ajouaou and others v Secretary of State for the Home Department* (SC/1/2002, 29 October 2003), at para 51.

suspicion and risk rather than proof. So it does not always appear to them necessary to pursue lines which might confirm or eliminate alternative explanations. But it does mean that less weight can be attached than otherwise might have been the case to certain aspects which aroused their suspicions. There may be a gap, between a seemingly suspicious activity and it giving reasonable grounds for suspicion in this context, which cannot be filled by inference or assessment where it could readily have been filled by further investigation.

106. The heavy reliance on secret evidence, together with the apparent limitations of the evidence itself, make it thoroughly unsurprising that, in every case between 2001 and 2004 save one, SIAC consistently upheld the Secretary of State's certification that the detainee was a suspected international terrorist. The sole exception was the 2004 case of *M v Secretary of State for the Home Department*, in which the defendant was given the following reasons for his detention:[184]

> You are a member of a group of Mujahideen engaged in active support for various international terrorist groups, including networks associated with Usama Bin Laden. Your activities on behalf of these networks include the provision of material support.

107. The defendant – a Libyan national – was a member of the Libyan Islamic Fighting Group (LIFG), an Islamist group opposing Colonel Gadaffi's regime. Despite the defendant's certification, the Home Secretary did not allege that the LIFG posed 'a current threat to national security'.[185] Indeed, although the defendant was detained in November 2002, it was not until October 2005 – more than 18 months after his release by SIAC – that the LIFG was proscribed as a terrorist organisation by the Home Secretary.[186] Instead, the government alleged that the defendant was one of a number of LIFG members who had links to Al

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[184] Appeal No SC/17/2002, 8 March 2004, at para 4.

[185] Ibid, para 8.

[186] See Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005 (SI 2005/2892), made on 14 October 2005. See also para 9: '[t]he LIFG has involved itself with armed insurrection in Libya and is not averse to the use of violent means to attain its objectives. It can properly be regarded as a terrorist organisation. The reason why that is not sufficient to justify certification under the 2001 Act is because it was accepted by the [Home Secretary] in the challenge to the derogation that the powers under [Part 4] of the 2001 Act would only be used against those said to be linked to Al Qa'ida and that the Commission should set aside the certificate if that link was not established'. This does not, however, explain why the LIGF was not proscribed at the time that the defendant was detained in 2002, as the proscription powers of the Secretary of State under Part 2 of the Terrorism 2000 were not limited by the undertaking which the Attorney-General gave in relation to Part 4 of the 2001 Act.

Qaeda.[187] SIAC noted that, as with other cases under Part 4, most of the evidence against the defendant was secret:[188]

> As is the position in almost all the appeals under the 2001 Act, most of the material evidence relied on against the appellant is closed and so he has not had sight of it. He was served with the open statement and material which contained the allegations made against him. They are in the main allegations since the supporting material is largely closed.

108. It was on this basis that the defendant complained that the proceedings against him were unjust and, through his lawyer, notified SIAC that 'he was not going to take any further part in it'. SIAC recorded his concern that the appeal was a 'foregone conclusion', that 'his inability to deal with the closed material made the whole process unfair' and that 'he did not want to lend it any credence by further participation'.[189] As it was, however, the secret evidence against the defendant proved so weak that even the special advocate, acting without any instructions, was able to demolish the Secretary of State's case in closed hearing:[190]

> As a result of [the special advocate's] rigorous cross examination in the closed session, we are satisfied that the assertions made in the statements provided by the [the Home Secretary] are not supported by the evidence put before us. Some are clearly misleading when the source documents are looked at and some can only be justified if the worst possible view is taken of the appellant. Further, in some instances it was apparent that insufficient effort was made to ensure that what appeared to be accurate on a somewhat superficial view of the material was in fact accurate since further investigation showed that it was not. Some of these shortcomings were accepted by the [Home Office] witness, but it was argued that sufficient remained when the evidence was looked at as a whole to justify the certification and detention. However, we are satisfied that [the special advocate's] submission that there has been in the statements served on behalf of the [Home Secretary] (which must we assume reflect what was put before him) a consistent exaggeration of the extent to which the documentary evidence relied on supports the links alleged between the appellant and Al Qa'ida linked extremists is correct.

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[187] *M*, n184 above, para 8.

[188] Ibid, para 5.

[189] Para 6.

[190] Para 10. See also para 7 ('[the special advocate] carried out a detailed and most effective cross-examination of the witness called on behalf of the [Home Secretary]') and para 12 ('[f]or obvious reasons, it is not possible to identify in this open judgment more than a very few of the assertions which are not supportable').

109. SIAC accordingly reversed the Home Secretary's decision to detain indefinitely the defendant as a suspected international terrorist under Part 4. On appeal, the Court of Appeal itself considered both the open and closed evidence against M,[191] and upheld SIAC's ruling. In passing, it noted:[192]

> Having read the transcripts, we are impressed by the openness and fairness with which the issues in closed session were dealt with by those who were responsible for the evidence given before SIAC.

It is unclear what the court meant by 'openness' in relation to a hearing that was held entirely private in relation to evidence that was not disclosed to even the defendant and his lawyers, let alone publicly. Possibly the Court of Appeal was referring to the frankness with which Home Office witnesses gave evidence in closed session, but it seems nonetheless an unfortunate choice of words to use in relation to an *ex parte*, *in camera* hearing involving secret evidence. The court went on to commend the use of special advocates in such hearings:[193]

> We feel the case has additional importance because it does clearly demonstrate that, while the procedures which SIAC have to adopt are not ideal*, it is possible by using special advocates to ensure that those detained can achieve justice* and it is wrong therefore to undervalue the SIAC appeal process.

110. More generally, the Court of Appeal noted that even though 'the need for society to protect itself against acts of terrorism today is self-evident', it remained of 'the greatest

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[191] *Secretary of State for the Home Department v M* [2004] EWCA Civ 324 at para 18: 'Prior to the hearing of this application the members of the court were provided with not only those judgments but also the open and closed material and open and closed skeleton arguments … on behalf of the Secretary of State and the submissions on behalf of the special advocate. The material with which we were provided, which we read prior to the hearing, enabled us to fully consider the issues on the appeals. So far as was possible, we heard the argument in open court. There came a stage however when we had to adjourn to closed court if we were to do justice to the Secretary of State's application. In open court [the defendant's lawyer] addressed us on behalf of "M". In closed court we had the advantage of the submissions of [the] special advocate. It is not necessary for us to give a closed judgment'.

[192] Ibid, para 34.

[193] Ibid. Emphasis added. See also para 13: '[t]he involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellants interests before SIAC. He can seek further information. He can ensure that evidence before SIAC is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to SIAC as to why the statutory requirements have not been complied with. In other words he can look after the interests of the appellant, insofar as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant'.

importance' that those who were detained should have 'have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not'.[194] As with the Court of Appeal's earlier ruling,[195] however, there was no detailed consideration of the compatibility of using secret evidence with the right to a fair hearing. Although the court noted that those in the defendant's position were 'undoubtedly under a grave disadvantage',[196] it did not otherwise attempt to reconcile its acceptance of the use of secret evidence with its insistence on the importance of the rule of law. The success of the special advocate in M's case was, in any event, subsequently cited by the government as evidence of the fairness of SIAC's procedures. As the Lord Chancellor told Parliament the following year:[197]

> the approach that SIAC has taken was explicitly approved on two separate occasions by the Court of Appeal as being a just process. The Court of Appeal looked at it and said that it is the right way to deal with it …. [quoting from the Court's judgment in *M*]. Everybody who has looked at it thinks that that is the right way to deal with it.

However, views on the significance of M's case were not quite as unanimous as the Lord Chancellor maintained. As one former special advocate put it, 'one swallow does not make a summer'.[198] Even this assessment may have been too generous. The fact that the Home Secretary's secret evidence against M was too weak to meet even the 'low standard of reasonable suspicion' that applies in SIAC cases[199] is hardly evidence that SIAC's procedures are 'just'. As Seneca made plain almost two thousand years ago, merely arriving at the correct outcome in a particular case is not the same thing as justice. Even a blind shot will occasionally hit its target, and even a broken watch will tell the time correctly twice a day.

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[194] Ibid.

[195] See n 172 above.

[196] Ibid, para 13.

[197] Lord Falconer of Thornton, Hansard, HL debates, 7 March 2005, col 606. See also e.g. the government's response to the 19th report of the Joint Committee on Human Rights (Cm 7215, September 2007) at para 45 citing the Court of Appeal judgment in *M*: '[t]he domestic special advocate regime has been considered by the UK's courts and, to date, found to provide a substantial measure of procedural justice'.

[198] Nicholas Blake QC, 'The Role of the Special Advocate', Middle Temple, 26 March 2007, at para 2.12. See also the evidence of nine special advocates to the House of Commons Constitutional Affairs Committee, in February 2005: 'We do not consider that the existence of one case in which the detainee's appeal was allowed demonstrates, as a general proposition, that the use of special advocates makes it 'possible… to ensure that those detained can achieve justice'. Nor should it be thought that, by continuing in our positions as Special Advocates, we are impliedly warranting the fairness or value of the SIAC appeal process. We continue to discharge our functions as Special Advocates because we believe that there are occasions on which we can advance the interests of the appellants by doing so. Whether we can 'ensure that those detained achieve justice' is another matter' (EV 38, para 7).

111. Although rightly famous for its declaration that indefinite detention under Part 4 breached fundamental rights, the December 2004 judgment of the House of Lords in the Belmarsh case[200] had relatively little to say about SIAC's use of secret evidence.[201] Although it is clear that the secret nature of SIAC's proceedings coloured the Law Lords' assessment of its incompatibility with the rights to liberty and non-discrimination,[202] the House found it unnecessary to decide the question of whether the use of secret evidence was compatible with the right to a fair hearing.[203]

Torture evidence

112. During the course of SIAC proceedings under the 2001 Act, it became apparent that some of the government's secret evidence may have come from interrogations carried out in other countries that involved the use of torture or other ill-treatment contrary to article 3.[204] This included not only information received by the government through its intelligence liaisons

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199 Para 9. Mr Justice Collins, the president of SIAC, elsewhere noted that the standard of proof required in SIAC cases was 'not a demanding standard for the Secretary of State to meet' (*Ajouaou and others v Secretary of State for the Home Department*, SC/1/2002, 29 October 2003, at para 71).

200 *A and others v Secretary of State for the Home Department (No 1)* [2004] UKHL

201 As with the Court of Appeal before them, the Law Lords did not consider the closed material. See para 94 per Lord Bingham: '[t]he Home Secretary has adduced evidence, both open and secret, to show the existence of a threat of serious terrorist outrages. The Attorney General did not invite us to examine the secret evidence, but despite the widespread scepticism which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction, I am willing to accept that credible evidence of such plots exist'.

202 See e.g. Lord Hoffman, ibid, para 87: 'the suspect is not entitled to be told the grounds upon which he has been suspected. So he may not find it easy to explain that the suspicion is groundless'; Lord Scott, para 155: '[i]ndefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares'; Baroness Hale at para 223: '[t]he detainee does not know a good deal of the case against him. He is not even interviewed by the authorities so that he can attempt to give some account of himself'.

203 See Lord Bingham, ibid, para 71: 'Having regard to the conclusions I have already reached, I think it unnecessary to address detailed arguments based on alleged breaches of articles 3 and 6 of the European Convention. I express no opinion on those questions, nor on a question relating to the admissibility of evidence obtained by torture which was not argued before SIAC or the Court of Appeal in the part of these proceedings which is now the subject of appeal'.

204 See e.g. *E v Secretary of State for the Home Department* (SC/4/2002, 29 October 2003), para 3: '[E's counsel] was not, of course, aware whether any information which may have been obtained following torture or other inhuman or degrading treatment was relied on against [E] He drew our attention to allegations that Abu Zubaida had been wounded when captured and that his wounds had not been treated when he was interrogated and to assertions made by Beghal that his confessions allegedly made in the UAE to involvement in a plot involving bombing in Paris had been forced out of him and were untrue'. SIAC nonetheless concluded that 'there is no sufficient material which persuades us that we can conclude either that torture or other treatment contrary to article 3 … was used or even that it may have been used'. It has since emerged that Abu Zubaida was subject to waterboarding 83 times in August 2002: see US Department of Justice Memorandum, 'Application of Article 16 UNCAT to Certain Techniques that May Be Used in the Interrogation of High Value Al Qaeda Detainees', 30 May 2005; New York Times, 'Waterboarding Used 266 Times on 2 Suspects', 19 April 2009.

with countries such as Algeria or Pakistan but also from the interrogation of detainees by the CIA in Guantanamo Bay and elsewhere.[205]

113. Although the common law had for several centuries prohibited the use of evidence obtained by torture in criminal cases,[206] the admissibility of *foreign* torture evidence not involving UK officials had never arisen in civil proceedings. In addition to the common law and the UK's obligations under article 3 ECHR, the UK was also bound by the UN Convention Against Torture, article 15 of which requires that each State Party 'shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings'.[207] SIAC, however, rejected the argument that it should refuse to consider material obtained by torture:[208]

> In the context of these appeals, which do not involve criminal proceedings, an exclusionary principle would be difficult, if not impossible, to apply …. We cannot be required to exclude from our consideration material which [the Home Secretary] can properly take into account, but we can, if satisfied that the information was obtained by means of torture, give it no or reduced weight. Otherwise, we will have regard to any evidence about the manner in which it may have been obtained and judge its weight accordingly. *We are, after all, concerned in these proceedings not with proof but with reasonable grounds for suspicion.*

SIAC instead ruled that the use of torture would be relevant to the weight to be given to be given to the evidence in each case. The Court of Appeal likewise held that SIAC could lawfully consider evidence obtained by torture.[209] The House of Lords, however, ruled unanimously that such evidence could never be heard by a British court:[210]

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[205] It has of course subsequently emerged that approved CIA interrogation techniques from 2002 onwards included such methods as waterboarding, water dousing, cramped confinement, confinement with insects, walling, restraint positions, slapping and sleep deprivation. See e.g. New York Times, 'Interrogation Memos Detail Harsh Tactics by the CIA', 16 April 2009 (detailing US Department of Justice memoranda from August 2002 and May 2005); New York Review of Books, 'The Red Cross Report: What It Means', 30 April 2009; International Committee for the Red Cross Report on the Treatment of 14 'High Value Detainees' in US Custody (February 2007).

[206] See e.g. *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 at para 11 per Lord Bingham: 'It is … clear that from its very earliest days the common law of England set its face firmly against the use of torture'. The use of torture warrants ended in England and Wales in 1640 with the abolition of Star Chamber and in Scotland with section 5 of the Treason Act 1708.

[207] The only exception is admitting a statement 'against a person accused of torture as evidence that the statement was made'. The 1984 Torture Convention is signed and ratified by the UK but is not directly incorporated into UK law.

[208] *Ajouaou and others v Secretary of State for the Home Department* (SC/1/2002, 29 October 2003), para 81. Emphasis added.

[209] *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123. See in particular Pill LJ at para 11: 'It would be…unrealistic to expect the Secretary of State to investigate each statement with a view to deciding whether the

> It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.

114. But although the Law Lords were unanimous in their condemnation of evidence obtained by torture, they were far from unanimous when it came to the more practical question of the burden of proof for excluding it. In a case where all the evidence is produced in open court, the parties would of course be free to challenge the introduction of any material that appeared to be procured by torture. But such a practice is impossible in proceedings where the defendant does not see the majority of the evidence against him, still less know its origins. As Lord Bingham noted:[211]

> I do not for my part think that a conventional approach to the burden of proof is appropriate in a proceeding where the appellant may not know the name or identity of the author of an adverse statement relied on against him, may not see the statement or know what the statement says, may not be able to discuss the adverse evidence with the special advocate appointed (without responsibility) to represent his interests, and may have no means of knowing what witness he should call to rebut assertions of which he is unaware.

115. However, the majority of the House held that evidence that *may* have been procured by torture should normally be admitted into evidence *unless* SIAC was satisfied that it was more likely than not (the civil standard of proof) that the evidence in question had been obtained by torture. Lord Bingham, joined by Lords Hoffman and Nicholls, dissented:[212]

> [The majority's test] is a test which, in the real world, can never be satisfied. The foreign torturer does not boast of his trade. The security services, as the Secretary of State has made clear, do not wish to imperil their relations with regimes where torture is practised. *The special advocates have no means or resources to investigate. The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness*

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circumstances in which it were obtained involved a breach of Article 3. It would involve investigation into the conduct of friendly governments with whom the Government is under an obligation to co-operate'.

210 *A and others (No 2)*, n206 above, at para 51 per Lord Bingham. See also Lord Hoffman at para 82: '[t]he use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it'.

211 Ibid, para 55.

212 Ibid, para 59. Emphasis added.

> *to blindfold a man and then impose a standard which only the sighted could hope to meet.* The result will be that, despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because its source will not have been 'established'.

Since the decision of the House of Lords, it has been the declared policy of the Home Secretary that 'she will not generally rely on statements reported to have been made by those detained by the authorities of states with a questionable record of treatment of suspects and detainees'.[213]

Proceedings post-7/7

116. In August 2005, less than a month after the 7/7 bombings, the Prime Minister Tony Blair held a press conference to announce a 'new approach to deportation orders'. [214] The 'new approach' was one that would involve the British government negotiating with countries in North Africa and the Middle East for the return of suspects, alongside assurances from those countries that the suspects would not be tortured on their return.[215] 'The rules of the game', declared Blair, 'are changing'.

> … the circumstances of our national security have self evidently changed, and we believe we can get the necessary assurances from the countries to which we will return the deportees, against their being subject to torture or ill treatment contrary to article 3.

Notwithstanding that the government had, in fact, a relatively long history of negotiating assurances against ill-treatment with varying degrees of success,[216] the Prime Minister revealed that the government had recently concluded a memorandum of understanding (MOU) with Jordan concerning the treatment of returned suspects, and indicated that 'there

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[213] *Secretary of State for the Home Department v AV* [2009] EWHC 902 (Admin) at para 5 per Mitting J.

[214] Prime Minister's press conference, 5 August 2005.

[215] Ibid.

[216] Eight months before Blair's speech, the Home Secretary told Parliament that 'we have been trying for some time to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin. We are currently focusing our attention on certain key middle-eastern and north African countries' (Hansard, HC Debates, 26 January 2005, col. 307). In both the 1989 *Soering* case and 1996 *Chahal* case, the European Court of Human Rights noted that the UK had received assurances from the US and Indian governments respectively. Similarly, the judgment of the High Court in *Youssef v Home Office* [2004] EWHC 1884 (QB) details the failed negotiations between the UK and Egyptian governments for the return of two Egyptian nationals consistently with article 3. For further details see Metcalfe. 'The false promise of assurances against torture', JUSTICE Journal [2009].

are around 10 such countries with whom we are seeking such assurances'.[217] MOUs have subsequently been concluded with Lebanon, Libya and most recently Ethiopia.[218] Formal negotiations on a memorandum with Algeria collapsed in 2006 but this did not prevent the Home Secretary from relying upon assurances received from the Algerian authorities before SIAC.

117. Following the August 2005 announcement, deportation orders were made against a number of foreign nationals on national security grounds. This included the nine remaining individuals who had previously been detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001 and (briefly) subject to control orders under the Prevention of Terrorism Act 2005. The first round of appeals triggered by the making of the orders were determined by SIAC in March 2006.

118. Accompanying the government's 'new approach' to deportation orders was a new approach to the use of secret evidence in deportation hearings before SIAC. As noted earlier, proceedings in SIAC before 9/11 had observed a clear separation between two main issues: first, a defendant's alleged risk to national security in the UK ('national security'); and secondly, the likelihood that a defendant would be subject to torture or other ill-treatment contrary to article 3 if returned ('safety on return'). Government ministers had given an assurance to Parliament that only evidence relating to national security would be closed, while evidence relating to safety on return would remain open, and this assurance had been carefully observed in the pre-9/11 cases.[219]

119. In the post-7/7 deportation cases before SIAC, by contrast, the government began to claim secrecy not only in relation to the evidence concerning national security but also in relation to safety on return. This became apparent when, at one of the first SIAC deportation hearings post-7/7 in October 2005, the government was directed to disclose evidence on safety on return to the defendants by 30 November but had failed to do so by March 2006.[220] Much of the material which the special advocates had argued should be disclosed to the defendants related to the details of the UK's negotiations with the regimes concerning the treatment of suspects (including guarantees of due process, a fair trial and guarantees of religious freedom while in detention).[221]

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[217] Other countries understood to be the subject of negotiations were Egypt, Morocco, Tunisia and Saudi Arabia.

[218] Written statement of Lord West, Hansard, 20 January 2009, col. WS161.

[219] See para 89 above.

[220] See *A and others v Secretary of State for the Home Department* (SIAC, 13 March 2006), paras 1-8.

[221] For example, the Jordanian MOU records the understanding that both governments 'will comply with their human rights obligations under international law regarding a person returned under this arrangement', it also provided eight 'further specific' assurances. However, six of the eight 'specific' assurances do no more than restate Jordan's existing obligations under the Torture Convention and the International Covenant on Civil and Political Rights, namely the right of those returned

120. By July 2006, SIAC had ruled that there was, in any event, nothing in the 1997 Act or the 2003 procedure rules that required the Secretary of State to keep open his evidence relating to safety on return, so long as he was satisfied that its disclosure would be contrary to the public interest.[222] There is, however, no indication in the judgment that SIAC had considered the explicit assurance given to Parliament in 1997. SIAC also held that there was no obligation on the Home Secretary to disclose 'in open all material relevant to the issue of safety on return which the [Home Secretary] may produce, whether he specifically relies on it or produces it because it may assist [a defendant]'.[223]

121. The subsequent cases of defendants facing deportation on national security grounds to Algeria, Libya and Jordan illustrate the government's 'new approach' to using secret evidence in relation to safety on return.[224] In one case, SIAC considered the government's submission that there was 'a clear and settled political will on the part of the Algerian government' to honour its assurances that suspects would not be mistreated on return:[225]

> We agree, but, as indicated, believe that it is necessary to examine whether or not it is in the long term interests of the Algerian state to do so. These interests have been examined in both open and closed sessions. *Evidence given in closed session powerfully supports the proposition that it is in the Algerian state's interest to do so.*

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to due process, a fair trial, and religious freedom. The prohibition against ill-treatment is not referred to directly but instead expressed in terms of a positive obligation on Jordan to provide the detainee: 'adequate accommodation, nourishment, and medical treatment, and [to] be treated in a humane and proper manner, in accordance with internationally accepted standards'. Only two of the assurances are specific to Jordan: an assurance of regular visits while in detention from an 'independent body nominated jointly by the UK and Jordanian authorities' and to allow access to the UK consulate while not detained. The MOU makes no provision for adjudication, enforcement or sanction for breach of any kind.

[222] See section 5(6)(b) of the 1997 Act which requires the Lord Chancellor to make procedure rules for SIAC with regard to 'the need to secure that information is not disclosed contrary to the public interest'; and rule 4(1) of the 2003 Procedure Rules which requires SIAC to 'secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest'.

[223] *Y and Othman v Secretary of State for the Home Department* (SC/36/2005), para 41. SIAC did, however, rule that the Home Secretary could not rely on any substantive assurance 'unless it is put into the open' – see para 58: '[i]t may be the case that encouraging or supportive comments, even if described as assurances by the Government's interlocutors, should remain in closed if for example they are steps en route to an agreement. But the key documents or conversations relied on to show that an Appellant's return would not breach the UK's international obligations or put him at risk of a death sentence or death penalty have to be in the open evidence'.

[224] See e.g. *BB v Secretary of State for the Home Department* (SC/39/2005, 5 December 2006); *Y v Secretary of State for the Home Department* (SC/36/2005, 24 August 2006); *DD and AS v Secretary of State for the Home Department* (SC/42 and 50/2005, 27 April 2007); and *Omar Othman* (*Abu Qatada) v Secretary of State for the Home Department* (SC/15/2005, 26 February 2007). Note that the case of BB was subsequently renamed RB before the Court of Appeal and the House of Lords. For the sake of overall consistency, the main text of this report uses RB throughout.

[225] *BB*, ibid, para 17.

> From the point of view of public understanding of our reasoning, it is unfortunate that that material cannot be put into the public domain.

122. In another case, SIAC agreed to the Secretary of State's argument that most of the details of the government's negotiations with the Algerian authorities concerning the safety of returned suspects were too sensitive to be disclosed openly. For instance:[226]

> The content of the proposed draft Exchange of Letters between the President [of Algeria] and the Prime Minister had been settled; there had been a query over who would initial it but we were told on the last day of closing submissions that they had now been initialled and were to be exchanged on the Presidential visit in August. *They remain largely in the closed evidence*. It provides general assurances to be applied to individuals, to be supplemented by individual assurances.

By contrast, the most explicit open assurance given by the Algerian authorities was the bland and generic claim that the defendant 'had the right to respect … for his human dignity'.[227]

123. SIAC subsequently agreed to make open parts of its closed ruling in the latter case.[228] The extracts from the closed judgment included the revelation that Algeria was considering signing the Optional Protocol to the UN Convention Against Torture.[229] We may never know why the Home Secretary eventually consented to this information being made public. What is even more mystifying is why it was ever thought sensitive enough to warrant its use as secret evidence in the first place. Whatever the rationale behind the disclosure or non-disclosure of any particular item of evidence, it is clear the scope of secret evidence had already moved well beyond the traditional justification for secrecy given by one government minister to Parliament in 1997:[230]

> [S]ome of these people are extremely dangerous not only to their countries of origin, but also to the people of this country and fellow nationals of their country of origin in this country. *No responsible government, in any circumstance, will give to an alleged terrorist such particulars as will enable him to murder or maim anyone who is resident in this country or elsewhere*.

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226 Ibid, para 238 [emphasis added]. SIAC later noted, however, that the Exchange of Letters 'add little if anything to what is open – their significance lies in the weight given to the political attitudes behind them' (para 340).

227 Para 256.

228 *Y v Secretary of State for the Home Department (Extracts from closed judgment)* (SC/12/2005, 14 November 2006).

229 See paras 84 ('Algerian readiness to sign OPCAT in principle') and 102 ('The Algerians are clearly willing to sign OPCAT in principle'). The open judgment noted only that the Algerian government 'is said to have agreed in principle to sign and ratify OPCAT, which requires monitoring, but has not done so' (para 21).

The traditional scope of withholding undisclosed material on national security grounds has typically included such information as the identities of informants or undercover agents, details of surveillance operations or sensitive methods of interception – material that would be sensible for any government to seek to protect.[231] However, it remains unclear exactly how much death and mayhem the government thought would have been caused by an alleged terrorist learning that Algeria may shortly sign an optional protocol relating to prison inspections.

124. The absurdity of the Home Secretary's reliance on secret evidence is also apparent in the SIAC case of two men facing deportation to Libya.[232] The government had negotiated a memorandum of understanding with the Libyan government, which included provision for the well-being of suspects to be monitored by 'an independent body' – subsequently named as the Gadaffi Foundation run by Saif Gadaffi, the son of Colonel Gadaffi.[233] The Home Secretary nonetheless insisted that some of the evidence relating to the government's assessment of the reliability of the assurances was secret.[234] SIAC held that the men faced a real risk of ill-treatment contrary to article 3 notwithstanding the agreement with Libya. It noted that 'all the conclusions which we have reached reflect and are supported, *at times strongly so*, by the closed evidence'.[235] However, to the extent that SIAC needed evidence of the unreliability of a promise not to torture from the Libyan regime – with the guarantee of 'independent' monitoring by the son of the head of the regime – it hardly seems likely that it needed to resort to secret evidence to reach that conclusion.

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[230] Lord Williams of Mostyn, Hansard, HL Debates, 5 June 1997, Col 755. Emphasis added.

[231] See e.g. Lord Bingham in *R v H* [2004], n60 above, at para 18: '[t]he public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations'. See also the judgment of the European Court of Human Rights in *Rowe and Davis v United Kingdom,* n68 above, at para 61: '[i]n any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused'.

[232] See *DD and AS v Secretary of State for the Home Department*, n224 above.

[233] Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Co-Operation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland concerning the provision of assurances in respect of persons subject to deportation, 18 October 2005.

[234] See e.g. *DD and AS*, n224 above, para 283: 'Many of these matters [concerning Colonel Gadaffi's reliability] were more fully answered by Mr Layden [the government's Special Representative for Deportation with Assurances] in the closed evidence, but he accepted that that there had been sudden policy changes in the past, a history of lying to foreign governments, pursuing assassinations and terrorism abroad. But he concluded that Colonel Qadhafi would adopt a pragmatic approach and demonstrated that he did so in relation to his rapprochment with the West'.

[235] Ibid, para 428. Emphasis added.

125. Indeed, it seems that the Home Secretary's reliance on secret evidence on the issue of safety on return may, in certain instances, have had less to do with its own view of the sensitivity of the material and more to do with the sensitivities of its foreign partners, of which the following extracts from SIAC judgments give some indication:

> The Algerian stance on ill-treatment had always been that they objected to repeating, in generic form, commitments which they had entered into in the Convention against Torture and in the International Convention on Civil and Political Rights….. A general reiteration was seen as casting doubt on whether they would abide by commitments which they had already entered into, whereas an individual assurance was seen as applying to an individual the general obligation already undertaken. Their history, that is their colonial past, made them very sensitive about that.[236]

> It is a clear characteristic of Colonel Qadhafi and, to a lesser extent some of the other regime leaders, as well that they are very sensitive to personal slights and to slights upon Libya.[237]

> [T]he MOU and arrangements are supported at the highest levels and the King's political power and prestige are behind it …. It would not be some general sop to public or world opinion. The Jordanian Government would have a specific interest in not being seen by the UK Government or the public in Jordan in this case as having breached its word, given to a country with which it has long enjoyed very good relations.[238]

In any event, the sensitivity of a foreign government seems a poor reason to allow the use of evidence not disclosed to a defendant and his lawyer in relation to the issue of safety on return. As Lord Bingham put it in *A (No 2),* 'I am not impressed by the argument based on the practical undesirability of upsetting foreign regimes which may resort to torture'.[239]. The Secretary of State's position before SIAC is all the more bewildering, given that extensive details of the government's earlier negotiations with the Egyptian authorities for assurances

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[236] *Y v Secretary of State for the Home Department*, n224 above, para 256.

[237] *DD and AS*, n224 above, para 358.

[238] *Abu Qatada*, n224 above, para 362.

[239] Note 206 above, para 50. Lord Bingham was here referring to SIAC's conclusion that an exclusionary rule against torture would be 'difficult if not impossible' to apply because it would put the Home Secretary to a duty of inquiry with foreign governments that provided information to the UK.

against the ill-treatment of suspects, including some of the handwritten notes of the Prime Minister, were disclosed in open court in 2004.[240]

126. In late 2008, various of the appeals against SIAC's conclusions in relation to Algeria and Jordan reached the House of Lords.[241] There the defendants argued that the importance of the prohibition against torture under article 3 meant that, at the very least, evidence relating to safety on return had to be dealt with in open court. This was especially important in circumstances where the government, rather than the defendant, was most likely to have access to information relevant to the defendant's safety on return. The Law Lords, however, rejected the submission that article 3 required evidence on safety on return to be disclosed to a defendant. As Lord Phillips put it:[242]

> It is in the public interest that diplomats should be free to make frank reports in the confidence that these will not be put into the public domain. It is also in the public interest that Ministers and officials in this country should be able to exchange information in confidence with their counterparts in other countries. For these reasons I consider that there are cogent considerations of policy that are capable of justifying the use of closed material provided that these considerations are not outweighed by the other relevant factors.

127. On the question of the government's assurance that only evidence relating to national security would remain closed, Lord Phillips held that – regardless of what Parliament was told – the language of the 1997 Act was clear on its terms.[243] Therefore, according to the rule set down in *Pepper v Hart*, there was no opportunity for a court to go behind what the statute said in order to consider what Parliament may have intended.[244] More generally, Lord Phillips

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[240] *Youssef v Home Office* [2004] EWHC 1884.

[241] *RB & U (Algeria); OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10.

[242] Ibid, para 93.

[243] See paras 81 ('I have been unable to detect any ambiguity in the terms of section 5 [of the 1997 Act]') and 82 ('Rule 4 [of the Procedure Rules] falls fairly and squarely within the power to make rules granted by section 5 of the 1997 Act. Neither the fact that the ECtHR in *Chahal* envisaged that it would only be necessary to use closed material where the interests of national security required this nor the assurance given to Parliament by the Junior Minister can have the effect of rendering Rule 4 *ultra vires*').

[244] The rule in *Pepper v Hart* [1993] AC 593 permits the courts to refer to parliamentary materials where '(a) legislation is ambiguous or obscure or leads to an absurdity; (b) the material relied upon consists of one or more statements by a minister or other promoter of a Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect (c) the statements relied upon are clear' (per Lord Brown-Wilkinson: ''The purpose [of the rule] is to give effect to, not thwart, the intentions of Parliament'). See also Lord Griffith at 617: 'I have to confess that on many occasions I have had recourse to Hansard, of course only *to check if my interpretation had conflicted with an express Parliamentary intention*' [emphasis added]. See also Lord Steyn's speech in *Westminster City Council v NASS* [2002] UKHL 38 at para 6: '[i]f exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about

distinguished between defendants in control order appeals and defendants in deportation cases before SIAC. In a control order case, Lord Phillips said, the closed evidence was 'likely to relate' to the Home Secretary's suspicion that the defendant was involved in terrorism. Therefore:[245]

> Insofar as he is the person to whom the information relates, he it is who is likely to be best placed to rebut it if it is untrue. His ability to defend himself will be seriously impaired, if not totally destroyed, if he is not told the case against him, and his special advocate may well be in no position to rebut the case made against him without obtaining the suspect's response to the closed material.

But the same is not true, reasoned Lord Phillips, of a defendant in a deportation hearing before SIAC:[246]

> It is true that, if that deportee will be at real risk of a violation of his human rights on return to his own country, this is likely to be because of facts that are personal to him. The difference is that he *will normally be aware of those facts* and indeed he will be relying on them to establish the risk that he faces on his return. His situation is not that of an individual who is unaware of the case that is made against him.

128. Lord Phillips did concede that negotiations with a foreign regime may include allegations made by the 'security services of the receiving State' about the defendant's activities and that – in those circumstances – a defendant *would* be best-placed to rebut those claims. But he maintained that such allegations would 'not be of much relevance' to determining the issue of safety on return in any event.[247] 'Even if he is in a position to demonstrate that suspicions held about him by the receiving state are groundless', said Lord Phillips, 'this will not have significant bearing on the risk that he will face on his return'.[248] In such situations, he held, the defendant was not disadvantaged by being represented by a special advocate with whom he could not communicate, because it was not 'critically important' for the special advocate to 'obtain input' from the deportee about the closed evidence.[249]

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the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court'.

[245] Para 94.

[246] Para 95, emphasis added. Lord Phillips continued: '[i]ndeed, so far as safety on return is concerned, the State does not have to make out a case against the deportee'.

[247] Para 96.

[248] Ibid.

[249] Para 98.

129. Lord Phillips's reasoning is far from clear, however. In the first place, the risk that the defendant will be tortured on return is, despite the predictive nature of the inquiry, an question of fact: either a real risk or it does not. Lord Phillips acknowledges, moreover, that the risk is one that is *personal* to the defendant..[250] In Abu Qatada's case, for instance there was extensive discussion of his 'high profile',[251] including the fact that he had been convicted in absentia for terrorist offences by the State Security Court in 1999,[252] and that he would be taken into GID detention on his return and questioned.[253] Lord Phillips at first appears to suggest that, because such facts are not only within the defendant's personal knowledge but actually being advanced by him, he is therefore not unaware of the case against him. But while Abu Qatada undoubtedly has personal knowledge of some of the facts relevant to the likelihood of his being ill-treated in Jordan (having, among other things, previously been interrogated by the Jordanian intelligence services), it is a *non sequitur* to conclude that he therefore is aware of the case he has to meet, at least insofar as that case is contained in secret evidence he has not seen. It is true that, unlike a secret allegation of wrongdoing, the defendant at least has knowledge of some of the facts that are relevant to the issue of his safety on return. But it is surely tendentious to say that, simply because he knows some of those facts, he therefore knows the case against him despite not knowing much, perhaps most, of the evidence on the other side.

130. Equally questionable is Lord Phillips's assumption that most of the government's closed evidence is not 'information personal to the deportee'.[254] Hence, he seems to suggest, the defendant is not prejudiced by his lack of knowledge of the government's material because there is nothing that he *personally* could say to rebut it. Lord Phillips does not offer any basis for this assumption – as he later makes clear, the appeals were conducted 'on the basis of the

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[250] This refers to the well-established case law of the European Court of Human Rights that it is not enough for a defendant to show merely that the general conditions in a country create a possibility of ill-treatment. Instead, the defendant must show that his own 'personal circumstances' put him at risk. See e.g. *Vilharajah and others v United Kingdom* (1991) 14 EHRR 248 at para 108: 'the examination of [the risk of ill-treatment contrary to article 3] … must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka in the light of the general situation there in February 1988 *as well as on their personal circumstances*', and at para 111: 'The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that *their personal position* was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country' [emphasis added].

[251] See e.g., *Abu Qatada*, n224 above, para 498.

[252] Ibid, paras 233-234.

[253] Para 371. SIAC noted the extensive allegations of torture of suspects in GID detention (see e.g., paras 141, 147-149, 151-152, 224) and the conclusion of the UN Special Rapporteur on Torture that 'torture is systematically practiced by … the GID' (para 265). The British government's own representative conceded on the witness stand that 'some detainees had been hidden during visits by [the Red Cross] to GID facilities because they bore signs of torture' (para 225).

[254] Para 96.

open evidence alone' and the Law Lords did not inspect the closed material[255] – but his earlier reference to 'a substantial body of information about conditions prevailing in the country in question, including personal information about public figures and other individuals in that country' that 'has been obtained in circumstances, or in terms, that could, if made public, cause serious prejudice to relations between the United Kingdom and that country' presumably indicates the kind of material that he believes the closed evidence contained.[256]

131. Of course, we do not know what the government's closed evidence in relation to safety on return actually contained, still less whether it involved 'information personal to [a] deportee'. It may well be that much of the material related to matters outside the defendant's personal knowledge, but there is little in any of the open judgments to indicate this one way or another. The obvious point is that even SIAC, which considered the secret evidence at length, could only speculate which parts of it related to facts within the defendant's personal knowledge. For just as the defendant is in the dark about the scope of the secret evidence, the court is in the dark about the scope of the defendant's knowledge of particular facts that may be addressed by the secret evidence. Lord Phillips's prediction that it is 'not likely' that the defendant will be able to say anything in relation to the government's closed evidence is, therefore, not only guesswork but guesswork twice removed.

132. Lord Phillips offered the further aside that, even if the closed material on safety on return *did* include allegations which the defendant was able to rebut, it would make no difference in any event because nothing the defendant could say in reply would have a 'significant bearing on the risk that he will face on his return'.[257] This conclusion is simply baffling. In the case of Abu Qatada, for example, SIAC noted that the Jordanian security service – the GID – had been involved in the negotiations with the British government over the MOU against the ill-treatment of suspects.[258] It was one of SIAC's findings of fact, moreover, that the GID – despite its 'deserved reputation' for torturing its detainees[259] and 'the real risk of torture' for 'the ordinary Islamist extremist in GID detention'[260] – was likely to abide by the terms of the MOU.[261] Presumably if, in the course of those negotiations, the Jordanian security service made allegations to the British government about something that Abu Qatada had personal knowledge of, and Abu Qatada, being told the allegations, was somehow able to

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[255] Para 104.

[256] Para 93.

[257] Para 96.

[258] See *Abu Qatada*, n224 above, para 256: 'the GID had been represented on the body with which the MOU had been negotiated and agreed'.

[259] Ibid, para 478.

[260] Para 350.

[261] Paras 354-367.

rebut them decisively in a way that not only showed their falsity but also demonstrated bad faith in the GID's involvement in the negotiation of assurances, then surely this would have a bearing on SIAC's assessment of the likelihood that the GID would not work to subvert the MOU? Of course, it may be that the closed evidence contained no such allegations, or it may be that Abu Qatada would be unable to rebut them, or rebut them but unable to show the necessary bad faith. The fundamental importance of a person's right to know the evidence against him lies not in being *able* to rebut each and every allegation concerning a fact in issue but in having the *opportunity* to rebut it. It rests on the simple truth that nobody knows what a party may say in response to some unknown piece of evidence until they have been given the chance to respond.

133. But even if it were correct, Lord Phillips's distinction between control order proceedings and SIAC hearings also proves too much. For if it is true that that the closed evidence in control order cases is likely to relate to the Home Secretary's suspicion that the defendant is 'involved in terrorist activity' and that the defendant is 'likely to be best placed to rebut it if it is untrue', then this is something that is equally likely to be true in SIAC cases in relation to the Home Secretary's belief that the defendant is a threat to national security. Whether or not the closed evidence on safety on return falls within a defendant's personal knowledge, it would be absurd for the government to claim that the defendant is a risk to the national security of the UK based on facts largely outside the defendant's knowledge. The inevitable logic of Lord Phillips's distinction is that defendants in SIAC hearings would, at the very least, be entitled to much greater disclosure of closed material on the issue of national security than is currently the case.

MK v Secretary of State

134. As has already been shown, the use of secret evidence by SIAC not only raises obvious issues of principle but also presents significant practical difficulties. Certain of these difficulties were starkly illustrated by the post-7/7 deportation case of *MK v Secretary of State for the Home Department*.[262] Before SIAC, the Secretary of State had alleged that MK – a dual French/Algerian citizen – was a 'prominent member of the Abu Doha group'[263] and that he had 'used his passport or allowed his passport to be used for extremist activities'.[264] In its open judgment handed down in May 2006, SIAC noted:[265]

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[262] *MK v Secretary of State for the Home Department* (SC/29/2004, 19 May 2006).

[263] Ibid, para 3(1).

[264] Ibid, para 4(6).

[265] Para 20. See also para 35: 'From the outset, the [defendant] denied that his passport had been used, at least to his knowledge, by Abu Doha or anyone else. The Secretary of State has now withdrawn the allegation that the passport was used by Abu Doha and reliance upon the event as directly connecting the [defendant] to Abu Doha'.

> Until after conclusion of the hearing the Secretary of State had maintained an allegation that the [defendant] had permitted Abu Doha to use a 'false' passport in the name of [MK] and thus permitted Abu Doha to enter Ireland claiming political asylum in 1997 and that subsequently Abu Doha had entered the Netherlands using a forged passport in the name of [MK] in 1998. The [defendant] denied any knowledge of such action by Abu Doha. From the outset he has resolutely denied any conduct on his part which contributed to or enabled Abu Doha to so conduct himself. Having regard to material drawn to the attention of counsel for the Secretary of State, this allegation has been withdrawn…

The May 2006 judgment gave no other details of the reasons why this allegation was withdrawn by the Secretary of State concerning the defendant's passport.[266]

135. However, in September 2006, SIAC agreed to make public extracts from its closed judgment in MK's case.[267] The closed extracts noted that Andrew Nicol QC, one of the special advocates appointed to act for MK in closed proceedings, was subsequently instructed to act as special advocate for Abu Doha himself in separate SIAC proceedings.[268] Having seen the government's secret evidence in the Abu Doha case, Mr Nicols discovered that the Secretary of State was relying upon the same item of evidence – MK's passport – to support a different and wholly contradictory allegation in Abu Doha's case.[269] Referring to the Home Secretary's original allegation that MK had allowed his passport to be used by Abu Doha, SIAC said:[270]

> This allegation has been withdrawn, but that withdrawal came only as a result of the Special Advocates' intervention, when their attention to the Abu Doha closed material revealed the existence of relevant documents. Had the coincidence of Mr Nicol's instruction in both cases not occurred, [SIAC] would have been left to determine the

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[266] SIAC nonetheless concluded that the defendant had lost several passports and his account for having done so was suspicious (para 37). This, combined with SIAC's conclusion that he had knowingly associated with members of Abu Doha's group meant that there was 'a real risk that his passports have been used by extremists for the purposes of travel and the furtherance of international terrorism' (para 67(3)).

[267] *Redacted version of paragraphs 88-104 in the Closed Judgment of* MK (SC/29/2004, 5 September 2006).

[268] See *U v Secretary of State for the Home Department* (SC/32/2005). U is understood to be Abu Doha, also known as Amar Makhlulif. See e.g. para 3 of the open judgment, which describes U as 'a leading organiser and facilitator of terrorist activity aimed mainly at overseas targets. To that end, it is claimed that he formed and led a terrorist group bearing one of the names which he had assumed in Afghanistan. Several of its members have been the subject of appeals to SIAC, against decisions by the Secretary of State to deport them on national security grounds. Claimed membership of the group formed part of the Secretary of State's case against each of them'.

[269] See e.g. Sam Knight 'Secret terror courts questioned after evidence bungle', The Times, 12 October 2006; Joshua Rozenberg, 'Clarke at centre of a shocking scandal of incompetence' Daily Telegraph, 12 October 2006.

[270] *Redacted version of closed MK judgment*, n267 above, para 4.

> question whether Abu Doha used the appellant's passport, on a false basis …. It is unnecessary to elaborate on the consequences which might have flowed had the Special Advocates not drawn [SIAC's] attention to the existence of these documents.

SIAC went on to remark that, had 'proper attention been paid to all the relevant material which was available to the Security Service, the allegation that Abu Doha used the [defendant's] passport would not have been made'.[271] It referred to the fact that SIAC was obliged by the revelation to reopen MK's appeal in closed hearing 'in order to consider the Abu Doha material'.[272] However, although it took the new information into account, it refused to order a fresh hearing in MK's case.[273]

136. The significance of MK's case is not simply that the government was found to have been using the same secret evidence to make contradictory cases in different proceedings behind closed doors. SIAC accepted the Secretary of State's submission that this had not been a case of bad faith on the government's part.[274] But even if SIAC is correct that it would not have occurred if 'proper attention had been paid' by the government to the different arguments being run in the different cases, it is also true that it would almost certainly not have occurred but for the evidence being kept secret. For the importance of giving evidence in open court does not lie in guaranteeing fairness to the defendant alone. It also imposes an important discipline on those responsible for prosecuting the government's case to ensure that cases are handled properly and, for instance, that contradictory arguments are not run. Exposing evidence to the glare of sunlight in open court is not just to the defendant's benefit, but to the public interest in ensuring the proper administration of justice.

137. The redacted extracts from the closed judgment in MK's case are also important for the light they shine on the difficulties with using intelligence assessments as evidence to prove facts in issue. SIAC set out these problems as follows: [275]

> The Security Service material amounts to the evidence in the case for the Secretary of State, *but is not recorded and prepared for the purpose of being presented and used as evidence in an adversarial hearing.* It is significant that the Security Service does

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[271] Ibid, para 5.

[272] Ibid.

[273] Paras 11 and 13. The Times report, n269 above, describes the defendant's fate as follows: 'MK, who was never charged with a crime, was deported to France on September 14. He took the Eurostar to Paris after voluntarily deciding to leave the country. He has dual French-Algerian nationality and faces no criminal charges in France'.

[274] Para 13.

[275] Para 6. Emphasis added. See also the discussion about intelligence material at para 105 above and the case of *Ajouaou v Secretary of State for the Home Department*.

> not, unless it regards the process as necessary, follow leads or events which the material records, so as to establish an evidential trail. That is not a criticism, but a consequence of its area of responsibility. But that does not mean that the opportunity to follow leads should not be taken, if it is available, by those preparing the evidence for a hearing.

And:[276]

> [I]t must be remembered that [SIAC's] task is to consider the factual basis for the Secretary of State's opinion. *The assessments which have been made by the Security Service do not, in themselves, provide a factual basis.* [SIAC] has to decide whether the assessments are reliable having regard to the facts which are available. Counsel for the Secretary of State should consider the material critically adopting, for example, an approach similar that employed in preparing an advice on evidence for a trial. That involves formulating the allegations and then marshalling the material by reference to each allegation. In this way [SIAC] will, from the outset, have an opportunity of weighing the conflicting arguments about the conclusions which the material can support.

In other words, what is put forward as 'evidence' in SIAC hearings is not attended by the kind of evidential procedures that apply in investigating offences as serious as murder or as common as burglary or petty theft – safeguards that have been established over many years to help ensure both the relevance and the reliability of evidence.[277] Unlike, say, a witness statement taken by police investigating a crime, intelligence assessments are not prepared with a view to prosecuting suspects in open court. They are summaries of information, which may come from many different sources, including direct testimony of covert agents, hearsay from informants, various kinds of surveillance including interception, information gained third-hand from foreign intelligence liaisons, and so forth. As SIAC complained:[278]

> The [government's] practice of presenting voluminous documents supported by a statement, carrying detailed footnote references to the documents, *lacks focus*. It

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[276] Ibid. Emphasis added.

[277] See e.g. Codes A-H under the Police and Criminal Evidence Act 1984.

[278] *Redacted version of closed MK judgment*, n267 above, para 7, emphasis added. The redacted extracts from the closed judgment in *MK* also stressed the importance of SIAC reaching an independent determination of the facts in issue based on the evidence before it: - see para 8: 'It is critical to remember that the case which is presented to [SIAC] is the Secretary of State's case, not that of the Security Service. [SIAC] acknowledges that the detail, the facts and the assessments of the Security Service are central, but [SIAC's] task is to reach a conclusion as to what the facts establish. *It is [SIAC's] conclusion and not the Security Service's assessment which is critical*. The Service is the witness on the appeal' [emphasis added].

> leaves [SIAC's] with the task of carrying out a survey and reconciliation which, to a large part, should have already been done.

Not only are defendants in SIAC cases not entitled to know the evidence against them and deprived of the benefit of even the civil standard of proof, therefore, but the material put forward as 'evidence' by the Secretary of State apparently fails, on occasion, to meet even minimal standards of reliability.

A and others v United Kingdom

138. A day before the House of Lords judgment in *RB & U (Algeria)* was handed down, the Grand Chamber of the European Court of Human Rights gave judgment in the case of *A and others v United Kingdom*,[279] which was a continuation of the 2004 Belmarsh case in the House of Lords. The eleven defendants complained, among other things, that SIAC's use of secret evidence had violated their right of access to a court under article 5(4). The UK government, on the other hand, maintained that the right to disclosure of evidence under article 5(4) was 'not absolute', that SIAC's use of special advocates was supported by the Court's own judgment in *Chahal*, and that in each defendant's case 'the open material gave sufficient notice of the allegations against him to enable him to mount an effective defence'.[280]

139. Ironically enough, some of the Law Lords in *RB & U (Algeria)* had offered their own predictions as to how the Grand Chamber would rule on the issue. Lord Hope noted that although '[t]he Strasbourg court has not yet had the opportunity to say whether or not [SIAC] meets with its requirements … it is hard to see why it should not say that it does'.[281] Lord Hoffman said that, although the Court in *Chahal* did not have the opportunity to consider the SIAC model directly, he felt that it 'would have had little difficulty in accepting the SIAC procedure as adequate'.[282]

140. However, the Grand Chamber did not share this mild assessment of SIAC's use of secret evidence. The Court began its analysis by noting that it had several times referred to the possibility of using special advocates to 'counterbalance procedural unfairness' caused by the use of secret evidence, but it had 'never been required to decide whether or not such a procedure would be compatible with either article 5(4) or article 6'.[283] While it observed that a

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[279] Application no. 3455/05, 19 February 2009.

[280] Ibid, para 197.

[281] *RB & U (Algeria),* n241 above, para 229.

[282] Ibid, para 177.

[283] Para 209.

special advocate acting on behalf of a defendant could see the secret evidence and challenge it on his behalf in closed session, the Court also noted that:[284]

> from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of SIAC.

Although the Court accepted that there was a 'strong public interest' in maintaining the secrecy of the government's intelligence on suspected terrorists,[285] the importance of being able to challenge the legality of one's detention meant that article 5(4) ''must import substantially the same fair trial guarantees as article 6(1) in its criminal aspect'.[286] It was therefore essential, the Court held, that 'as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'.[287] Where full disclosure was not possible, article 5(4) required that 'each applicant still had the possibility effectively to challenge the allegations against him'.[288]

141. The Court acknowledged that SIAC had made its own assessment of the need for secrecy in each case and that this secrecy did not appear to be 'excessive and unjustified'.[289] It also found that the special advocate appointed to represent each defendant in closed session 'could provide an important, additional safeguard' by making arguments for further disclosure.[290] In addition, the Court observed, the special advocate could 'perform an important role' in counterbalancing the use of secret evidence by 'testing the evidence and putting arguments on behalf of the detainee during the closed hearings'.[291] However, the Court noted, 'the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions'.[292]

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[284] Para 215.

[285] Para 216: due to the threat of terrorism, the Court held there was 'a strong public interest' in 'obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information'.

[286] Para 217.

[287] Para 218.

[288] Ibid.

[289] Para 219.

[290] Ibid,

[291] Para 220.

[292] Ibid.

142. The Court did not say that *any* use of closed material *always* made proceedings incompatible with article 5(4). Instead, it ruled that the question of compatibility depended on whether the open evidence revealed enough detail about the government's allegations to enable him to meet the case against him. Generally speaking, the Court observed that: [293]

> where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the [defendant] was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him.

Even in cases where 'all or most of the underlying evidence remained undisclosed', the Court considered that it 'should have been possible' for a defendant to provide the special advocate with information 'with which to refute them … without his having to know the detail or sources of the evidence which formed the basis of the allegations' so long as the allegations contained in the open evidence 'were sufficiently specific'.[294] The Court gave the example of the allegation made against several of the defendants that they had attended a terrorist training camp 'at a stated location between stated dates'.[295]

> given the precise nature of the allegation, it would have been possible for the [defendant] 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.

143. By contrast, the Court held that, where the open evidence 'consisted purely of general assertions' and SIAC's judgment against the defendant was based 'solely or to a decisive degree' on secret evidence, the requirements of article 5(4) 'would not be satisfied'.[296] The Grand Chamber therefore undertook an analysis of the open judgments against nine of the defendants[297] and, in five of them, held that the allegations contained in the open evidence

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[293] Ibid.

[294] Ibid.

[295] Ibid.

[296] Ibid.

[297] The complaints of two of the defendants, Ajouaou and F, were held by the Court to be 'manifestly ill-found' as they had already left the UK by the time the proceedings to challenge the legality of their detention had begun (see para 220). Detention under Part 4 was famously described as a 'three-walled prison' because even though the government accepted that they could not be deported to their country of origin due to a real risk that they would be tortured contrary to article 3, it was nonetheless open to them to return at any time if they chose to do so. In Ajouaou's case, he returned to Morocco after three days in detention. By contrast, F was detained on the basis that he could not be deported to Algeria. However, it subsequently emerged that F was a dual French/Algerian national and after being detained for nearly three months, he departed the UK for France.

'were sufficiently detailed to permit the [defendants] effectively to challenge them'.[298] In the case of four of the defendants, however, the Court held that the defendants had not received sufficient detail about the allegations against them in order to 'effectively challenge the allegations against them'.[299]

> The principal allegations against the first and tenth [defendants] were that they had been involved in fund-raising for terrorist groups linked to al'Qaeda. In the first [defendant's] case there was open evidence of large sums of money moving through his bank account and in respect of the tenth [defendant] there was open evidence that he had been involved in raising money through fraud. However, in each case the evidence which allegedly provided the link between the money raised and terrorism was not disclosed to either [defendant]. …. The open allegations in respect of the third and fifth [defendants] were of a general nature, principally that they were members of named extremist Islamist groups linked to al'Qaeda. SIAC observed in its judgments dismissing each of these [defendants'] appeals that the open evidence was insubstantial and that the evidence on which it relied against them was largely to be found in the closed material.

Accordingly, the Grand Chamber upheld the complaints of four defendants that SIAC's use of secret evidence had violated their rights under article 5(4). It was the first time since SIAC had been created in 1997 that the Court had had the opportunity to rule on its procedures. It was also the first time in more than eleven years that any court had held that SIAC's use of secret evidence was inconsistent with basic principles of procedure fairness.

Control order hearings

144. Control orders were introduced by the Prevention of Terrorism Act 2005. Notoriously pushed through both Houses in a mere 17 days, the Act was Parliament's response to the 2004 judgment of the Law Lords in the Belmarsh case. In that case, the defendants had

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298 Para 222. The Court noted, for instance, that 'the open material against the sixth, seventh, eighth, ninth and eleventh applicants included detailed allegations about, for example, the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places'. The Court's analysis was subsequently questioned in the course of the hearing before the House of Lords in *AE, AF and AN v Secretary of State for the Home Department* (2-9 March 2009), see e.g. para 13 of SIAC's judgment in Abu Qatada's case, n224 above: 'The open material discloses a considerable number of press reports. The Security Services have put before us reports which they regard as reliable. This does not mean that they or we have relied upon them to reach our decision, but the evidence, most of it in closed, largely supports the conclusions set out in them. Their production enables the appellant to see what allegations made against him are regarded as largely reliable. While *we accept that this is not a substitute for the underlying evidence,* it does at least enable the appellant to focus to some extent his denials' [emphasis added].

299 Paras 223 and 224,

argued that indefinite detention without trial was not only an unjust counter-terrorism measure but an unnecessary one to boot. They pointed to SIAC's decision to allow one of the defendants, G, to be released on bail due to his deteriorating mental health on various conditions that included a 24-hour curfew, wearing an electronic tag, with strict restrictions on communications and visitors.[300] Lord Bingham agreed with the defendant's suggestion that 'conditions of this kind, strictly enforced, would effectively inhibit terrorist activity' without the need for indefinite detention.[301]

145. SIAC's decision in G's case had itself followed a recommendation in December 2003 by the committee of Privy Counsellors appointed to review the 2001 Act that indefinite detention under Part 4 should be replaced 'as a matter of urgency'.[302] Among the alternative measures identified by the committee was the possible use of 'restriction orders' against suspects:[303]

> It would be less damaging to an individual's civil liberties to impose restrictions on: (a) the suspect's freedom of movement (e.g. curfews, tagging, daily reporting to a police station); and (b) the suspect's ability to use financial services, communicate, or associate freely (e.g. requiring them to use only certain specified phones or bank or internet accounts, which might be monitored, subject to the proviso that if the terms of the order were broken, custodial detention would follow.

There was no suggestion, however, that these alternative measures would involve the use of secret evidence. And although the Privy Counsellors' recommendation was initially given a tepid response by the Home Secretary in 2003,[304] restriction orders – renamed 'control orders' – were subsequently seized upon as the government's preferred way forward after the Belmarsh judgment a year later.[305]

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[300] *G v Secretary of State for the Home Department* (SC/2/2002, Bail Application SCB/10, 20 May 2004). The bail conditions are set out at para 23.

[301] *A and others (No 1)*, n200 above, para 35.

[302] Report of the Privy Council Review of the Anti-Terrorism Crime and Security Act 2001 (December 2003), para 4.

[303] Ibid, para 251.

[304] See the response of the Home Secretary David Blunkett MP on 18 December 2003: 'While I will, of course, look carefully at what the Committee has said in relation to the detention powers in Part 4 of the Act, I am not convinced that the current threat leaves us with any option but to continue to use these powers' (Hansard, col146WS).

[305] See statement of the Home Secretary Charles Clarke MP on 26 January 2005. 'The Government have … decided to replace the part 4 powers with a new system of control orders. We intend that such orders be capable of general application to any suspected terrorist irrespective of nationality or, for most controls, of the nature of the terrorist activity—whether international or domestic—and that they should enable us to impose conditions constraining the ability of those subject to the orders to engage in terrorist-related activities'.

146. The 2005 Act enables the Home Secretary to make a 'non-derogating'[306] control order against any person, UK or foreign national, whom she suspects of being 'involved in terrorist-related activity'.[307] An order may specify a broad range of conditions, including a curfew up to 16 hours a day,[308] restrictions on visitors and meetings with others, employment, movement and communication. Orders must be renewed every 12 months but may be renewed indefinitely.[309] Those subject to an order are entitled to an appeal,[310] not to SIAC but to a specially-constituted division of the High Court which operates essentially the same procedural rules as apply in SIAC cases.[311] In other words, the High Court uses the same system of open and closed hearings and judgments, with the appointment of special advocates to represent the defendants in closed session.

147. Immediately following the 2005 Act receiving royal assent, the Home Secretary made control orders against nine men who, up until that point, had continued to be detained under Part 4.[312] A total of 38 defendants have been made subject to control orders since the Act was passed, of which 15 are currently in force.[313]

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[306] The Act also allows for 'derogating' control orders to be made under section 4. A 'derogating' order may involve even greater restrictions on liberty including 24-hour house arrest. However, it can only be made where the government has derogated from article 5 ECHR and cannot be made directly by the Home Secretary. Instead, derogating orders may only be made by a court on application by the Secretary of State. Of the more than 38 control orders made since 2005, all have been non-derogating orders. For this reason, all subsequent references in this report to 'control orders' are therefore references to the non-derogating variety.

[307] Section 2(1)(a). 'Terrorism-related activity' is defined in s1(9), and includes either the 'commission, preparation or instigation' of acts of terrorism, facilitating or encouraging such activities, or giving support or assistance to others engaged in such conduct.

[308] The Act itself does not specify the length of a curfew that may be imposed by way of a non-derogating order. The limit of 16 hours was established by the majority of the House of Lords in *JJ and others v Secretary of State for the Home Department* [2007] UKHL 45.

[309] See sections 2(4) and 2(6).

[310] Section 3 requires any control order made by the Home Secretary to be confirmed by a court. Although not a formal appeal, confirmation proceedings enable defendants to challenge the making of an order. Technically, an appeal under section 10 only lies against the renewal of an order or the modification of one of its condition.

[311] The procedural rules for control order proceedings in the High Court are set out in Part 76 of the Civil Procedure Rules.

[312] Following 7/7. the control orders against the nine men were revoked and replaced with deportation orders.

[313] Lord Carlile of Berriew QC, *4th Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act* (3 February 2009), para 14. Of the 23 defendants who are no longer subject to control orders: 9 have been served with deportation orders (see ibid), 6 have either been revoked or not renewed due to reassessment by the Home Secretary as to the necessity of the orders, 6 have absconded (and are therefore unable to be served with new orders, and 2 have been quashed by the courts.

Secretary of State v MB

148. The first successful challenge to the use of secret evidence in control order proceedings came in April 2006 involving a defendant known as MB. MB was a British citizen born in Kuwait who was served with a control order in September 2005. Six months earlier he had been detained by police at Manchester airport while boarding a flight to Syria. He told police he was going on holiday. Having been prevented from doing so, the next day he attempted to board a flight to Yemen and was again detained by police. Among the conditions imposed by the control order was a requirement to report daily to a police station, and a prohibition from leaving the UK and from entering any airport or sea port.

149. The government's open statement described MB as 'an Islamist extremist who, as recently as March 2005, attempted to travel to Syria and then Yemen'. The statement recorded the Security Service assessment that 'MB was intending to travel from Syria onwards to Iraq' and that 'MB intended to go to Iraq to fight against coalition forces'.[314] However, MB denied those allegations and, hearing his appeal in the High Court, Mr Justice Sullivan noted that there was no open evidence to support them:[315]

> In the present case it has not been possible to provide the [defendant] with even a summary of the closed material …. On the open material, the only basis on which anyone could reasonably suspect the [defendant] of being involved in [terrorist] activity is the following … statement: 'The Security Service is confident that prior to the authorities preventing his travel [the defendant] intended to go to Iraq *to fight against coalition forces*'. The basis for the Security Service's confidence is wholly contained within the closed material. Without access to that material it is difficult to see how, in reality, the [defendant] could make any effective challenge to what is, on the open case before him, no more than a bare assertion.

150. This lack of any open evidence to support the government's case, together with the low standard of proof and the limited terms of the court's own review led the judge in MB's case to conclude that the appeal procedure was 'uniquely unfair'.[316] He therefore declared section 3 of the 2005 Act incompatible with the right to a fair hearing under article 6.[317] However, this declaration was overturned four months later by the Court of Appeal.[318]

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[314] *Re MB* [2006] EWHC 1000 (Admin) at para 20.

[315] Ibid, paras 66-67. Emphasis in original.

[316] Ibid, para 85.

[317] *Re MB* [2006] EWHC 1000 (Admin) at para 103: 'To say that the Act does not give the [defendant] in this case … a fair hearing in the determination of his rights … would be an understatement. The court would be failing in its duty under the 1998 Act, a duty imposed upon the court by Parliament, if it did not say, loud and clear, that the procedure under the Act

151. The extent of secret evidence was also at issue in another control order decision handed down in March 2007.[319] That case involved a defendant identified only as AF. AF was a British citizen who had been raised in Libya but had returned in 2004 to live in the UK. In May 2006, he was served with a control order that included an 18 hour curfew.[320] This was replaced in September 2006 by a 14 hour curfew, but the other restrictions were just as substantial:[321]

> AF was required to remain in the flat where he was already living (not including any communal area) at all times save for a period of 10 hours between 8 am and 6 pm. He was thus subject to a 14 hour curfew. He was required to wear an electronic tag at all times. He was restricted during non-curfew hours to an area of about 9 square miles bounded by a number of identified main roads and bisected by one. He was to report to a monitoring company on first leaving his flat after a curfew period had ended and on his last return before the next curfew period began. His flat was liable to be searched by the police at any time. During curfew hours he was not allowed to permit any person to enter his flat except his father, official or professional visitors, children aged 10 or under or persons agreed by the Home Office in advance on supplying the visitor's name, address, date of birth and photographic identification. He was not to communicate directly or indirectly at any time with a certain specified individual (and, later, several specified individuals). He was only permitted to attend one specified mosque. He was not permitted to have any communications equipment of any kind. He was to surrender his passport. He was prohibited from visiting airports, sea ports

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whereby the court merely reviews the lawfulness of the Secretary of State's decision to make the order upon the basis of the material available to him at that earlier stage are conspicuously unfair. The thin veneer of legality which is sought to be applied by section 3 of the Act cannot disguise the reality. That controlees' rights under the Convention are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision'. The judge also noted that, but for the Court of Appeal's 2002 precedent in the Belmarsh case (n above), he would have been inclined to hold that control orders were, in substantive terms, a 'criminal charge ' for the purposes of article 6 (see paras 38-39).

318 *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 at paras 80 ('The Strasbourg court has accepted that there can be circumstances where material evidence need not be disclosed in order to satisfy the requirements of Article 6') and 84 ('The Strasbourg Court would recognise that, where complaints are made in relation to surveillance, procedures for a fair trial cannot extend to an automatic requirement on the part of the security services to disclose to a complainant the evidence which has led them to put in place the surveillance').

319 *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin).

320 The May 2006 control order was revoked following the decision of the Court of Appeal in *JJ and others v Secretary of State for the Home Department* [2006] EWCA Civ 1141 that control orders involving curfews of 18 hours a day were unlawful because they amounted to a deprivation of liberty under article 5 (and therefore could only be made as derogating orders, see above n306). A fresh order with a 14 hour curfew was made in September 2006.

321 *Secretary of State for the Home Department v MB* [2007] UKHL 46 at para 7 per Lord Bingham.

or certain railway stations, and was subject to additional obligations pertaining to his financial arrangements.

152. The open statement of the Home Secretary against AF alleged only that he had 'links with Islamist extremists in Manchester, some of whom are affiliated to the Libyan Islamic Fighting Group ('LIFG')'.[322] The LIFG had been a proscribed organisation since 2005.[323] Three of AF's associates were identified in the open judgment as TT, QQ, and ZA, although none of those identified were said to be members of the LIFG.[324] The Secretary of State did not allege that AF himself was a member either.[325] The judge in AF's case, Mr Justice Ouseley, accepted that AF had innocent explanations for knowing each of the three men identified as extremists, and that nothing in the open material gave reasonable grounds for suspecting AF was or had been involved in terrorism related activity.[326] He also accepted that 'the essence of the case [against AF] is in the closed material; he does not know what the [Secretary of State's] case against him is'.[327] The judge also agreed with the submission made by AF's counsel that:[328]

> no, or at least no clear or significant, allegations of involvement in terrorist-related activity are disclosed by the open material, nor have any such allegations been gisted. The case made by the [Secretary of State] against AF is in its essence entirely undisclosed to him. Answers to a Request for Further Information did not advance AF's understanding. Nor were any allegations of wrongdoing put to him by the police in interview after his arrest, affording him an idea by that side wind of what the case might be.

Despite this, the judge rejected the submission that AF had not had a fair hearing because of his lack of knowledge of the case against him. Mr Justice Ouseley noted that, although AF did not know the secret evidence against him, he nonetheless had a special advocate to represent him in closed session and therefore he did not regard the process 'as one in which AF has been without a substantial and sufficient measure of procedural protection'.[329] In other

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[322] *AF*, n319 above, para 11.

[323] See n186 above.

[324] Para 12.

[325] Ibid.

[326] Para 131: 'It is clear that the open material, i.e. that which has been disclosed to AF does not give [reasonable grounds for suspecting that AF is or has been involved in terrorism–related activity], and it was not contended that it did. There are no more than links to extremists, who also have innocent links to AF'.

[327] Para 61.

[328] Para 146.

[329] Para 167.

words, the judge concluded that the fact that AF had a special advocate appointed to act on his behalf was enough to make the proceedings fair, even though the entire case against AF was contained in the secret evidence and the special advocate was unable to discuss any of this evidence with AF.

153. In October 2007, the House of Lords delivered its judgment in the appeals of MB and AF.[330] The Law Lords held unanimously that article 6 applies to control order proceedings but that they were not a 'criminal charge' in substantive terms, being based on 'suspicion about what they may do in the future and not upon a determination of what they have done in the past'.[331] A majority of the Law Lords also agreed that article 6(1) entitled the defendant to disclosure of the evidence against him to the extent that it was necessary in order for him to receive a fair hearing, and that section 3 of the Human Rights Act should be used to read down the 2005 Act to require this.[332]

154. Unfortunately, however, the majority also gave wildly divergent opinions on *how much* of the closed material would need to be disclosed to a defendant in any particular case. Lord Bingham expressed the greatest concern at the use of secret evidence in control order proceedings, and the inability of special advocates to overcome its unfairness to defendants:[333]

> In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. 'Grave disadvantage' is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain.

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330 *MB v Secretary of State for the Home Department* [2007] UKHL 46.

331 Para 48 per Lord Hoffman.

332 See Baroness Hale at para 72: 'paragraph 4(3)(d) of the Schedule to the 2005 Act [which provides that a court may not disclose material contrary to the public interest] should be read and given effect "except where to do so would be incompatible with the right of the controlled person to a fair trial"'. See also Lord Carswell at para 84: 'It seems to me possible to imply into … paragraph 4(2)(a) and 4(3)(d) of the Schedule to the 2005 Act, a qualification that the powers conferred do not extend to withholding particulars of reasons or evidence where to do so would deprive the controlee of a fair trial'.

333 Para 35.

155. Lord Bingham then considered the extent to which there had been disclosure in the two cases on appeal, MB and AF. In MB's case, he concluded that:[334]

> MB was confronted by a bare, unsubstantiated assertion which he could do no more than deny. I have difficulty in accepting that MB has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired.

156. In AF's case, Lord Bingham noted that the open material 'did not give grounds for reasonable suspicion' and that the judge had accepted the submission of AF's counsel that 'no, or at least no clear or significant, allegations of involvement in terrorist-related activity were disclosed by the open material', that 'no such allegations had been gisted', and that the case made by the Secretary of State against AF was 'in its essence entirely undisclosed to him'.[335] He concluded:[336]

> This would seem to me an even stronger case than *MB*'s. If … the concept of fairness imports *a core, irreducible minimum of procedural protection*, I have difficulty, on the judge's findings, in concluding that such protection has been afforded to AF. The right to a fair hearing is fundamental. In the absence of a derogation (where that is permissible) it must be protected. In this case, as in *MB*'s, it seems to me that it was not.

157. By contrast, Baroness Hale described the conclusion of Mr Justice Ouseley in AF's case at first instance (that AF had received a fair hearing despite not knowing any of the case against him) as one 'with which any appeal court should be slow to interfere'.[337] Indeed, three of the Law Lords – Baroness Hale and Lords Carswell and Brown – appeared to endorse the view that, in most cases, the appointment of a special advocate to represent the interests of the defendant in closed session would provide a sufficient safeguard against unfairness, despite the defendant not knowing much of the evidence against him. [338] In particular, Lord

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[334] Para 41.

[335] Para 42.

[336] Para 43. Emphasis added.

[337] Para 76.

[338] See e.g. para 66 per Baroness Hale: 'I do not think that we can be confident that Strasbourg would hold that *every* control order hearing in which the special advocate procedure had been used … would be sufficient to comply with article 6' [emphasis added]. Para 85 per Lord Carswell: 'there is a fairly heavy burden on the controlee to establish that there has been a breach of article 6, for the legitimate public interest in withholding material on valid security grounds should be given due weight. The courts should not be too ready to hold that a disadvantage suffered by the controlee through the withholding of material constitutes a breach of article 6'. Para 90 per Lord Brown: 'I agree further that the special advocate

Brown seemed to suggest that, in some circumstances, it may be unnecessary to disclose evidence to a defendant if the judge felt sure that there was no answer the defendant could make to it:[339]

> There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. *Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded* (a difficult but not, I think, impossible conclusion to arrive at — consider, for example, the judge's remarks in AF's own case…), he would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect.

This apparent reference to the hypothetical possibility that disclosure to a defendant would be unnecessary where the secret evidence was effectively unanswerable was described in subsequent cases as the 'Lord Brown exception'.

AF and others v Secretary of State

158. The conflicting judgments of the Law Lords in MB created considerable difficulty for those High Court judges faced with the decision of how much secret evidence should be disclosed to a defendant in a control order hearing in order to avoid a breach of article 6. In the case of *Bullivant*, the first control order appeal to be decided after the House of Lords decision in 2007, the head of the Administrative Court, Mr Justice Collins, asked:[340]

> How … is it to be decided whether a particular matter should be disclosed to avoid a breach of Article 6? Regrettably, the House of Lords has provided no ready answer. There is no irreducible minimum. No doubt, it would be very difficult if not impossible to produce a test which could be applied and which could provide an answer in all cases.

The judge also said that it was 'unfortunate that the House of Lords in MB did not see the closed material or read the closed judgments in the cases before them',[341] particularly in view

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procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so'.

[339] Para 90.

[340] *Re Bullivant* [2007] EWHC 2938 (Admin) at para 7.

[341] Ibid, para 6.

of the mosaic quality of the intelligence material.[342] Although Baroness Hale had predicted that it would be possible for a defendant to receive a fair trial 'even though the whole evidential basis for the basic allegation … cannot be disclosed', Mr Justice Collins noted that the nature of the secret evidence was such that no one piece of evidence was likely to be decisive:[343]

> various individual pieces of evidence are likely to be crucial in establishing the reasonable suspicion. Once they are put together, the suspicion is established. Thus, [the special advocate submits] it is necessary to look at the accretion and so it may be necessary to disclose a number of different pieces of evidence since, if the [defendant] can show a defence to one or more, the overall case against him will be weakened or destroyed.

159. In several other cases, the Secretary of State placed reliance on Lord Brown's speech in *MB*, arguing that there was no obligation on the court to require disclosure of secret evidence in situations where 'no possible challenge to it could conceivably succeed'.[344] The judges themselves again took different views. Mr Justice Mitting accepted that the exception *could* apply, although he held that it did not apply on the particular facts of AN's case.[345] In AF's case, which had been remitted back to the High Court for reconsideration, Mr Justice Stanley Burnton ultimately concluded that the so-called exception was not good law.[346]

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[342] See e.g. *Secretary of State for the Home Department v AF* [2008] EWCA Civ 1148, at para 24: 'the closed material is comprised of a mosaic of information drawn in various combinations, depending on the particular case, from a variety of sources such as (1) intercept evidence, (2) covert surveillance evidence and (3) agent reporting'. In argument before the Court of Appeal in *AF*, counsel for the Home Secretary had supplied the court with a written note describing the 'normal control order case' as containing 'a mosaic of different elements of intelligence, some of them fragmentary, regarding the controlled person's pattern of behaviour that together establish the reasonable grounds for suspecting that he is or has been involved in terrorism-related activity. This mosaic of information is likely to be drawn from the following, in varying combinations depending on the particular case: (1) Intercept evidence; (2) Covert surveillance evidence; (3) Source and/or agent reporting (which may be wholly or predominantly single sourced or may be multi-sourced); (4) Information from foreign intelligence liaison'.

[343] Para 7. Similar concerns were voiced by High Court judges in other control order appeals: see *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin) at para 32 per Stanley Burnton J. Secretary of State for the Home Department v AN [2008] EWHC 372 (Admin) at para 10 per Mitting J: 'I have identified in a closed disclosure judgment what must be disclosed to him to fulfil his right to a fair hearing in accordance with my understanding of the speeches of the majority in MB. *I do so with disquiet, because the factors which require further disclosure in this case are likely to arise in many others, with the result that the non-derogating control order procedure may be rendered nugatory in a significant number of cases* in which the grounds for suspecting that a controlled person has been involved in terrorism related activities may otherwise be adjudged reasonable' [emphasis added].

[344] See e.g. *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin) at para 6 per Mitting J; *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin) at para 48 per Stanley Burnton J;

[345] Ibid.

[346] *Secretary of State for the Home Department v AF* [2008] EWHC 689 (Admin) at para 32: 'Notwithstanding my great respect for the authority of Lord Brown, I conclude that Article 6, as interpreted by the House of Lords in *MB and AF*, requires the

160. Inevitably, the Court of Appeal came to consider the status of the 'Lord Brown exception' in its October 2007 judgment of *AF and others v Secretary of State for the Home Department*[347] – a series of joined appeals from various control order cases in the High Court. The Court unanimously rejected the government's submission that Lord Brown had identified, and the majority of the House of Lords in *MB* had endorsed, a free-standing exception to the general rule that article 6 entitles a defendant to disclosure of such evidence necessary to receive a fair hearing.[348]

161. However, members of the court differed as to whether there existed an 'irreducible minimum' of evidence which must be disclosed to a defendant to meet the requirements of article 6.[349] The majority held that article 6 did *not* require any minimum amount of evidence to be disclosed to a defendant, so long as the judge was satisfied that various conditions had been made out, including whether the special advocate in closed hearings had been able to effectively challenge the secret evidence, and whether disclosure would make any difference.[350] In a powerful dissent, however, Lord Justice Sedley criticised as 'dangerous and wrong' the idea that evidence could ever be withheld from a defendant on the basis that it would make no difference to the eventual outcome:[351]

> Far from being difficult, as Lord Brown tentatively suggested it was, it is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in

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substance of the Secretary of State's case on which she relies to be disclosed to a respondent, with no exception, if there is to be compliance with Article 6'.

[347] [2008] EWCA Civ 1148.

[348] See e.g. Sedley LJ at para 111: 'To suggest that the highest court of this country has by two concurring opinions, neither of which purports to do so, given the force of law to what is clearly a third member's aside is to go beyond even divination. Unless and until the new Supreme Court changes the mode of giving judgment, lower courts and lawyers ought in my respectful view to be able to assume that when their Lordships, or a majority of them, intend to make new law, they say so'.

[349] Para 64(iv).

[350] Para 64(v) per Clarke MR and Waller VP: 'Whether a hearing will be unfair depends upon all the circumstances, including for example the nature of the case, what steps have been taken to explain the detail of the allegations to the controlled person so that he can anticipate what the material in support might be, what steps have been taken to summarise the closed material in support without revealing names, dates or places, the nature and content of the material withheld, how effectively the special advocate is able to challenge it on behalf of the controlled person and what difference its disclosure would or might make'.

[351] Paras 113, 117.

> cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know.

Noting the majority's conclusion that there was no irreducible minimum entitlement, Lord Justice Sedley maintained that, on the contrary, 'a complete withholding of the grounds for suspicion makes a fair hearing impossible'.[352]

162. The Court of Appeal granted the defendants leave to appeal to the House of Lords and the matter was heard before a panel of nine Law Lords in early March. However, less than two weeks before the hearing began, the Grand Chamber of the European Court of Human Rights handed down its judgment in the case of *A and others v United Kingdom*,[353] in which it held that article 5(4) was breached where a defendant was not provided 'with sufficient information about the allegations against him to enable him to give effective instructions'.

163. Significantly, on the eve of the hearings in early March, the Home Secretary disclosed a number of documents, including extracts from some of the closed judgments in the High Court and the Court of Appeal. Among the extracts was a reference by Mr Justice Stanley Burnton in his closed judgment in AF's case to a piece of secret evidence put forward by the Home Secretary: [354]

> there is some evidence relied upon by the Secretary of State that I find very cogent indeed. I find it difficult to see an innocent explanation for [……..] referred to in paragraph [number] of the closed submissions. I can see no innocent explanation [……]. It seems to me that the only real possibility of displacing this [……..] would be by showing that [……] is misleading.

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[352] Para 119: See also, ibid: 'I am not at all sure that Baroness Hale's phrase … 'even though the whole evidential basis … is not disclosed' is intended to mean 'even though none of the evidential basis is disclosed'. As I understand her, she means 'even though not all of the evidential basis is disclosed'.

[353] See n279 above.

[354] *Open extracts of the closed judgment of Mr Justice Stanley Burnton in AF,* 13 March 2008, para 13. Redactions in original.

The judge then considered whether the evidence should be disclosed to the defendant in light of the so-called 'Lord Brown exception':[355]

> My conclusion is […….] if genuine and […….*accurate*…..] inescapably leads to the conclusion that AF was involved in terrorist-related activity. The question then arises: in applying Lord Brown's exception to the general rule, is the Court to assume that the […….] evidence [……..…] is genuine and [……] accurate?
>
> *The accuracy* [……..] *are matters that the Special Advocates could cause to be checked*, and I do not think that AF is substantially disadvantaged in not having access [……].
>
> It follows that I consider that the evidence referred to in paragraphs [number] above is incontestable and that it satisfies Lord Brown's test. [……..]. It seems to me that […*it*…] constitutes evidence of terrorist-related activity. This evidence justifies the Secretary of State's reasonable suspicion.

164. However, in the extracts from the Court of Appeal's own closed judgment, it emerged that Mr Justice Stanley Burnton had mistakenly believed that AF's special advocates would be able to test the accuracy of the evidence in question. In fact, they had no way of doing so:[356]

> Stanley Burnton J would, in applying the 'Lord Brown exception', have found against AF on the narrow ground identified in [paragraph numbers] of his judgment [……...]. He then poses the question whether the court in applying the exception is bound to assume [……..] evidence is genuine and [……] accurate […….]. The accuracy [……] could have been checked by the special advocates. [……].
>
> *It seems that the special advocates had not had the opportunity to check* […….] and *so the judge is mistaken in that regard*. Although the chances [……] would not seem to be high, we do not think it right simply to allow the appeal by applying this narrow finding. Having taken the view that the judge had misdirected himself in the way explained it seems to us that the matter ought to be fully reconsidered.

In other words, not only was the original judgment in AF of March 2008 based on an apparently critical error of fact but the open judgment of the Court of Appeal in October 2008 also concealed the full reasons why AF was being remitted back to the High Court for

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[355] Ibid, paras 15-17. Emphasis added. Redactions in original.

[356] *Open extracts of the closed judgment of the Court of Appeal in AE, AF and AN,* 17 October 2008, paras 43-44. Emphasis added. Redactions in original.

rehearing. Moreover, the fact that this information was revealed publicly in open court in March 2009 without apparent damage to national security only begs the question of why it was not able to be disclosed in similarly redacted form in October or even (in the case of AF's High Court judgment) March 2008.

165. In hearing the appeals in *AF and others*, the Law Lords were themselves invited to sit in closed session to consider the secret evidence against the defendants. They declined to do so.[357] Among the issues involved was the constitutionality of delivering a closed judgment: technically speaking, the Law Lords are a committee of the House of Lords and deliver their judgments on the floor of the House. Presumably this will no longer be an issue when the UK Supreme Court commences operation in October 2009. More generally, however, the practice of issuing closed rulings also raises questions about democratic transparency, legal certainty, and judicial accountability.

166. First of all, the giving of reasons is one of the cornerstones of the judicial function[358] and a central aspect of the rule of law. It is no coincidence that one of the corollaries of the principle of *audi alteram partem* ('let the other side be heard') is the principle *audiatur et altera pars* (all the premises of an argument should be stated explicitly). The entitlement to reasons is not only an 'indispensable part of a sound system of judicial review', as Professor Wade described it, but also 'a healthy discipline for all who exercise power over others'.[359] Secondly, the giving of reasons by courts also promotes legal certainty and transparency, allowing those governed by the law to know how it is being applied.[360] This is especially true in a democracy, where the public are themselves responsible for the making of laws. Thirdly, the giving of reasons is also central to judicial accountability. Unlike administrative officials who are at least indirectly accountable (through the responsibility of government ministers to Parliament), the

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[357] See e.g. Lord Hope in *AF and others v Secretary of State for the Home Department*, n363 below, at para 83: 'The House … declined the Secretary of State's invitation to look at the closed material. I believe that it was right to do so. The judge at first instance must have access to it where it is said that disclosure of relevant material will be contrary to the public interest, and the Court of Appeal may perhaps need to too if this is necessary for the exercise of its jurisdiction [the 2005 Act]. But the process should stop there. The function of the House, as the final court of appeal, is to give guidance on matters of principle. Its judgments must be open to all, not least to the controlled person. The giving of reasons in a closed judgment, which would be inevitable if it were to be based to any extent on closed material, is inimical to that requirement. It is hard to imagine any circumstances in which scrutiny of such material by the House, or by the Supreme Court when it comes into existence, would be necessary or appropriate'.

[358] See e.g. Lord Denning, '[t]he giving of reasons is one of the fundamentals of good administration', *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 191.

[359] Wade, Administrative Law (6th ed), p 548. See also Report of the JUSTICE/All Souls Review of Administrative Law, *Administrative Justice: Some Necessary Reforms* (Oxford, Clarendon Press: 1988), 3.117.

[360] See e.g. the decision of the European Court of Human Rights in *Campbell and Fell v UK* (1985) 7 EHRR 165, explaining that the right under article 6 to judgment 'pronounced publicly' must be considered in light of the need 'to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial'.

safeguard of judicial independence means that the transparency of judicial decision-making is an even more important element of maintaining public confidence in the fair administration of justice.[361]

167. All these ends are frustrated not only by the failure to give reasons but the failure to make those reasons public. The extracts from the closed judgments in AF's case in the High Court and the Court of Appeal illustrate once more that the vice of secret evidence is not restricted to unfairness to the defendant. Having been charged by Parliament with the task of keeping evidence secret, the courts are also obliged to keep secret the full reasons for their decisions. While the House of Lords can at least evade the need to give a closed judgment by declining to examine the closed evidence in a control order case, the Civil Procedure Rules give the High Court and Court of Appeal no such option.[362] Not only are they required to preside over hearings that are dramatic in their unfairness, but they are made to adopt practices which erode their own judicial function.

168. In June 2009, the House of Lords handed down its judgment in *AF and others*. Overturning its previous ruling in *MB*, the nine Law Lords held unanimously that the right to a fair hearing under article 6 meant that the defendant:[363]

> must be given sufficient information about the allegations against him to enable him *to give effective instructions in relation to those allegations*. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the [defendant] is

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[361] See Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK ' (2004) 24 Legal Studies 73. See also *R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office* [2009] EWHC 152 (Admin) at para 36 per Thomas LJ: 'The reasons most commonly expressed as to why the courts must sit and do justice in public are as a safeguard against judicial arbitrariness, idiosyncrasy or inappropriate behaviour and the maintenance of public trust, confidence and respect for the impartial administration of justice. It has also been noted that sitting in public can make evidence become available. Furthermore the public sitting of a court enables fair and accurate reporting to a wider public and makes uninformed and inaccurate comment about the proceedings less likely'.

[362] See Civil Procedure Rules, Parts 76.32(2): 'Where the judgment of the court does not include the full reasons for its decision, the court must serve on the Secretary of State and the special advocate a separate written judgment including those reasons'. See also the corresponding provision in asset-freezing proceedings in the High Court under the Counter-Terrorism Act 2008 (CPR Part 79.28(2)).

[363] *AF and others v Secretary of State for the Home Department* [2009] UKHL 28 at para 59 per Lord Phillips. See also e.g. Lord Brown at para 76: 'The [defendant] must be given sufficient information about the allegations against him to give effective instructions to the special advocate. This is the bottom line, or the core irreducible minimum as it was put in argument, that cannot be shifted'; Baroness Hale at para 103: 'The test … is whether the [defendant] has had the possibility effectively to challenge the allegations against him. For this he does not have to be told all the allegations and evidence against him, but he has to have sufficient information about those allegations to be able to give effective instructions to his special advocate'; Lord Brown at para 116: 'Strasbourg has decided that the suspect must *always* be told sufficient of the case against him to enable him to give 'effective instructions' to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk [emphasis in original].

> not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the [defendant] is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

In giving judgment, the Law Lords made clear that they were bound by the decision of the Grand Chamber of the European Court of Human Rights in *A and others v United Kingdom.*[364] They also agreed that 'in none [of the cases under appeal] has the disclosure required by the judgment of the Grand Chamber been given'.[365] As Lord Hope held:[366]

> The principle that the accused has a right to know what is being alleged against him has a long pedigree. As Lord Scott of Foscote observed in *A v Secretary of State for the Home Department* … a denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour. The fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him.

He continued:[367]

> [F]or a judge to hold that a hearing in which the party affected has had no opportunity to answer is a fair hearing negates the judicial function which is crucial to the controlled order system: …. The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.

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[364] See e.g. Lord Rodger at para 98: 'Strasbourg has spoken, the case is closed'; Lord Hoffman at para 84: 'your Lordships have no choice but to submit'. For discussion of *A v UK*, see pages 73-75 above.

[365] Ibid, para 69.

[366] Ibid, para 78. See also e.g. Lord Scott at para 97: 'The function of the courts is to apply the law. It is not the function of the courts to water down the concept and requirements of a fair trial so as to render Convention compatible legislation that may be incompatible'.

[367] Ibid, para 79.

Parole board hearings

169. The decision of the parole board in 2002 to appoint a special advocate in the case of a life prisoner, Harry Roberts, marked a turning point. Before 2002, the only courts and tribunals that had used secret evidence were those that had been explicitly authorised to do so by an Act of Parliament.[368] In Harry Roberts' case, however, a decision was made to rely on secret evidence even though there was no mention of such a procedure in the legislation that governed the parole board's operation.[369]

170. The parole board's decision shows how SIAC's use of secret evidence has inspired other courts and tribunals to adopt similar procedures of their own. Moreover, the facts in Roberts' case – some of which only became public long after the parole board took its decision – revealed inconsistencies in the government's use of secret evidence and also show how reliance on secret evidence, which was originally justified by witness protection concerns, proved to be a highly ineffective substitute for actual witness protection.

Roberts v Parole Board

171. Harry Roberts is a prisoner serving a mandatory life sentence for the murder of three policemen in 1966.[370] On sentencing, he was given a tariff of 30 years. In 2000, he was transferred to HMP Sudbury, an open prison. However, he was removed from Sudbury in October the following year and returned to closed conditions. A notice from the Prison Service informed him that he was being removed 'in light of investigations into your alleged

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[368] In 2000, the Court of Appeal in *Rehman* had identified an inherent common law power to appoint a special advocate. However, the court did not ultimately look at the secret evidence in that case: see n155 above.

[369] The Parole Board was first established under the Criminal Justice Act 1967 but it derives its current authority from section 32 of the Criminal Justice Act 1991 and section 239 of the Criminal Justice Act 2003. Although rule 6(2) of the Parole Board Rules now refer to the use of closed material, they have so far only ever been used in Roberts' case (although JUSTICE is aware of another case currently before the Board in which a special advocate will shortly be appointed). In *Re Campbell* [2008] CSOH 16, a prisoner brought an action for judicial review against the decision of the Parole Board to withdraw its recommendation for his release on licence. Among other things, he argued that the Board had relied on a police report which it had refusedto disclose to him. However, Lord Turnbell in the Outer House of the Scottish Court of Session held that the report had not been relied on by the Board in reaching its decision (para 19). See also the earlier preliminary ruling of the Outer House in *Re Gallagher* [2005] ScotCS CSOH_126.

[370] See e.g. the speech of Lord Steyn in *Roberts v Parole Board* [2005] UKHL 45 at para 84: 'In *United States v Rabinowitz,* 339 U S 56 (1950) at p 69 Justice Frankfurter observed: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." Even the most wicked of men are entitled to justice at the hands of the State. In the comparative league of grave crimes those of Roberts rank at the very top'.

involvement in drug dealing and bringing contraband into prison'.[371] However, he was not charged in relation to the alleged offences, nor was he subject to disciplinary proceedings.[372]

172. In April 2002, Roberts' solicitor was notified that 'certain material about the Sudbury removal to be included in the dossier will not be disclosed to your client in line with prison service policy on the withholding of information'.[373] The undisclosed material came to be known as the 'Flag C material''. Following a complaint to the parole board from Roberts' solicitor about the lack of disclosure, the board's deputy chair Lord Justice Scott Baker gave the following decision:[374]

> Having considered the sensitive material, in my view the way forward is as follows. It should be in the first instance be disclosed to a special advocate agreeable to both parties. This would be on the basis that it would not be disclosed to Roberts, his lawyers, or anyone else without the consent of the Parole Board. The special advocate procedure is I think a statutory one in other fields (SIAC) but I can see no reason why it should not be used in the present circumstances and it does not prejudice Roberts provided other options remain open to argument afterwards.

173. In May 2003, a special advocate[375] was appointed to act for Roberts in relation to the Flag C material. Among other things, the board based its decision on its findings that 'the fears of the source or sources are genuine and held on reasonable grounds' and 'if full disclosure of [the Flag C material] were to be made to Mr Roberts, there would be a real risk to the safety of the source or sources'.[376] At the same hearing, the board also noted its statutory duty to consider all material relevant to the risk of dangerousness and described the 'triangulation of interests' between the prisoner, the public and the unnamed source.[377] In June 2003, the parole board accepted the submissions of Roberts' counsel that there could be 'no disclosure

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[371] *Harry Roberts v Parole Board* [2003] EWHC 3120.

[372] Ibid, para 2.

[373] Ibid.

[374] Para 3.

[375] In the Robert's case, the term 'specially appointed advocate' was coined to distinguish a special advocate appointed under a statutory provision (e.g. the 1997 SIAC Act) from a special advocate appointed under the inherent powers of the court (e.g. in criminal cases involving PII applications). As we will see, however, the Court of Appeal and a majority of the House of Lords held that the Parole Board *did* have a statutory power to appoint a special advocate. For the sake of convenience and clarity, this report uses the generic term 'special advocate' throughout (although in Part 4 explains the difference between statutory special advocates and ad hoc special advocates). For reasons which are set out in Part 5, we believe that the most important distinction between different kinds of special advocates is not the source of their appointment but their specific function.

[376] Para 4.

[377] Para 5.

of even a gist' to Roberts and that, therefore, he could not 'in any sense whatever answer the case against him' and that:[378]

> If the Board accepts the source's evidence and does not direct Mr Roberts' release as a result, the prejudice to Mr Roberts will not end there. Just as the Board cannot disclose the gist to him now, it will not be in a position to do so when it comes to provide reasons for its decision. Mr Roberts will continue to be detained on the basis of allegations about which he remains completely ignorant. He will not therefore be able to address the concerns underlying his continued detention or take any steps to reduce risk.

Although the special advocate appointed to act on Roberts' behalf himself argued that the resort to secret evidence was 'unnecessary and inappropriate', the Board nonetheless concluded that 'the appointment of [a special advocate] can secure acceptable standards of fairness for Mr Roberts'.[379]

174. On December 2003, the Administrative Court heard an application for judicial review of the parole board's decision to use secret evidence. This involved the court itself hearing submissions in both open and closed session, and delivering both an open and closed judgment.[380] Although he noted that the use of secret evidence and the appointment of a special advocate was 'wholly exceptional', Mr Justice Maurice Kay held that the board had the 'inherent power to adopt a novel concept in the interests of justice and in the public interest'.[381] He also rejected the submission that the board's decision would breach article 5(4) and this judgment was upheld by the Court of Appeal in July 2004.[382]

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[378] Para 6.

[379] Para 7.

[380] Ibid.

[381] Para 14.

[382] *Roberts v Parole Board* [2004] EWCA Civ 1031 at para 29 per Tuckey LJ: 'In making these difficult judgments … the Board [must] have regard to all the evidence which is put before it. This is not surprising given its protective and preventative role. It is obvious that such evidence may come from a source who himself may be at risk of life or limb if his identity is known. It seems to me that the Board must have inherent power to devise procedures to protect such a source. The risk to the witness may only justify external measures of protection such as those used to protect witnesses in criminal trials. But if the risk is sufficiently serious, I think the Board must have the power to direct that the evidence should be withheld from the prisoner or his representatives altogether. Once it is accepted that the Board does have such a power it must additionally have the power to mitigate the unfairness to the prisoner caused by the withholding of the evidence from him or his representatives. One obvious way of doing this is by the [special advocate] procedure'.The Court of Appeal dealt only with 'the point of principle' and did not view 'the sensitive material, [hear] submissions from [the special advocate] or [sit] in private' (para 3).

175. In June 2005, the House of Lords gave its judgment in Roberts' appeal.[383] The Law Lords unanimously concluded that it was not possible to say in advance of the hearing whether the Parole Board's consideration of secret material was compatible with article 5(4). As Lord Bingham noted:[384]

> [T]here are some outcomes which would not in my opinion offend article 5(4) despite the employment of a [special advocate]. It might, for instance, be that the Board, having heard the sensitive material tested by the [special advocate], wholly rejected it. Or having heard the material tested in that way the Board might decline to continue the review unless the sensitive material, or at least the substance of it, were disclosed at least to the [defendant's] legal representatives …. Or the Board might, with the assistance of the [special advocate], devise a way of anonymising, redacting or summarising the sensitive material so as to enable it to be disclosed to the [defendant] or his legal representatives. Or the Board might, in a manner that was procedurally fair, reach a decision without relying at all on the sensitive material. If any of these possibilities were to eventuate, I do not think there would be a violation of article 5(4).

176. However, the Law Lords differed considerably on whether the use of secret evidence and a special advocate *could* be compatible with article 5(4). Lord Bingham himself expressed grave concerns about the procedure, suggesting that the special advocate could do no more than take 'blind shots at a hidden target':[385]

> I would doubt whether a decision of the Board adverse to the appellant, based on evidence not disclosed even in outline to him or his legal representatives, which neither he nor they had heard and which neither he nor they had had any opportunity to challenge or rebut, could be held to meet the fundamental duty of procedural fairness required by article 5(4) …. If the procedure proposed is fully adopted, the [defendant's[rights under article 5(4) could be all but valueless.

In a judgment that quoted from Kafka's *The Trial*,[386] Lord Steyn was similarly forthright about the unfairness of using secret evidence: [387]

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[383] *Roberts v Parole Board* [2005] UKHL 45 at para 10 per Lord Bingham: '[The House] received no submissions by [Roberts' special advocate] or any specially appointed advocate, and did not read or receive submissions on the sensitive material'.

[384] Para 19 per Lord Bingham.

[385] Paras 18, 19.

[386] Ibid, para 95: 'A passage in *The Trial* has a striking resonance for the present case. Joseph K was informed ". . . the legal records of the case, and above all the actual charge-sheets, were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea; accordingly it could be only by pure chance that it contained really relevant matter. . . . In such circumstances the Defence

> Under this procedure the prisoner and his legal representatives are not allowed to know anything of the case made against the prisoner. Once the special advocate becomes aware of the case against the prisoner he may not divulge that information to the prisoner. It is not to the point to say that the special advocate procedure is 'better than nothing'. Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.

177. The Lord Chief Justice, Lord Woolf, was more accepting than Lord Steyn of the different possibilities in which secret evidence could be used, but even he was careful to stress that the use of special advocates did 'not affect the overriding obligation for a hearing to meet the requirements of article 5(4) and of appropriate standards of fairness required by domestic law'.[388] (para 62). In particular, he concluded:[389]

> If a case arises where it is impossible for the Board both to make use of information that has not been disclosed to the prisoner and, at the same time, protect the prisoner from a denial of his fundamental right to a fair hearing *then the rights of the prisoner have to take precedence*

However, Lord Woolf was careful to stress that 'we have not in my view reached the stage in this case where we can say this has happened'.[390] The Law Lords differed even more on the

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was naturally in a very ticklish and difficult position. Yet that, too, was intentional. For the Defence was not actually countenanced by the Law, but only tolerated, and there were differences of opinion even on that point, whether the Law could be interpreted to admit such tolerance at all. Strictly speaking, therefore, none of the Advocates was recognized by the Court, all who appeared before the Court as Advocates being in reality merely in the position of hole-and-corner Advocates'. Lord Steyn was not the only member of the House to cite Kafka: see also Lord Carswell at para 126: 'A prisoner against whom unfounded allegations have been made is in a Kafka-esque situation …. He may be altogether in the dark about the allegations made and unable to divine what they may be and give instructions about rebutting them'. But see also Lord Rogers at para 110: 'These circumstances - for which no-one is to blame - are exceptional. They pose a difficult problem for our system - one, moreover, which inapposite references to Kafka do nothing to illuminate and tend, rather, to trivialise'.

387 Para 88. See also Lord Steyn's comments at para 96: 'In my view it is a formalistic outcome to describe a phantom hearing involving a special advocate (as directed by the Board) as meeting minimum standards of fairness. In truth the special advocate procedure empties the prisoner's fundamental right to an oral hearing of all meaningful content'.

388 Para 62.

389 Para 78. Emphasis added.

390 Ibid. In *MB v Secretary of State for the Home* Department [2007] UKHL 46 at para 34, Lord Bingham summarised the various judgments of the House in *Roberts* in the following terms: 'I do not understand any of my noble and learned friends to have concluded that the requirements of procedural fairness under domestic law or under the Convention would be met if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied

question of whether the parole board could use secret evidence without explicit parliamentary approval. The majority of the Law Lords concluded that such a power was inherent in the Board's powers as set down by the Criminal Justice Act 1991 Act, even though there was no suggestion that Parliament had ever considered the possibility. The minority, Lord Bingham and Lord Steyn, were extremely critical of the idea that Parliament could authorise the Parole Board's use of secret evidence without even realising it.[391]

178. After the House of Lords had approved the parole board's decision, the board held its hearing in Roberts' case in 2006, including hearing secret evidence in closed session, and refused his application for release on licence.[392] Among the grounds it gave Roberts for its refusal, the board said '[w]hile in open conditions, you demonstrated that you are untrustworthy, utterly egocentric and highly manipulative'.[393] Following the hearing, Roberts brought a second application for judicial review, this time complaining that the use of secret evidence in his hearing had in fact breached his right under article 5(4). He won permission to bring judicial review proceedings in June 2007 and the parole board agreed to hold a fresh hearing in Roberts' case in early 2008.[394]

179. In preparation for the new hearing, the parole board directed Roberts' special advocate to disclose the secret evidence used in the previous hearings directly to Roberts and his solicitors. The board's decision to reveal the secret evidence was apparently based on the fact that the closed material had already been leaked to Roberts in 2007.[395] In the course of reviewing the newly-disclosed evidence, Roberts' solicitor discovered transcripts of a phone conversation that he had had with Roberts in late 2005 while Roberts had been detained in HMP Channings Wood. Concerned that the Prison Service had unlawfully intercepted legally

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such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him'.

391 See e.g. Lord Bingham at para 25: 'the course proposed and so far adopted in the conduct of the [defendant's] parole review involves a substantial departure from the standards of procedural fairness which would ordinarily be observed in conducting a review of this kind. *It would in my opinion violate the principle of legality … and undermine the rule of law itself,* if such a departure were to be justified as incidental or conducive to the discharge of the Board's functions' [emphasis added]. See also para 30: 'It is in my opinion contrary to legal principle and good democratic practice to read such a power into a statute which contains no hint whatever that Parliament intended or even contemplated such a departure' (per Lord Bingham) and Lord Steyn at para 93: 'The special advocate procedure strikes at the root of the prisoner's fundamental right to a basically fair procedure. If such departures are to be introduced it must be done by Parliament' and para 97: 'In my view the outcome of this case is deeply austere. It encroaches on the prerogatives of the legislature in our system of Parliamentary democracy. It is contrary to the rule of law. It is not likely to survive scrutiny in Strasbourg'.

392 See e.g. Jason Bennetto, 'Police killer denied parole after 40 years behind bars', *The Independent,* 29 December 2006.

393 Gallagher, *Daily Mail*, 19 April 2009, n406 below.

394 See e.g. BBC News, 'Review for police killer Roberts', 29 June 2007; John Aston, 'Murderer wins review over the use of secret evidence', *The Independent*, 30 June 2007.

395 Richard Ford and David Brown, 'Police killer Harry Roberts to be freed after 42 years in jail', *The Times*, 28 February 2009.

privileged communications with his client,[396] he wrote to the Treasury Solicitor for an explanation.

180. Following an internal review, the Justice Secretary admitted to Parliament in May 2008 that the Prison Service had indeed been illegally, although apparently inadvertently, intercepting calls between Roberts and his solicitors in 2005.[397] It also emerged that the unlawful interceptions had first been realised as early as January 2006 by counsel for the Home Secretary who had discovered a transcript of the conversations while preparing the secret evidence in Roberts' case and 'advised that the transcript should not be reviewed'.[398] Following this discovery, two further transcripts were identified by government lawyers and all three 'were then deleted from the transcripts that the Secretary of State provided to the Parole Board' in advance of Roberts' 2006 hearing.[399] Although the transcripts did not ultimately form part of the secret evidence in Roberts' case, they *were* disclosed to the special advocate acting for Roberts in the closed hearings. However, the special advocate was unable to reveal their existence to Roberts and his lawyers due to the prohibition on communication concerning any aspect of the secret evidence. The Treasury Solicitor, who could have informed Roberts and his lawyers directly of the unlawful interceptions, instead took the decision to keep them secret.[400] It was only in January 2008, when Roberts' special advocate was directed by the Parole Board to disclose previously secret material to Roberts and his lawyers, that the existence of the recordings and the transcripts became publicly known.

181. In addition, the Justice Secretary also disclosed that Roberts' conversations with his solicitor were also intercepted by the Derbyshire police between 19 August 2005 to 8 October 2006 in relation to 'a possible risk that had arisen to sources of certain information which had

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396 Although the interception of telephone calls from prisons do not require a warrant under Part I of the Regulation of Investigatory Powers Act 2000, legally privileged communications between prisoners and their lawyers may only be intercepted with special authorisation from the prison governor on the grounds that he has reasonable cause to suspect the conversations contain information 'of a criminal nature or would endanger prison security or the safety of others'. Following the discovery of the unlawful interceptions in Roberts' case, the Justice Secretary directed that subsequent authorisations could only be made by the Chief Operating Officer for the National Offender Management Service (see n397 below, col 69WS).

397 Written ministerial statement of the Secretary of State for Justice, Jack Straw MP, Hansard, 15 May 2008, col 67WS: 'On 8 November 2005, for the purposes of a closed hearing of the Parole Board, … the [Home Secretary] was directed by the board to obtain recordings of telephone calls for the period 1 October to 8 November 2005 made by Mr Roberts whilst he was at HMP Channings Wood, to enable further detailed consideration of his level of risk to specific individuals. This request was for recordings in general. It did not refer to calls with his solicitor, nor was it intended to cover such calls. Mr Roberts was represented at the closed hearing by a [special advocate]' (col 70WS). No authorisation was made in Harry Roberts case. See also e.g. Richard Ford, 'Taping killer's calls broke the rules, Jack Straw admits', *The Times,* 16 May 2008.

398 Ibid, col 70WS.

399 Ibid.

400 Ibid.

been provided to the Parole Board and taking such action as was necessary and proportionate to mitigate that risk'.[401] However, it appears that these recordings were also not used as the secret evidence against Roberts.[402]

182. In April 2009, it was publicly revealed that the secret witnesses against Roberts were Joan Cartwright and her son, James, who ran an animal sanctuary where he worked while on day release from HMP Sudbury in 2001.[403] Her allegations against Roberts while at the sanctuary included that he 'opened a bank account using her son's address', 'mixed with violent criminals', made claims that prison guards at HMP Sudbury were 'in his pocket', and threatened the Cartwrights should they report his behaviour.[404] Although Roberts had been returned to closed conditions in October 2001 following a complaint they made through an intermediary, the Cartwrights refused to make a formal statement to the police and Prison Service until October 2003, following an undertaking from the Home Secretary that Roberts would 'never see their evidence or learn who had supplied it'. The undertaking included the condition that:[405]

> If at any stage the Parole Board directs that any of the material should be disclosed either to Harry Roberts or to his solicitor, the Secretary of State will withdraw that material.

It is alleged that, despite their existence being kept a secret, Roberts called Mrs Cartwright 'up to five times a week for nearly four years' and:[406]

> issued terrifying veiled threats, which coincided with a series of sickening attacks on her animals. In the worst incident, a horse's head was hacked at with an axe the night before she was due to give evidence against him.

183. According to the Cartwrights, the Prison Service not only advised them to conceal from Roberts that they were the source of the secret evidence against him,[407] but also

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[401] Col 71WS.

[402] Col 72WS.

[403] See e.g. Jonathan Wynn-Jones, 'Reign of terror by Harry Roberts, the police killer, revealed', *Daily Telegraph*, 19 April 2009; 'Family's life 'made misery by cop killer'', *Derby Telegraph*, 20 April 2009; Ian Gallagher, 'How family who kept police killer Harry Roberts behind bars were betrayed by the so-called Ministry of Justice', *Daily Mail,* 25 April 2009.

[404] Ian Gallagher, 'Police killer Harry Roberts's five year campaign to silence woman who kept him behind bars', 19 April 2009.

[405] Ibid.

[406] Ibid: 'In … assaults between 2002 and 2006, a horse lost an eye after being battered with an iron bar; a donkey died after its pelvis was shattered, probably with a baseball bat; the family's pet cat was electrocuted, and a peacock was strangled'.

encouraged them to give false testimony to this effect at the open session of Roberts' earlier parole hearing in 2006.[408] They claim that, in any event, the Home Secretary breached his 2003 undertaking by allowing their testimony to be disclosed to Roberts and his lawyers in 2008. The Parole Board ultimately rejected allegations that Roberts had been engaged in criminal conduct but upheld other allegations relating to his character and behaviour.

184. Three things emerge from the tangled facts of Roberts' case. First, it illustrates how swiftly the use of secret evidence spread throughout Britain's courts and tribunals. Within five years, a system that had originally been introduced to allow the use of classified material from MI5, MI6 and GCHQ had been adapted, without any obvious statutory authority, in order to protect witnesses from intimidation in a parole hearing in the East Midlands.

185. Secondly, the Home Office's resort to secret evidence was not only unnecessary but also, viewed as substitute for proper witness protection measures, an abject failure. If Mrs Cartwrights' allegations about the campaign of witness intimidation against her and her family – and Harry Roberts' involvement in it – are correct, then it is clear that the use of secret evidence did next to nothing to protect her. Indeed, by forcing her to maintain a façade of normalcy in her dealings with Roberts – including visiting him in HMP Channings Wood in 2002 – it seems only to have made things much worse (especially as the Cartwrights' identities would eventually be disclosed to Roberts regardless). Moreover, it seems that the Prison Service's reliance on secret evidence lead it to forgo basic witness protection measures: despite the alleged threats since 2001, a security system was not installed until 2006[409] and, as of December 2007, the family did not have a witness liaison officer.[410] As Mrs Cartwright said:[411]

> If simple common-sense measures had been carried out we would not have been required to give secret evidence, our animals would still be alive, and the hundreds of thousands of pounds spent on legal fees, security, relocating horses and police protection would not have been spent.

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[407] Ibid: '[Mrs Cartwright] had to maintain her part in the phoney friendship so Roberts would not suspect she was the one who had lodged the complaint. *Coached about what to say by Prison Service officials*, she expressed mock dismay at the way Roberts had been treated. 'It was horrendous, so stressful and every fibre of my being hated it,' she said' [emphasis added]

[408] Email to JUSTICE, 11 December 2007: 'At the instigation of the Prison Service we had to give evidence that wasn't true at Mr Roberts' Open Parole Hearing. This was condoned by all the government departments involved. But Mr Roberts' legal team didn't know that the evidence we were giving was false. This worried us a great deal. It can't be right'.

[409] Daily Mail article, 19 April, n406 above.

[410] Email to JUSTICE, n408 above.

[411] Daily Mail article, 25 April, n403 above.

Similarly, as Lord Justice Sedley pointed out in 2008, keeping evidence secret from defendants has the 'ironic effect' that 'while the guilty would find it relatively easy to work out what it is that they need to explain away, the innocent will remain completely baffled and face an adverse finding without a fair hearing'.[412]

186. Thirdly, Roberts' case highlights a basic contradiction in the Parole Board's insistence upon considering all relevant evidence. For a central part of the Board's justification for using secret evidence in Roberts' case was its statutory duty to consider *all* material relevant to the risk of dangerousness. This duty, it maintained, obliged it to accept the Home Secretary's condition that the Cartwrights' testimony must remain secret. But it is clear that the Board did not consider all the relevant material in Roberts' case. We know, for instance, that the Prison Service had secretly and unlawfully been taping Roberts' conversations with his solicitors. We also know that the Home Secretary's lawyers, when they discovered this, immediately withdrew the transcripts from the file of secret evidence to be forwarded to the Parole Board. So not all the material was considered.

187. Of course, it is not known if the transcripts of Roberts' conversations actually contained any information relevant to his dangerousness. But this is because the review of the transcripts ceased the moment that the Home Secretary's lawyers realised that they contained privileged material, i.e. because they wished to avoid the taint of using illegal evidence to prove their case.[413] In other words, the government did *not* believe that the Parole Board was required to consider *all* relevant material in Roberts' case, just as – one assumes – the government would not have sought to rely on evidence of dangerousness that was procured by way of a tortured confession, for example. The Parole Board may be obliged to consider all relevant material but it is also, in terms of article 5(4) at least, a court.[414] That means that it must also adhere to certain minimum standards of judicial integrity, including the basic requirements of a fair hearing. Where evidence does not meet these minimum requirements,

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[412] *AF and others,* n347 above, para 116.

[413] Unlike some other common law jurisdictions, UK law does not maintain an absolute bar on evidence obtained illegally. Section 78 of the Police and Criminal Evidence Act 1984 provides courts a statutory discretion in criminal proceedings to exclude prosecution evidence where 'having regard to all the circumstances, including the circumstances in which the evidence was obtained' admitting the evidence would cause sufficient unfairness to the defence. There is also a common law discretion to exclude prejudicial evidence in order to ensure a fair trial and a specific discretion to exclude evidence where it involves a breach of the principle against self-incrimination (though not otherwise for being unfairly obtained): see *R v Sang* [1980] AC 402. In civil cases, there is no general discretion to exclude evidence simply for being illegally obtained but there may be a common law discretion to exclude evidence obtained in circumstances 'contrary to public policy' (*Goddard v Nationwide Building Society* [1987] QB 670 at 684 per Nourse LJ). See also e.g. Civil Procedure Rules, Part 32.1(2), giving courts a broad power to 'exclude evidence that would otherwise be admissible'.

[414] See e.g. *Roberts*, n383 above, at para 13 per Lord Bingham: 'The [Parole] Board is not in any ordinary sense a court. But it is accepted as being a court for purposes of article 5(4) because, and so long as, it has the essential attributes of a court in performing the function of directing release and other functions not in issue in this appeal'.

the sin lies not in the refusal of the Board to consider it, but in its decision to accept it. The facts in Roberts' case not only show that using secret evidence is unnecessary, but – like the issue of torture evidence before SIAC or evidence illegally obtained – remind us that there are some forms of evidence which even courts should decline to use.

Other civil proceedings

188. Outside of SIAC, the parole board and control order hearings, secret evidence has been used in a number of other civil proceedings, including asset-freezing cases, employment hearings, immigration cases, the Investigatory Powers Tribunal and the Proscribed Organisations Appeals Commission. Anonymous hearsay evidence is widely used in ASBO hearings in magistrates courts and even the rules governing the new combined administrative tribunal system allow for the use of evidence withheld from a defendant and her lawyer.

189. At the same time, however, the civil courts have begun to consider the possibility of using special advocates in helping them determining ordinary issues of disclosure, rather than in relation to secret evidence. As in criminal cases, although to a much lesser degree, parties in civil disputes are entitled to disclosure of unused material held by the other party. In a number of cases involving the government's refusal to disclose relevant material, including before the Information Tribunal and in the Binyam Mohammed case, special advocates have been appointed to help argue for disclosure.

Administrative tribunals

190. Under the Tribunal Courts and Enforcement Act 2007, a new two-tier system of administrative tribunals was established. The First Tier Tribunal hears appeals from a very wide range of governmental decisions ranging from asylum support and criminal injuries compensation to war pensions and VAT. [415] In place of individualised tribunals for each kind of appeal, the First Tier has Chambers dealing with certain groups of subjects: namely Tax; Social Entitlement; Health, Education and Social Care; etc. The Upper Tribunal hears appeals from the First Tier, as well as certain judicial reviews against administrative decisions that would ordinarily begin in the High Court.[416]

191. Schedule 5 of the 2007 Act allows for procedure rules to 'make provision for the disclosure *or non-disclosure* of information received' in hearings before the Tribunal. In practice, however, this has meant that a rule that was originally introduced to allow evidence

[415] Ibid, section 9.

[416] Section 15.

to be withheld from patients in mental health cases has become standardized throughout the new tribunal system.

192. Before November 2008, the procedure rules for the Mental Health Review Tribunal ('MHRT') allowed for the Tribunal to withhold evidence from a patient 'on the grounds that its disclosure would adversely affect the health or welfare of the patient or others'.[417] However, where evidence was withheld from a patient on these grounds, the MHRT was *required* to disclose it to the patient's lawyers or other authorised representative.[418] The representative could then seek the permission of the MHRT to disclose it to the patient.[419] This half-way approach to disclosure was meant to address the unusual circumstances of mental health proceedings, in which the patient's capacity may often be at issue.

193. In November 2008, MHRTs were amalgamated into one of the Chambers of the First Tier Tribunal.[420] Under the new rules, the Tribunal can withhold disclosure of evidence if it is satisfied that 'disclosure would be likely to cause that person or some other person serious harm' and also that this would be proportionate 'having regards to the interests of justice'.[421] Unlike the previous MHRT rules, however, the Tribunal's procedure rules do not *require* disclosure to the party's representatives where evidence is withheld from a party. Instead, the Tribunal has a *discretion* to disclose the evidence to the party's representatives if it is satisfied that 'disclosure to the representative would be in the interests of the party'.[422] Significantly, the Tribunal also has the power to hold an *in camera* and apparently *ex parte* hearing of the undisclosed material.[423] Even more significantly, these powers are *not* restricted to mental health proceedings, or even the other proceedings before the Health Education and Social Care Chamber which may involve highly vulnerable claimants (e.g. special educational

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[417] Rules 6(4) and 12 of the Mental Health Review Tribunal Rules 1983 (SI 1983/942).

[418] Rule 12(3): 'provided that no information disclosed in accordance with this [provision] shall be disclosed either directly or indirectly to the applicant or (where he is not the applicant) to the patient or to any other person without the authority of the tribunal or used otherwise than in connection with the application'.

[419] Ibid.

[420] The Health Education and Social Care chamber, which includes appeals concerning care standards, special educational needs and disability.

[421] See Rule 14(2) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699). Rule 14(2) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Rules 2008 (SI 2008/2685); and Rule 14(2) of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation) Rules 2008 (SI 2008/2686); Rule 14(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

[422] Rule 14(5)(a). Rule 14(6) effectively reintroduces the proviso in rule 12(3) of the 1983 Rules, see n418 above.

[423] Rule 26(5)(c) allows the Chamber to exclude 'any person who the Tribunal considers should be excluded in order to give effect to a direction under rule 14(2) (withholding information likely to cause harm)',

needs). The same restriction applies in *all* proceedings before the First Tier Tribunal and the Upper Tribunal, with the exception of tax cases.[424]

194. In other words, the new Tribunal system has the power in a very wide range of proceedings to withhold evidence altogether from a party in order to prevent 'serious harm' where this is in 'the interests of justice'. While the original MHRT procedure might perhaps have been reasonable in the context of proceedings where the patient may sometimes lack the mental capacity to make his or her own decisions, the justification for the Tribunal's broad power is much harder to fathom. There is, as yet, no information available on whether the new rules have resulted in evidence being kept secret from defendants. But it remains unclear why people challenging the government's decisions on matters such as pensions or criminal injuries compensation or asylum support should have less entitlement to disclosure of the evidence against them than did sectioned patients under the old MHRT rules.

ASBO hearings

195. Anti-Social Behaviour Orders (ASBOs) were first introduced by the Crime and Disorder Act 1998. They are civil orders under which magistrates may impose a wide range of restrictions on individuals who have acted in a manner 'likely to cause harassment, alarm or distress', in order to prevent further anti-social behaviour. Breach of an ASBO is punishable by imprisonment. This is includes cases where the conduct complained of itself may constitute a minor criminal offence, but is not punishable by a custodial sentence, e.g. street-walking or begging.

196. In 2002, the House of Lords considered a joined set of appeals concerning, among other things, the use of hearsay evidence in ASBO proceedings.[425] The general rule in civil proceedings is that hearsay evidence may be admitted but the court is entitled to place limited weight on it having regard to its hearsay nature.[426] In one of the appeals, an ASBO was sought that was partly based on 'anonymous complaints where the source was never known' and 'complaints where the source was known but was not disclosed'.[427] Lord Hope noted in particular that it was a 'striking feature' of the case that 'two of the statements relied on were

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[424] Rule 14(2) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Rules 2008 (SI 2008/2685); and Rule 14(2) of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation) Rules 2008 (SI 2008/2686); Rule 14(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

[425] *R v Crown Court at Manchester ex parte McCann* [2002] UKHL 39.

[426] Section 1(4) of the Civil Evidence Act 1995. See also the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999; and Part 33 of the Civil Procedure Rules.

[427] Ibid, para 8.

anonymous'.[428] Indeed, the House of Lords was sufficiently concerned at the potential seriousness of ASBO proceedings that they decided that the criminal – rather than civil – standard of proof should apply.[429] At the same time, however, the Law Lords unanimously sanctioned the use of hearsay evidence – including the possibility of anonymous hearsay – to help meet the heightened standard of proof in ASBO hearings.[430] Rather than exclude such evidence as a class, the Law Lords took the view that the interests of the community in preventing anti-social behaviour took precedence over fairness to the defendant. As Lord Hutton explained:[431]

> I consider that the striking of a fair balance between the demands of the general interest of the community (the community in this case being represented by weak and vulnerable people who claim that they are the victims of anti-social behaviour which violates their rights) and the requirements of the protection of the defendants' rights requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence in applications for anti-social behaviour orders.

At first glance, ASBO hearings seem very far removed from the other kinds of civil proceedings in which secret evidence has been used. They do not involve closed sessions or special advocates, for instance, nor are the proceedings private. Indeed, the main difficulty in getting information on the frequency of anonymous hearsay in ASBO cases is not due to any inherent secrecy of the proceedings but rather that they are so common, that virtually all ASBO decisions go unreported. Given, however, the massive growth in the number of ASBO applications since 1998[432] and the very broad discretion given to magistrates and county court judges to admit hearsay in ASBO cases, it seems certain that thousands of ASBOs have been made that were based – at least in part – on anonymous hearsay. As unlikely as it seems, the greatest growth in the use of secret testimony in the past decade is not in cases before SIAC or the Administrative Court but in the local magistrates' court.

Asset freezing proceedings

197. Like the Prevention of Terrorism Act 2005, Part 6 of the Counter-Terrorism Act 2008 introduces SIAC-like procedures into the High Court, this time in relation to various terrorist

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[428] Ibid, para 45.

[429] See e.g. Lord Steyn at para 37, Lord Hope at para 83 Lord Hutton at para 114.

[430] See e.g. Lord Steyn at paras 35-36.

[431] Ibid, para 113.

[432] 12,675 ASBOs were issued between April 1999 and December 2006 (Source: Home Office, Anti-social Behaviour and Crime Prevention Unit).

financing measures of the Treasury.[433] When first introduced in Parliament in April 2008, the Bill only made provision for appeals in relation to asset-freezing decisions. In November 2008, however, the government introduced a much broader range of provisions relating to the full range of financial restrictions. This latter move was prompted by the September 2008 judgment of the European Court of Justice in *Kadi*[434] and the October 2008 judgment of the English Court of Appeal in *A, K, M, Q and G*.[435]

198. The case of *Kadi* concerned various international measures aimed at terrorist financing after 9/11. In particular, both UN Security Council Resolution 1390 (2002) and EU Council Regulation 881/2002 directed the assets of Al Qaeda and associated groups to be frozen. The defendants, Mr Kadi and the Al Barakaat International Foundation, were among those named in Annex I of the EU regulation. However, the defendants had had no knowledge of the reasons why they had been listed, no knowledge of the evidence supporting those reasons, and no opportunity to contest the findings:[436] Both complained to the European Court of Justice that the measures violated, among other things, their right to be heard. The Court concluded that these rights 'were patently not respected'[437] in the defendants case:[438]

> Because the Council neither communicated to the [defendants] the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the [defendants] were not in a position to make their point of view in that respect known to advantage. Therefore, the [defendants'] rights of defence, in particular the right to be heard, were not respected.

Among other things, the Court noted the judgment of the European Court of Human Rights that there were 'techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice'.[439]

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[433] See also Civil Procedure Rules Part 79: Financial Restriction Proceedings under the Counter-Terrorism Act 2008.

[434] *Kadi v Council of the EU and the Commission* (joined cases (C-402/05P) and (C-415/05P) [2008] 3 C.M.L.R. 41, September 3, 2008).

[435] [2008] EWCA Civ 1187.

[436] Ibid, para 348.

[437] *Kadi*, n434 above, para 334.

[438] Ibid, para 348.

[439] Ibid, para 344.

199. In *A, K, M, Q and G,* the defendants had, like Mr Kadi, had their bank accounts and assets frozen after being named by the Treasury under two Orders in Council: the Al-Qaida and Taliban (United Nations Measures) Order 2006 and the Terrorism (United Nations Measures) Order 2006. Like Mr Kadi, they had no information concerning the reasons why they had been listed. At the time that the Orders were made, a Treasury Minister told Parliament:[440]

> the Treasury has agreed, on the advice of law enforcement agencies, to use closed source evidence in asset freezing cases where there are strong operational reasons to impose a freeze, but insufficient open source evidence available. The use of closed source material will be subject to proper judicial safeguards. The Government intend to put in place a special advocate procedure to ensure that appeals and reviews in these cases can be heard on a fair and consistent basis.

However, until the 2008 Act was passed in December 2008, no provision was ever made for such a procedure in the orders.[441]

200. At first instance, Mr Justice Collins in the High Court upheld the defendants' appeals, quashing the orders on the grounds that, among other things, they afforded the defendants no opportunity to make 'meaningful representations'.[442] However, the Court of Appeal reversed the High Court's ruling. While the appeal court accepted the Orders' lack of procedural safeguards,[443] it considered that this was not sufficient to make them unlawful.[444] Although it was a 'great pity that there has been so much delay' in introducing the provisions of the 2008 Act,[445] this did not prevent the Orders' validity. In a dissenting judgment, Lord Justice Sedley

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[440] Written ministerial statement of Ed Balls MP, Hansard, 10 Oct 2006: cols 11-12WS.

[441] Nor was any exemption granted from the Regulation of Investigatory Powers Act 2000 to enable the use of intercept evidence to justify freezing decisions – a standard feature of the legislation governing the use of closed evidence elsewhere.

[442] *A, K, M, Q and G v HM Treasury* [2008] EWHC 869 (Admin), see e.g. para 14: 'there was no means whereby G could mount an effective challenge to his listing since he did not know nor was there any procedure whereby he could be informed of what material had led the Committee to list him. It is known that he was listed following information given against him by the government. Thus, without the support of the government, his chances of achieving delisting are infinitesimal'; and para 16: 'It is I think obvious that this procedure does not begin to achieve fairness for the person who is listed. Governments may have their own reasons to want to ensure that he remains on the list and there is no procedure which enables him to know the case he has to meet so that he can make meaningful representations'.

[443] See e.g. n435 above, para 59 per Clarke MR: 'There is so far no statutory power to appoint a special advocate in proceedings arising out of a [Terrorism Order]. However, as I see it, there is no reason in principle why a special advocate should not be appointed in a particular case'. The Master of the Rolls also disagreed that the lack of any statutory provision for the use of intercept material in closed proceedings meant that it would be impossible to challenge such evidence where it was used to justify a freezing decision: see paras 72-78.

[444] Ibid, para 60.

[445] Ibid, para 65 per Clarke MR.

described the asset-freezing scheme as 'markedly deficient' in the 'opportunity which it gives, or which is provided by other means, to ensure that a freezing order cannot be made or confirmed without a fair hearing'.[446]

Coronial proceedings

201. Inquests are required to be held in any case where a person's death results from a violent or unnatural act, a sudden and unknown cause, or occurs in state custody (e.g. prison, mental health or immigration detention). The purpose of an inquest is to determine the identity of the deceased and answer 'how, when and where [he] came by his death'.[447] In addition, where a person dies either at the hands of the state or in its custody, the right to life under article 2 ECHR requires an effective investigation into whether the state breached its own obligation to protect the right to life.[448]

202. In a 1991 inquest into the deaths of three people killed by British soldiers in Northern Ireland, the coroner admitted into evidence statements taken from the soldiers concerned by their officers, even though the identity of the soldiers was not disclosed and the soldiers themselves could not be compelled to give evidence.[449] Among other things, this was justified by reference to the fact that inquests are inquisitorial rather than adversarial proceedings.[450] As Lord Lane said in 1982:[451]

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[446] Ibid, para 140.

[447] Section 11(5) of the Coroners Act 1988 and rule 36(1) of the Coroners Rules 1984. See also *R v Coroner for North Humberside, ex parte Jamieson* [1995] QB 1: the purpose of an inquest is to determine 'by what means' the deceased met his death, as opposed to 'in what broad circumstances'.

[448] See e.g. *McCann v United Kingdom* (1995) 21 EHRR 97 at para 161: article 2 requires 'some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State'. See also *Jordan v United* Kingdom (2001) 33 EHRR 38; R *v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51; *R (on the application of Middleton) v HM Coroner for West Somerset* [2004] UKHL 10; *R (Hurst) v Commissioner of Police for the Metropolis* [2007] UKHL 13; and, most recently, the judgment of the Court of Appeal in *Secretary of State for Defence v Smith and HM Assistant Deputy Coroner for Oxfordshire* [2009] EWCA Civ 441 at para 64 per Clarke MR: 'There are now two types of inquest. They are the traditional inquest and what we will call an article 2 inquest. The essential difference between them is that the permissible verdict or verdicts in a traditional inquest is significantly narrower than in an article 2 inquest. In addition, it is said that the scope of the investigation is or is likely to be narrower at a traditional inquest …. We are bound to say that, given the long history of the traditional inquest and the jurisprudence which discusses the article 2 inquest, it is in our view surprising that the differences are not absolutely clear'.

[449] *R v HM Attorney-General for Northern Ireland, Ex p Devine* [1992] 1 WLR 262. The coroner had also ruled that the soldiers' attendance was 'unnecessary'. However, the ruling of the High Court in *R (Paul and Ritz Hotel) v Assistant Deputy Coroner of Inner West London* [2007] EWHC 2721 (Admin) noted key differences between the Northern Ireland Rules and those in 1984 Coroners Rules.

[450] See Lord Bingham in *R v Davis* [2008] UKHL 13 at para 21.

[451] *R v South London Coroner ex p Thompson* (1982) 126 SJ 625. See also Lord Bingham in *R v Davis*, ibid: ' Above all, there is no accused liable to be convicted and punished in that proceeding'.

> an inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where a prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use.

Nonetheless, although an inquest does not determine guilt or wrongdoing, its proceedings may nonetheless have considerable consequences for those involved, including the disclosure of evidence and the determination of facts that may point towards criminal or civil liability.[452] In cases where article 2 is engaged, it is also central to the determination of whether the state is responsible for a person's death. Even though the concept of a fair *trial* is inapplicable, coronial courts are – like any court or tribunal – bound to observe basic principles of procedural fairness, as well as the more general requirements of open justice.

203. In April 2008, an inquest in 2007 concerning the death of a British soldier in Basra from heat exposure was quashed by the High Court because – among other things – it was necessary to ensure that the Ministry of Defence disclosed all relevant material to the coroner, without 'absurd' redactions of the identity of witnesses.[453] Mr Justice Collins noted that:[454]

> any claim that material should not be disclosed on national security grounds must be considered by the coroner. His is an inquisitorial, not an adversarial, process. He must have all the information, but he must, bear in mind *the requirements of the procedural obligation which include enabling the family to play a proper and effective part in the process.*

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[452] As the former Head of the Public Law group of the Treasury Solicitor's Department acknowledged in 2005, 'inquests have become much more adversarial, particularly in cases involving deaths in custody, in which the family of the deceased regularly speaks of "winning the inquest" (that is, securing a verdict of unlawful killing, or a verdict which includes a finding of neglect). There may be sound reasons for permitting this change in character (compliance with the adjectival duty under Article 2 is one)' (Response of the Treasury Solicitor to the Council of Tribunal's consultation on oral hearings in the administrative justice system, dated 2 September 2005, p15).

[453] *Smith v Assistant Deputy Coroner for Oxfordshire* [2008] EWHC 694 (Admin) at paras 34-36.

[454] Ibid, para 36. Emphasis added.

Although the judge noted that 'full disclosure' to interested parties may 'not always be necessary', he observed that 'in an Article 2 case it will be difficult to justify any refusal to disclose relevant material'.[455]

204. In early 2008, the government published the Counter-Terrorism Bill, Part 6 of which provided for the use of secret evidence and closed sessions in inquests involving consideration of any material 'that should not be made public' for reasons of national security, the international relations of the UK, or 'otherwise in the public interest'.[456] The provisions were ultimately withdrawn from the Counter-Terrorism Bill but were reintroduced in Part 1 of the Coroners and Justice Bill in January 2009.[457]

205. It is clear that these provisions, even as subsequently amended, would – if introduced – have breached the requirements of article 2, not to mention the core requirements of natural justice. Although a coroner presiding over an inquest is not required to balance the competing interests of the parties in the same way as in adversarial proceedings, she is obliged to balance interests nonetheless. As Lord Lane said, the function of an inquest is 'to seek out and record as many of the facts concerning the death *as [the] public interest* requires'.[458] Inevitably, therefore, any question of sensitive material being disclosed to the parties would fall to be considered by the coroner according to established principles of public interest immunity. There was no evidence that existing PII principles would not have been adequate to protect the public interest in such cases, just as they were used in the inquest into the killing of Jean Charles de Menezes by members of the Metropolitan Police's SO19 unit.[459] More generally, the government's argument that coroners are required to consider *all* evidence in a case, no matter what its provenance, is vulnerable to the same objection discussed in relation to parole board hearings: there are some kinds of evidence which courts cannot hear.[460] If it

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[455] Ibid, para 37. This conclusion was upheld on appeal in *Secretary of State for Defence v Smith and HM Assistant Deputy Coroner for Oxfordshire* [2009] EWCA Civ 441. See also In *R (Bentley) v HM Coroner for Avon* (2001) 74 BMCRI in which Sullivan J held that there was a presumption in favour of as full disclosure as possible.

[456] Clause 64 of the Bill as originally introduced, 24 January 2008.

[457] The provisions were subsequently amended in the course

[458] *Thompson*, n451 above. Emphasis added. See also e.g. Baroness Hale in *R (Hurst) v Commissioner of Police for the Metropolis* [2007] UKHL 13 at para 22: 'this suggests there was an acute *public interest,* and not merely the private interest of a grieving mother, in a full investigation of how it came about that Troy Hurst met his death' [emphasis added].

[459] In the de Menezes inquest, for instance, 47 police officers out of a total of 65 gave evidence from behind screens and remained anonymous. Additionally, that details of the 'shoot to kill' policy known as Operation Kratos were subject to public interest immunity. See e.g. 'De Menezes inquiry increases pressure on Met and its chief', *The Guardian,* 20 September 2008.

[460] Indeed, the main impetus for the government's proposals appears to have been the bar on using intercept evidence in civil or criminal proceedings (see section 17 of the Regulation of Investigatory Powers Act 2000) which led to a temporary impasse in an inquest into the police shooting of Azelle Rodney in April 2005: see e.g. BBC News, 'Shot man's family wants law change', 5 November 2007.

would be improper for a coroner to base her findings on evidence obtained by torture, for instance, then it should be equally improper for a verdict in a coroner's court to be based on material not disclosed to the parties involved.

206. In May 2009, the secret inquest provisions were withdrawn from the Coroners and Justice Bill.[461] The Lord Chancellor indicated that, where it was not possible to proceed with an inquest 'under the current arrangements':[462]

> the Government will consider establishing an inquiry under the Inquiries Act 2005 to ascertain the circumstances the deceased came by his or her death. Each case will be looked at on its own individual merits. As with the provisions in respect of the certification of coroners' investigations, we would expect to resort to such a procedure only in very exceptional and rare circumstances.

The Inquiries Act 2005, however, makes its own provision for the use of secret evidence: section 19 of the Act allows ministers to issue a restriction notice to the chairman of the inquiry concerning the disclosure or publication of any evidence 'given, produced or provided to an inquiry'.[463] Ministers may impose such restrictions on disclosure as they consider either 'conducive to the inquiry' or 'necessary in the public interest'.[464] Relevant considerations include the 'risk of harm or damage' that a restriction might prevent, including 'damage to national security or economic relations', damage to 'the economic interests of the United Kingdom', or damage 'caused by disclosure of commercially sensitive information'.[465] Shortly before the Act was passed, Mr Justice Cory – a retired Canadian Supreme Court justice whom the UK and Irish governments had appointed in 2002 to produce a report into collusion by the Northern Ireland authorities into four killings[466] – said the restrictions 'would make a meaningful inquiry impossible'.[467]

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[461] Written ministerial statement, the Lord Chancellor and Secretary of State for Justice Jack Straw MP, 15 May 2009.

[462] Ibid.

[463] Section 19(1)(b).

[464] Section 19(3)(b).

[465] Sections 19(4) and (5).

[466] Cory Collusion Inquiry reports into the deaths of Patrick Finucane, Robert Hamill, Rosemary Nelson, and Billy Wright (HC 470-473, 1 April 2004).

[467] Letter of the Hon Peter Cory to Chris Smith (Chair of the US House of Representatives sub-committee on Human Rights), dated 15 March 2005: 'it seems to me that the proposed new Act would make a meaningful inquiry impossible. The commissions would be working in an impossible situation. For example, the Minister, the actions of whose ministry was to be reviewed by the public inquiry would have the authority to thwart the efforts of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation. There have been references in the press to an international judicial membership in the Inquiry. If the new Act were to become law, I would advise all Canadian judges to decline an appointment in light of the impossible situation they would be facing. In fact, I cannot contemplate any self respecting

Counter-terrorism proceedings

207. In October 2003, two members of the public challenged the Metropolitan Police for its use of stop-and-search powers under section 44 of the Terrorism Act 2000 during a protest outside an arms fair exhibition in London's Docklands the previous month.[468] Prior to the hearing in the Divisional Court, the Home Secretary indicated to the defendants that he would be willing to agree to the appointment of a special advocate to 'review in closed session the underlying intelligence material on the basis of which the Home Secretary had confirmed the authorisation [for the police to use stop-and-search powers]'.[469] The offer, however, was not taken up.

208. In March 2008, the Chief Constable of Manchester Police applied to Manchester Crown Court for an order against a freelance journalist named Shiv Malik for production of documents relating to Hassan Butt, a suspected terrorist. Following both an open and closed hearing, the order was granted by the judge.[470] Mr Malik complained to the Administrative Court that the procedure involved was unfair as, among other things, he had not been represented in the closed hearing. The Attorney General was also granted leave to intervene to make submissions on 'the role of special advocates and the circumstances in which they may be employed'.[471]

209. Like the Crown Court, the Administrative Court considered the closed evidence in Mr Malik's case, and confirmed that it contained material 'which had an important bearing on the outcome of the application before the judge'.[472] Lord Justice Dyson agreed that the court had an inherent power to request the appointment of a special advocate, but that the power 'should be exercised only in an exceptional case and as a last resort'.[473] Among other things, a judge should consider whether the absent party 'is afforded a sufficient measure of

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Canadian judge accepting an appointment to an inquiry constituted under the new proposed act'. See also Joint Committee on Human Rights, *Scrutiny: Fourth Progress Report* (HL 60/HC 388, 2 March 2005), para 3.10: 'the independence of an inquiry is put at risk by ministerial power to issue these restrictions, and that this lack of independence may fail to satisfy the Article 2 obligation to investigate, in cases where an inquiry under the Bill is designed to discharge that obligation'.

[468] *R (Gillan and another) v Commissioner of Police for the Metropolis and another* [2003] EWHC 2545 (Admin).

[469] *R (Gillan and another) v Commissioner of Police for the Metropolis and another* [2006] UKHL 12 at para 64 per Lord Scott. See also Lord Bingham, ibid, para 17 and Brooke LJ in the Divisional Court, at para 30: 'We also considered it unnecessary to receive certain secret evidence which the Secretary of State proffered on the basis that a special advocate would make submissions to us in relation to that material'.

[470] *Malik v Manchester Crown Court and others* [2008] EWHC 1362 (Admin), para 3.

[471] Ibid, para 93.

[472] Ibid, para 94.

[473] Ibid, para 99.

procedural protection' by the requirement on the party who is present to put forward 'any material that undermines or qualifies his case or which would assist the absent party'.[474] The court should also consider its own ability 'to perform a role of testing and probing the case which is presented',[475] and the 'extent to which a special advocate is likely to be able to further the absent party's case before the court' – in particular, whether the court considers that 'the special advocate is unlikely to be able to make a significant contribution to the party's case'.[476] In the particular facts of Mr Malik's case, the Administrative Court held, it was not unfair for the Crown Court judge to consider the closed material sitting alone.[477]

Employment proceedings

210. In 2000, the Employment Tribunal was given the power to use secret evidence and special advocates in race discrimination claims involving issues of national security.[478] The first[479] and so far only case before the Tribunal involving the use of secret evidence has been an action brought by Amjad Farooq, a firearms specialist, against the Metropolitan Police for racial and religious discrimination.[480] Mr Farooq complained that he had been transferred from the Diplomatic Protection Squad in December 2003 after failing to obtain the necessary security clearance. Following an unsuccessful appeal to the Security Vetting Appeal Panel – an internal review committee run by the Cabinet Office – the Metropolitan Police refused to give details of the reasons why he was refused clearance. Media reports suggested that the vetting 'revealed an alleged link between a former imam at the Jamia Masjid mosque in

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[474] Ibid, para 101.

[475] Ibid.

[476] Ibid, para 102.

[477] Ibid, para 106.

[478] See section 8 of the Race Relations (Amendment) Act 2000, amending section 67A(2) of the Race Relations Act 1976.

[479] An earlier case involving the appointment of a special advocate in an employment dispute was the 2005 case of *R(B) v Secretary of State for Transport* (unreported), a judicial review of the Transport Secretary's decision to deny counter-terrorism clearance to a security guard at Heathrow airport, which resulted in her dismissal. The claim was brought in the Administrative Court in parallel to the guard's claim in the Employment Tribunal (*B v BAA plc* [2005] UKEAT 0557_04_1905) and the court agreed to the appointment of a special advocate to test the government's evidence in closed session. Following this decision, however, the Department for Transport and BAA both settled out of court, conceding that B had been unlawfully dismissed. In *Farooq*, n480 below, Burton J noted that 'that there have been other cases in the tribunals in which Rule 54 [allowing the tribunal to sit *in camera* and in the absence of one party] has been applied or referred to, but I also know of no other case which has come to trial with a special advocate at the helm for the Appellant dealing with the closed elements' (para 6).

[480] *Farooq v Commissioner of Police for the Metropolis* [2007] UKEAT 0542_07_2011.

Swindon [which Farooq and his family attend] and the Sipah-e-Sahaba terror group in Pakistan'.[481] The case has yet to be resolved.

FOIA and data protection proceedings

211. The Information Tribunal hears appeals from the decisions of the Information Commissioner under the Freedom of Information Act (FOIA), the Data Protection Act, and certain other information and privacy regulations.[482] The Tribunal's procedure rules allow it to consider closed material in hearings that are *in camera* and *ex parte*.[483]

212. In 2008, the Information Tribunal heard the joined appeals of two non-governmental organisations – the Campaign Against the Arms Trade ('CAAT') and Corner House – against the refusals of the Ministry of Defence ('MoD') and the Foreign Office to provide details under the FOIA of their dealings with the Saudi Arabian government. In the course of the appeals, the Tribunal agreed to the NGOs' request for the appointment of a special advocate to inspect the closed material and make submissions on their behalf in closed session.[484] The Tribunal then sat in closed session to consider the government's claim to secrecy in the withheld documents. As the Tribunal noted, 'it would have been impossible to do that in open session without defeating the object of [the FOIA's requirement] to maintain the nondisclosure of the documents'.[485] Although it said the appointment of a special advocate to test the government's claims in closed session was not required 'in the vast majority of cases', the Tribunal held that it was appropriate to do so in the appeals having regard to the 'piecemeal' and 'incoherent' quality of the evidence.[486] Although the Tribunal upheld the MoD's claim to secrecy, it allowed Corner House's appeal in relation to some of the material held by the Foreign Office relating to the 'activities of UK officials in the sale of arms and services are concerned with reference particularly to the payment and negotiation of commissions and employment of agents'.[487] In

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[481] 'Muslim cop removed from Blair guard duty due to 'national security' claims £25k damages', *Daily Mail*, 1 May 2008. Sipah-e-Sahaba was proscribed as a terrorist organisation under the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005 (SI 2005/2892).

[482] The Tribunal was originally established as the Data Protection Tribunal under the 1984 Data Protection Act. It was renamed by section 18(2) of the Freedom of Information Act 2000.

[483] See rule 24 of the Information Tribunal (National Security) Rules 2005 (SI 2005/13); Rules 22 and 23 of the Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005/14).

[484] *CAAT v Information Commissioner and the Ministry of Defence* [2008] UKIT EA_2006_0040, para 15. The Tribunal held that it had the power to direct the appointment of a special advocate under both rules 14 and 24 (para 21). See also *Gilbey v Information Commissioner and Foreign and Commonwealth Office* [2008] UKIT EA_2007_0071, annexes A and B.

[485] Ibid, para 19.

[486] Para 21.

[487] *Gilbey,* n484 above, para 59.

other FOI cases before the Information Tribunal, the closed material has been considered without the appointment of a special advocate on the appellant's behalf.[488]

213. Another case involving the appointment of a special advocate was a case involving a prisoner in a psychiatric hospital who sought disclosure of a psychologist's report under the Data Protection Act.[489] Following his conviction in October 1989 for various firearms offences and making threats to kill, Clive Roberts was detained as a patient in Rampton Hospital, a high security psychiatric hospital on the basis that he was suffering from a psychotic delusional disorder and a bi-polar effective disorder.[490] In January 2008, he requested a copy of a report from the NHS Trust that had been prepared about him by a psychologist who was identified in proceedings only as A. He argued that the report was relevant to his upcoming hearing before the Mental Health Review Tribunal.

214. The NHS Trust refused, claiming that the report was exempt from disclosure. Among the exemptions against disclosure under the Data Protection Act is that a person's personal health data can be withheld 'in any case where [disclosure] would be likely to cause serious harm to the physical or mental health or condition of the data subject or any other person'.[491] The MHRT itself also denied his request for disclosure on the basis that, among other things, the hospital did not propose to rely on the report at the hearing.[492] After hearing both the open and closed evidence, including submissions from the special advocate in closed session, the High Court held that the NHS Trust had:[493]

> the defendant has produced clear and compelling reasons based on cogent evidence, that I should not order that A's report be released. Moreover, the [NHS Trust] has also persuaded me, on the same basis *that the justification for this, in terms of any exemption recognised by the Act, should not be stated. My reasoning is detailed in the closed judgment.*

In other words, not only was the report not disclosed but the patient and his lawyers were not entitled to know the legal basis upon which it was withheld.

215. To be clear, Clive Roberts' case did not involve secret evidence as such, for there was no suggestion that the report would be used against him in the MHRT hearing. Like the

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[488] See e.g. *British Broadcasting Corporation v Information Commissioner* [2008] UKIT EA_2008_0019.

[489] *Roberts v Nottinghamshire Healthcare NHS Trust* [2008] EWHC 1934 (QB).

[490] Ibid, para 2.

[491] Data Protection (Subject Access Modification) (Health) Order 2000 (SI 2000/413), para 5.

[492] Ibid.

[493] Para 23. Emphasis added.

Information Tribunal cases considered above, his case illustrates one of the rare, positive benefits of using special advocates in civil proceedings: whereas previously a judge would have to determine the question of disclosure sitting alone, the special advocate can help test the issue by way of adversarial challenge in closed session. However, Roberts' case also shows how the adoption of novel methods can also lead courts astray: in this case, by refusing to publicly identify the legal basis for its decision. Even if the judge's decision on disclosure was ultimately correct, his failure to state his reasons publicly is yet another departure from the common law principle of open justice 'according to known laws truly interpreted'.

Immigration and nationality proceedings

216. Although SIAC was specially created to deal with cases involving immigration decisions made on national security grounds, this has not prevented the use of closed material in immigration and nationality cases before the ordinary courts.

217. In July 2005, for instance, a Kenyan MP and former government minister named Dr Murungaru, received a letter from the Home Secretary cancelling his visitor's visa. [494] The letter said only that he was being excluded from the country because his presence in the UK was not conducive to the public good in light of his 'character, conduct and associations'.[495] Dr Murungaru applied for judicial review of the decision, complaining among other things that he did not know the reasons for the Home Secretary's finding.

218. In an ex parte hearing before the High Court in November 2008, the government said that the 'most important material' justifying the Home Secretary's decision could not be disclosed on 'diplomatic grounds'.[496] A junior Foreign Office minister subsequently certified the material as subject to public interest immunity ('PII') on the grounds that it was 'necessary to protect national security'.[497] In November 2005, Dr Murungaru was told that his exclusion was due to 'increasing concerns regarding [his] involvement in corrupt practices'.[498] The Home Secretary subsequently told Dr Murungaru that it would undermine the government's 'support of the Kenyan Government's determination to stamp out corruption' to allow him to reenter the

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[494] [2006] EWHC 2416 (Admin).

[495] Ibid, para 8.

[496] Ibid, para 18.

[497] Ibid, para 18.

[498] Ibid, para 11. See also *R (Murungaru)*, n500 below, at para 3: 'So far as that is concerned the entry clearance officer in Nairobi was aware when permission to enter was granted in April 2005 that serious allegations of corruption had been made against [Dr Murungaru]. What changed between then and the decision in July [2005] was that the Secretary of State became aware that when [Dr Murungaru] was in the United Kingdom he had been involved in activities connected with these allegations'.

UK.[499] In November 2006, Mr Justice Mitting inspected the PII material and directed that a special advocate should be appointed to challenge it in closed session on Dr Murungaru's behalf.[500]

219. In 2008, however, the Home Secretary appealed Mr Justice Mitting's decision.[501] The Attorney-General also intervened, making separate submissions on the need to appoint a special advocate in Dr Murungaru's case.[502] The issues raised by the Attorney's submissions are dealt with in Part 4 of this report. The Court of Appeal rejected the conclusion of the High Court that the decision to exclude Dr Murungaru engaged his Convention rights.[503] Accordingly, it proceeded to determine the case on common law principles of fairness and, inspecting the closed material, held that:[504]

> the material covered by the PII certificate does not warrant the appointment of a special advocate. There is no reason to think that the judge, in what is now purely a common law due process claim, cannot do what a special advocate might otherwise do by way of critical examination of the closed material in [Dr Murungaru's] absence, assuming that the material turns out to have any useful bearing at all.

However, it is extremely difficult to follow the Court of Appeal's reasoning on this point. Regardless of whether any Convention rights were engaged or not, the central issue in Dr Murungaru's case was whether the Home Secretary's decision to exclude him (because of allegations of his 'involvement in corrupt practices') was reasonable.[505] The Home Secretary herself identified the closed material as the 'most important' in reaching her decision. It would therefore be impossible for the court to determine the issue of reasonableness without considering it. Common law principles of fairness dictate that a party is entitled to know the evidence that forms the basis of any judicial decision against him, and to test that evidence by way of adversarial proceedings. Special advocates are certainly no substitute for full disclosure and effective cross-examination, but the Court of Appeal's suggestion that – absent Convention rights – a judge sitting alone could provide a defendant with the same degree of 'critical examination' in such a case is bizarre.

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499 Ibid.

500 *R (Murungaru) v Secretary of State for the Home Department* [2006] EWHC 3726.

501 *Murungaru v Secretary of State for the Home Department and others* [2008] EWCA Civ 1015.

502 Ibid, para 14.

503 Ibid, para 33.

504 Ibid, para 39 per Sedley LJ. See also para 38: 'We do not propose to give a separate closed judgment upon [the PII material]. We simply record that it is uncomplicated and undramatic'.

505 See n498 above.

220. The use of special advocates in immigration proceedings outside SIAC was also considered by the High Court in the October 2008 decision of *MH and others*.[506] In *MH*, challenges were brought by eleven defendants against the Home Secretary's refusal of their applications for naturalisation as British citizens on the grounds that they were not of good character.[507] Although most of the defendants were refugees and none had been refused refugee status on grounds of national security, or been convicted of any criminal offence,[508] the Home Secretary refused to provide a detailed explanation of her reasons for refusing their applications.[509] Instead, the reasons ranged from generalised allegations such as 'association with known Islamist extremists, including a number who have been arrested under anti-terrorism legislation',[510] 'close association with well known Islamic extremists',[511] and 'association with Iranian elements hostile to British national interests',[512] to slightly more specific ones, e.g. 'openly preached anti-Western views and voiced sympathy with Usama Bin Laden at the Hatherley Street Mosque Liverpool'.[513] In one case, the defendant known as AS was told only that 'it would be contrary to the public interest to give reasons in this case'.[514]

221. In hearing the challenges, the High Court considered the extent to which 'the tension between national security and the common law duty of fairness' could be resolved by the appointment of special advocates to test the closed material on the defendants' behalves.[515] Considering the Court of Appeal's judgment in *Murungaru* the previous month, Mr Justice Blake rejected the Home Secretary's submission that the appointment of a special advocate would be inappropriate:[516]

> I cannot readily accept that [Lord Justice Sedley] was indicating that a secret hearing of the merits of judicial review claims where national security grounds are relied on which deprive a [defendant] of what he or she would otherwise expect to receive, is the new normal and that only exceptional circumstances would require the appointment of a special advocate. That would be a very dramatic step … and an

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[506] *MH and others v Secretary of State for the Home Department* [2008] EWHC 2525 (Admin).

[507] Schedule 1 to the British Nationality Act 1981.

[508] *MH and others*, n506 above, para 3.

[509] Ibid, para 2.

[510] Para 2.

[511] Ibid.

[512] Ibid.

[513] Ibid.

[514] Ibid.

[515] Ibid, para 7.

[516] Ibid, para 27

advance into uncharted waters contrary to the basic principle that justice is open and *inter partes*.

In cases 'where the essence of the claim is a right to fairness, and a right to be given sufficient information to be able to make realistic representations', said the judge, 'it would seem peculiar if such a claim can be determined by the court secretly'.[517] Looking at each of the defendants' cases, the judge held that two of the defendants, FM and AM, had received sufficient gist of specific allegations 'to be able to make sensible representations'.[518] In the other nine cases, however, Mr Justice Blake directed that a special advocate should be appointed to 'examine, negotiate and if appropriate make submissions about whether further data can be disclosed without damage to the public interest'.[519] In cases where defendants lacked sufficient detail of the allegations against them, this had effectively deprived them of the opportunity to make representations in response.[520] In such cases, the judge held, the assistance of a special advocate 'is likely to be more effective to the court and the claimants than proceeding without one'.[521]

222. In April 2009, the Court of Appeal heard the Home Secretary's appeal against Mr Justice Blake's decision to appoint special advocates in the court below.[522] Remitting the cases back, it held that the proper test for whether a special advocate should be appointed in such cases was 'where it is just to do so, having regard to the requirement that the proceedings must be fair to the claimant and to the Secretary of State'.[523] Among other things, a judge considering the appointment of a special advocate should bear in mind the following principles:[524]

(a) A special advocate should be appointed where it is just, and therefore necessary, to do so in order for the issues to be determined fairly.

(b) Where the material is not to be disclosed and/or full reasons are not to be given to the claimant there are only two possibilities: (a) that the judge will determine the issues,

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[517] Ibid, para 33. See also para 35: 'to conclude … the cases … on secret material, viewed in secret by the judge and one party to the contested proceedings would give rise to precisely the danger that Sedley LJ noted and warned against. The judge would inevitably be seen as descending into the arena and deciding the case without any informed input from the claimant'.

[518] Ibid, para 69.

[519] Ibid, para 68.

[520] Ibid.

[521] Ibid, para 63.

[522] *Secretary of State for the Home Department v AHK and others* [2009] EWCA Civ 287.

[523] Ibid, para 35.

[524] Ibid, para 37(iv),

which may include or be limited to issues of disclosure, by looking at the documents himself or herself or (b) that he or she will do so with the assistance of a special advocate.

(c) The appointment of a special advocate is, for example, likely to be just where there may be significant issues and/or a significant number of documents. The position may be different where there are very few documents and the judge can readily resolve the issues simply by reading them.

(d) All depends upon the circumstances of the particular case, but it is important to have in mind the importance of the decision from the claimant's point of view, the difficulties facing the claimant in effectively challenging the case against him in open court and whether the assistance of a special advocate will or might assist the claimant in meeting the Secretary of State's case and the court in arriving at a fair conclusion.

(e) These principles should not be diluted on the grounds of administrative convenience

In particular, the Court of Appeal disagreed with the Home Secretary's submission that a judge should ever hear ex parte submissions from the government on the closed material in the absence of either counsel for the defendant or a special advocate appointed on his behalf: 'We do not think that it is appropriate for the judge to test and probe the material with the benefit of counsel for only one side'.[525] The Court also observed that 'the less information given to the individual the more likely it is that the judge will conclude that the individual should have the benefit of the assistance of a special advocate'.[526]

The Investigatory Powers Tribunal

223. The Investigatory Powers Tribunal was established under Part 4 of the Regulation of Investigatory Powers Act 2000.[527] Its main function is to hear complaints about surveillance or the interception of communications carried out by the police or the security and intelligence

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[525] Ibid, para 38(ii). See also para 46: 'In our judgment, if the procedure we have identified is adopted, the judge, who is of course entirely independent of the parties, will be able to make an independent decision in order to enable each case to be dealt with fairly. He or she will neither be nor be seen to be in any way partial because the process we envisage will not involve the Secretary of State making submissions to the judge at that stage'.

[526] Ibid, para 47.

[527] Sections 65-70. The IPT consolidated the old Interception of Communications Tribunal (established under the Interception of Communications Act 1985), and the tribunals for the Security Service (established under the Security Service Act 1989). and the Intelligence Services (established under the Intelligence Services Act 1994).

services. It also has exclusive jurisdiction over all proceedings brought against the security and intelligence services under the Human Rights Act.[528]

224. Perhaps by virtue of its unique role in investigating complaints against agencies that work largely in secret,[529] the Tribunal's own procedures bear only a remote resemblance to any kind of open and adversarial system of justice. First, the Tribunal's overriding responsibility is not fairness to a complainant but to carry out its functions:[530]

> in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.

Secondly, the Tribunal cannot disclose to a complainant the identity of any witness before it, any evidence it has received, or even the fact it has held a hearing without first having the consent of the person involved.[531] Thirdly, the Tribunal is under no duty to hold hearings but any hearings it does hold must be in private.[532] In the event that a hearing is held, a complainant may have the opportunity to make submissions, give evidence or call witnesses.[533] However, there is nothing in the Tribunal's rules that *require* it to give complainants this opportunity. Nor are complainants entitled to an *inter partes* hearing, to be present when other parties give evidence or call witnesses.[534] Unlike proceedings before SIAC, there is not even provision for a special advocate to act for a complainant in relation to the closed material. Finally, complainants are only entitled to a reasoned judgment in the event that the Tribunal finds in their favour.[535]

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[528] Section 65(2). See e.g. *A v B* [2009] EWCA Civ 24, in which the Court of Appeal held that a judicial review of the Director of MI5's refusal to allow a former member of the MI5 to publish his memoirs could only be heard by the Tribunal.

[529] The inquisitorial nature of the IPT is reflected in section 67(3), which imposes a duty on it to investigate complaints. See also *B v Security Service,* IPT/03/01/CH, 31 March 2003 at para 28: The Tribunal 'is an independent body established to investigate the substance of such complaints. By virtue of its powers under [the 2000 Act] it is in a different position from an ordinary court or from other tribunals, such as the Information Tribunal, faced with a complaint about the holding of personal data and with an NCND response from the intelligence services to a request for access and disclosure. The Tribunal does not have to accept the NCND response as final or as preventing investigation of the facts by it.

[530] The Investigatory Powers Tribunal Rules 2000 (SI 2000/2665), rule 6(1).

[531] Ibid, rules 6(2)-(4).

[532] Ibid, rules 9(2) and (6).

[533] Ibid, rule 9(3).

[534] Ibid, rule 9(4), which allows for 'separate oral hearings'.

[535] Ibid, rule 13(2): 'When they make a determination in favour of the complainant, the Tribunal shall provide him with a summary of that determination including any findings of fact'.

225. In its first preliminary ruling in 2003, the Tribunal considered a challenge to its 'secretive and one-sided' rules of procedure.[536] The Tribunal accepted that the rule requiring all hearings to be held in private was *ultra vires* on the basis that there was 'no conceivable ground for requiring legal arguments on pure points of procedural law … to be held in private'.[537] The Tribunal also agreed that its preliminary rulings could be disclosed, whatever the outcome.[538] But it held that the other aspects of the Tribunal's procedures, including its sweeping restrictions on disclosure, were necessary in order to prevent breaches of the 'neither confirm nor deny' policy under which the intelligences services operated.[539]

226. Another preliminary ruling in 2004 in *B v Security Service* concerned an MP who had lodged a complaint to determine whether MI5 held 'personal data relating to his activities with ecological groups 15 or more years ago'.[540] The Tribunal considered how it could determine the issue without breaching the Security Service's 'neither confirm nor deny' policy. It ruled that B's right to privacy under article 8 ECHR would only be engaged if the Security Service actually held data on B and that, even if it did, the Tribunal indicated that it might privately determine that the retention of the data was nonetheless justified under article 8(2). In other words, B might only be entitled to know if his personal data was being held by MI5 in a way that amounted to a violation of article 8(2), not whether it held it justifiably or if it even held it at all.[541]

Northern Ireland proceedings

227. Two years after the decision of the European Court of Human Rights in *Chahal*, the Strasbourg Court heard another complaint against the UK concerning fair proceedings in cases involving national security. In *Tinnelly and Sons Ltd and McDuff and others v United Kingdom*,[542] the complainants were a group of contractors in Northern Ireland who had been refused security clearance to work on government contacts. After they brought actions alleging religious discrimination, the Northern Ireland Secretary issued certificates that cited national security concerns as the reason for the refusals, blocking any further inquiry by either the statutory equality bodies or the courts into the allegations of discrimination.

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[536] IPT/01/62 and PIT/01/77, 23 January 2003, para 146.

[537] Ibid, para 171. See also para 172: 'The public, as well as the parties, has a right to know that there is a dispute about the interpretation and validity of the relevant law and what the rival legal contentions are'.

[538] Ibid, para 190.

[539] See e.g. para 161.

[540] *B v Security Service,* IPT/03/01/CH, 31 March 2003, para 3.

[541] Ibid, para 39.

[542] (1998) 27 *EHRR* 249.

228. On appeal to Strasbourg, the Court held that the government had violated the complainants' rights under article 6(1) by issuing certificates that prevented any independent investigation of the reasons why they had been refused security clearance.[543] In the Court's view, it should be possible for such complaints to determined by an independent body 'even if national security considerations are present and constitute a highly material aspect of the case'.[544] The right of access to a court under article 6, said the Court, 'cannot be displaced by the *ipse dixit* of the executive'.[545] Noting various developments, including the use of special advocates before SIAC, the Court repeated its observation in *Chahal* that 'it has been found possible to modify judicial procedures in such a way as to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice'.[546]

229. Since the *Tinnelly* decision, a number of Northern Ireland bodies have been given statutory authority to use secret evidence and appoint special advocates.[547] This includes the Sentence Review Commissioners,[548] the Life Sentences Review Commissioners, [549] Industrial Tribunals,[550] and the creation of an independent tribunal to review national security certificates in discrimination claims.[551]

230. In July 2005, the House of Lords considered an appeal from a prisoner in Northern Ireland named McClean against a decision of the Sentence Review Commissioners to revoke his eligibility for release under the terms of the Good Friday agreement.[552] Among other things, the Commissioners had had regard to a secret intelligence summary about McClean that had been supplied by the Northern Ireland Secretary. Accordingly, a special advocate

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[543] See e.g. para 73: 'the Court notes that at no stage of the proceedings was there any independent scrutiny by the fact-finding bodies … of the facts which led the Secretary of State to issue the conclusive certificates'.

[544] Para 77.

[545] Ibid.

[546] Para 78.

[547] In judicial reviews concerning the Northern Ireland Secretary's refusal to issue firearms certificates, however, the Northern Ireland courts have resisted calls to exercise an inherent jurisdiction to appoint special advocates to enable defendants to challenge the government's secret evidence: see e.g. *Donnelly and another v Northern Ireland Secretary and PSNI* [2007] NIQB 34.

[548] Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 (SI 1998/1859). See also the Northern Ireland (Remission of Sentences) Act 1995, as amended by the Terrorism Act 2000.

[549] Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564).

[550] Para 8 of Schedule 2 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SI 2005/150).

[551] Section 91 of the Northern Ireland Act 1998.

[552] *Re McClean* [2005] UKHL 46.

was appointed to represent him in closed session. McClean nonetheless received a summary of the closed evidence as follows:[553]

> The withheld information relates to intelligence to the effect that if you were released immediately you would be a danger to the public. In particular that you have been involved in paramilitary activities on behalf of the Loyalist Volunteer Force (LVF) both before committal to prison in 1998 and in the period since; that you have sought to retain an involvement in the affairs of the group; and that you will become re-involved in LVF activity upon release from prison

However, the Commissioners made clear that their decision was 'based entirely on the [McClean's] oral evidence at the revocation hearing' and the judgment of Mr Justice Girvan in the prisoner's earlier trial in the Belfast Crown Court.[554] They stressed, moreover, that they had 'taken no account whatsoever' of the material submitted by the Northern Ireland Secretary 'because it was not necessary to do so to reach a decision in this case'.[555]

231. The House of Lords unanimously dismissed McClean's appeal. In particular, Lord Bingham held that the consideration of the secret evidence was not unfair for two reasons. First, although McClean did not see the secret intelligence material, he nonetheless received a gist of it that was sufficient to meet the case against him:[556]

> That notice did not, understandably in the circumstances, identify informants or reveal operational methods. But it can have left Mr McClean in no doubt at all of the substance of the Secretary of State's reasons for believing that the fourth statutory condition was not satisfied in his case: that he had been, was and on release would be involved in the paramilitary activities of an organisation which had recently been specified by the Secretary of State as a terrorist organisation.

Secondly, Lord Bingham held that the use of secret evidence in McClean's case was not unfair because it was plain that the Commissioners' had not relied upon it in reaching their decision. Although he conceded that there were cases in which 'it is hard to understand how a conclusion is justified if material said to have been excluded was not relied on', McClean's case 'is not one of them'.[557]

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[553] Ibid, para 17.

[554] Para 18.

[555] Ibid.

[556] Para 35.

[557] Para 36: 'If, arguably, there is room for surprise, it is not that the … declaration was revoked but that it was ever made'.

232. In 2006, however, another prisoner named Brady brought a judicial review in the High Court of Northern Ireland challenging the decision of the Sentences Review Commissioners to revoke his licence based entirely on secret evidence.[558] Before the Commissioners, a special advocate had been appointed to represent Brady. However, the defendant complained that 'in the absence of specific details or allegations emanating intelligence sources', his instructions to the special advocate 'were based on pure speculation as to what the damaging information was'.[559] Indeed, the Commissioners themselves made clear that, based on the open evidence alone, they did not consider that Brady was likely to breach the terms of his release.[560] Instead, they made clear that their decision to revoke his licence was based on the closed material.[561] Mr Justice Girvan nonetheless dismissed Brady's appeal, on the basis that he had failed to show that the Commissioner's reliance on the secret evidence was outside the statutory scheme.[562]

The Proscribed Organisation Appeals Commission

233. In 2000, the Proscribed Organisations Appeals Commission ('POAC') was created.[563] Established on the same lines as SIAC, including the use of secret evidence and special advocates, the purpose of POAC is to hear appeals against the decisions of the Home Secretary concerning the proscription of groups as terrorist organisations.[564] 45 groups have been proscribed since this general power of proscription was introduced in 2000.[565]

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[558] *Re Brady* [2006] NIQB 37. The defendant was given a gist of the closed material as follows: 'The withheld information relates to intelligence to the effect that you have been and are likely to be concerned in the commission and preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland. In particular you have had and continue to maintain close links with dissident Republican elements and had been involved in serious crime committed by the Real IRA and will become involved in acts of terrorism upon release' (para 7).

[559] Ibid, para 10.

[560] Para 17.

[561] Ibid: 'having fully carefully considered all of the evidence presented in the closed session, the panel took the view that Mr Brady has breached the conditions that he does not support a specified organisation, that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland and that he does not become a danger to the public'.

[562] Ibid, paras 43-47.

[563] Section 5(1) of the Terrorism Act 2000.

[564] Section 3 of the Terrorism Act 2000.

[565] 14 Northern Irish groups were proscribed under previous legislation. The full list of proscribed organisations is available from security.homeoffice.gov.uk.

234. One of those organisations, the People's Mojahadeen Organisation of Iran ('PMOI'), was proscribed by the Home Secretary in February 2001.[566] The PMOI was initially founded in 1965 to oppose the Shah's regime, and its purpose is described as 'the replacement of the existing theocracy with a democratically elected, secular government in Iran'.[567] Although it took an active part in the overthrow of the Shah, it subsequently came into conflict with the fundamentalist regime led by the Ayatollah Khomeini. From 1986 onwards, it was based in Iraq whence it conducted paramilitary attacks against the Iranian authorities until 2001.[568] Since 2001, it has committed itself to the peaceful overthrow of the current Iranian regime.

235. In June 2006, thirty five members of both Houses of Parliament, including five Queens' Counsel and one former Law Lord, applied to the Home Secretary for the PMOI to be deproscribed on the basis that it was not a terrorist organisation within the meaning of Part 2 of the Terrorism Act 2000. POAC described its use of closed hearings and open hearings as 'a fair procedure'.[569] Among other things, it noted that:[570]

> In reaching his decision in response to an application for deproscription, the Secretary of State will inevitably have access to information, material and assessments which will not be known to the relevant applicants and which cannot be disclosed to them. Indeed, given that, as in the present appeal, an application for deproscription can be made by persons other than the organisation or members of the organisation itself, Parliament must have contemplated that the applicants in question may have very little direct knowledge of the organisation's activities and aims.

However, as POAC itself noted, when the Home Secretary came to consider the application for deproscription, he had before him 'only a limited number of documents, namely the Submission, the Application … a draft letter refusing the application for deproscription, and a closed report from [the Joint Terrorism Analysis Centre]'.[571] By contrast, the open material in the appeal, which included 'exculpatory material' disclosed by the Home Secretary to the

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[566] Terrorism Act (Proscribed Organisations) (Amendment) Order 2001 (SI 2001/1261). The PMOI (proscribed under its alternative name, the Mujaheddin-e-Khalq) originally appealed its proscription to POAC in 2001 and by way of judicial review in 2002: see *R (Kurdistan Workers' Party and others) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin).

[567] *Lord Alton of Liverpool and others v Secretary of State for the Home Department* (PC/02/2006, 30 November 2007), para 14.

[568] Ibid, paras 16-18.

[569] Para 63.

[570] Para 108.

[571] Para 132.

appellants, ran to 'some 15 volumes'.[572] POAC not only concluded that the Home Secretary's decision to refuse deproscription was flawed[573] but, in public law terms, perverse, i.e. it was a decision that no reasonable decision maker could have arrived at.[574]

236. The government appealed POAC's decision but it was dismissed by the Court of Appeal.[575] Among other things, the Court noted that, unlike the assessment that an individual is a threat to national security in SIAC cases, 'the question of whether an organisation is concerned in terrorism is essentially a question of fact'.[576] It also had regard to the closed material in the PMOI case but concluded that '[t]he reality is that neither in the open material nor in the closed material was there any reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future'.[577]

Public interest immunity applications

237. As in criminal cases, the issue of public interest immunity ('PII') arises in civil proceedings wherever one party (typically the government) seeks to withhold crucial material from the other party on the grounds that its disclosure would be contrary to the public interest. As we will see in Part 3, one of the first uses of special advocates outside of SIAC was in criminal cases involving PII applications by the prosecution. Although the principles governing PII in civil cases are different from those in criminal proceedings, British courts have also recently begun to appoint special advocates in civil cases to assist with PII questions.

238. For many years, the default common law position was that the courts would not go behind the government's assertion that certain material should be withheld because its disclosure would be contrary to the public interest. This doctrine of Crown privilege (as PII was previously known) was famously set out in the 1942 case of *Duncan v Cammell Laird and Co*.[578] The case concerned a submarine, the HMS Thetis, that had sunk during a test run with the loss of 99 lives. The families of the deceased brought an action in negligence against the

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[572] Para 134. See also e.g. para 360: 'We believe … that this Commission is in the (perhaps unusual) position of having before it all of the material that is relevant to this decision'.

[573] See e.g. paras 338-339.

[574] Para 349: 'the only belief that a reasonable decision maker could have honestly entertained, whether as at September 2006 or thereafter, is that the PMOI no longer satisfies any of the criteria necessary for the maintenance of their proscription. In other words, on the material before us, the PMOI is not and, at September 2006, was not concerned in terrorism'.

[575] *Secretary of State for the Home Department v Lord Alton of Liverpool and others* [2008] EWCA Civ 443.

[576] Ibid, para 43.

[577] Para 53. See also para 57: 'Closed material was also available to the applicant. We have considered that material. It has reinforced our conclusion that the applicant could not reasonably have formed the view when the decision letter was written in 2006 that PMOI intended in future to revert to terrorism'.

[578] [1942] 1 AC 624.

company that built the Thetis, but the case effectively stalled after the Admiralty asserted Crown privilege over various documents relating to its construction. In the House of Lords, Viscount Simon held that 'the principle to be applied in every case is that documents otherwise relevant and liable to production [as evidence] must not be produced if the public interest requires that they be withheld'.[579] Even more significantly, he held that the question of whether disclosure would be contrary to the public interest was exclusively for the *government* to decide.[580]

239. It was not until the 1968 case of *Conway v Rimmer*[581] that the House of Lords reversed its earlier ruling. Conway was a former probationary police constable who had been dismissed from the Cheshire police after being acquitted on a charge of stealing a torch from a colleague. He brought an action for malicious prosecution against Rimmer, his former superior, but the Home Secretary asserted Crown privilege over Rimmer's internal police reports about Conway. The House of Lords, however, rejected Lord Simon's conclusion in *Duncan* that the government was the best judge of whether there should be disclosure of such material. As Lord Reid put it, the courts:[582]

> have and are entitled to exercise a power and a duty to hold *a* balance between the public interest, as expressed by a minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice.

It was therefore the responsibility of the courts to determine whether disclosure should be allowed, carrying out a balancing exercise between the public interest in non-disclosure and

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[579] Ibid, per Viscount Simon at 686. He went on to identify two types of privilege: one based on the *content* of the documents, and one based on the documents belonging to a particular *class*. Examples of the latter would be minutes of Cabinet meetings or documents relating to the making of policy by government departments.

[580] Ibid, 638: 'The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced'. See e.g. Wade and Forsyth, *Administrative Law* 7th ed (OUP: 1994) at 686: 'Privilege was claimed for all kinds of official documents on purely general grounds, despite the injustice to litigants. It is not surprising that the Crown, having been given a blank cheque, yielded to the temptation to overdraw'.

[581] *Conway* v *Rimmer* [1968] AC 910.

[582] Ibid, at 952. See also Lord Reid at 940: 'There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done' and 950-951: 'If the minister, who has no duty to balance, says no more than that in his opinion the public interest requires concealment, and if that is to be accepted as conclusive … it seems to me not only that very serious injustice may be done to the parties, but also that the due administration of justice may be gravely impaired for quite inadequate reasons'.

the public interest in disclosure. As Lord Upjohn said, 'the judiciary must regain its control over the whole of this field of the law'.[583]

240. By the 1970s, the term 'Crown privilege' had fallen out of favour and been replaced by the term 'public interest immunity',[584] not least because it was inaccurate. As the House of Lords held in a 1978 case involving the NSPCC, PII principles could apply not only to the disclosure of sensitive information held by the government but also potentially to non-governmental bodies, so long as there was a sufficiently strong public interest in non-disclosure.[585]

241. The law relating to PII developed further in the 1990s following the collapse of the Matrix Churchill trial in 1992 and the Scott Report in 1996.[586] Following Scott's severe criticism of the government's excessive reliance on PII certificates – especially those based on the *class,* rather than the contents, of documents[587] – the Attorney General announced that the government would in future only claim public interest immunity 'when it is believed that the disclosure of a document would cause real harm to the public interest'.[588]

242. Even with these positive developments, however, the process of PII remained inherently one-sided. By its very nature, the process of one party applying to withhold material on public interest grounds from the other party would require at least some *ex parte* submissions, and it would inevitably fall to the judge sitting alone *in camera* to determine the balance between the public interest in disclosure as against the public interest in non-disclosure. Without knowledge of the withheld material, it was obvious that the other party could do no more than make general submissions on the desirability of disclosure. Even before the 1996 judgment of the European Court in *Chahal*, legal academics had mooted the possibility of using novel procedures to increase fairness in the PII process:[589]

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[583] Ibid at 994.

[584] See *R v Lewes Justices ex parte Home Secretary* [1973] AC 388 at 400 per Lord Reid.

[585] *D v NSPCC* [1978] AC 171,

[586] Report *of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions,* by Sir Richard Scott VC (1996). See also Scott, 'The Acceptable and Unacceptable Use of Public Interest Immunity', [1996] Public Law 427 and the decision of the House of Lords in *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274.

[587] Scott, ibid, at 439: 'It is … unacceptable for PII class claims to be made covering such relatively routine and, in terms of 'high policy', unimportant documents as many of those for which protection was sought in the Matrix Churchill case'.

[588] Sir Nicholas Lyell QC, Hansard, HC Debates, 18 December 1996, cols. 949-950.

[589] Ian Leigh, 'Reforming Public Interest Immunity' [1995] 2 Web JCLI. Leigh suggested that the Parliamentary Commissioner for Administration might be an appropriate official to make submissions in such cases.

> Another way of introducing a counter-balance to the government's perspective within the proceedings would be to devise procedures to open up argument as part of the inspection process. Plainly this could not involve the other party to the litigation unless some kind on Chinese wall were to operate between the client and counsel, something of which the courts have disapproved in similar contexts on the grounds that it undermines the professional relationship of trust which should subsist between them … However, an independent person acting as amicus curiae might be able to argue before the court the reasons favouring disclosure, having had sight of the documents…

243. The 'inherent jurisdiction' of the civil courts to appoint a special advocate to look at closed material was first identified by the Court of Appeal in 2000 in *Rehman*.[590] Although that case involved an appeal from SIAC, rather than a PII matter, it seemed likely that if the Court had the inherent power to appoint a special advocate in relation to a substantive appeal, then it could do so in relation to other issues.

244. The issue next arose as part of the long-running litigation over the collapse of the Bank of Credit and Commerce International ('BCCI'). In proceedings in 2002, the defendants sought the disclosure of one of the appendices of the Bingham Report[591] which gave details of the involvement of Security and Intelligence Services in the affairs of BCCI prior to its collapse. The Foreign Secretary, however, certified a number of passages in the appendix, claiming that they were subject to PII. He also claimed that some of the material was barred by statute from being disclosed, although the statute was never publicly identified.[592] In the High Court, Mr Justice Tomlinson was invited by the defendants to consider the appointment of a special advocate to assist him in considering the Foreign Secretary's statutory claim. However, the judge – who accepted the Foreign Secretary's claims that the source of the exemption should not be identified[593] – said that he 'did not consider that [he had] the power to direct disclosure of the material to any special counsel who might be appointed'.[594] Oddly, the appointment of a special advocate in relation to the PII claim was apparently not considered.

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[590] See n154 above.

[591] *Inquiry into the Supervision of the Bank of Credit and Commerce International,* by Sir Thomas Bingham (1992).

[592] *Three Rivers Council and others v Bank of England* [2002] EWHC 2735 (Comm), para 6.

[593] Ibid, para 6. The judge's ruling on this point suggests that the passages in question contained intercept material: see section 17 (1)of the Regulation of Investigatory Powers Act 2000 which prohibits any reference in any legal proceedings that would 'disclose' or even 'suggest' the existence of an intercept warrant under Part 1 of the Act.

[594] Ibid, para 13.

245. In the 2006 case of *Al Rawi*,[595] which concerned the government's then-refusal to negotiate with the US government for the return of three British residents detained in Guantanamo Bay, a special advocate was appointed in proceedings before the Court of Appeal but was not called upon.[596] The Court noted that the government had put forward closed material but that it had 'not been necessary to refer to or rely on this material' and the case proceeded 'without any regard being paid to it'.[597] Thus the issue of disclosure did not arise.

246. It was not until the 2008 case of Binyam Mohamed,[598] another British resident held in Guantanamo, that special advocates were actually used in civil proceedings to assist the Divisional court in determining the Foreign Secretary's PII claims in that case.[599] At the time judicial review proceedings began in May 2008, Mr Mohamed was still detained in Guantanamo Bay where he was facing the prospect of trial before military commission on charges of conspiracy.[600] The main issue in the case was whether the Foreign Secretary was obliged to disclose to Binyam Mohamed's lawyers certain information and documents held by the British government, including its involvement in his detention and interrogation in Pakistan by US officials, and his subsequent rendition to Morocco – information which was at least relevant to his forthcoming trial and which might prove to be exculpatory.

247. At first instance, most of the material provided to the Divisional Court was closed, and the special advocates appointed to represent Mr Mohamed made submissions and cross-

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595 *R (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and others* [2006] EWCA Civ 1279.

596 There is no reference in either the Divisional Court judgment ([2006] EWHC 972 Admin)or the earlier grant of permission by Collins J ([2006] EWHC 458 Admin) to the appointment of a special advocate prior to this.

597 Ibid, para 56. The Court said that it had seen the closed evidence 'for the purpose of giving directions in relation to it'.

598 The first judgment in the Binyam Mohamed case was handed down in August 2008: *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin). There have been at least three subsequent rulings by the Divisional Court and the matter is ongoing.

599 Ibid, para 52: 'Closed witness statements were … provided by Witness A and Witness B, together with certain other closed material. The Home Secretary provided a certificate on 11 July 2008 claiming public interest immunity for the documents and the identities of Witness A and Witness B. The reasons for the claim were that there would be serious damage to the national security if the documents were disclosed to [the defendant] or his lawyers or in open court. In the light of the provision of this closed material, Special Advocates … were appointed on behalf of [the defendant]'. See also para 59: 'We made this judgment in draft together with the closed judgment available to the Foreign Secretary and the Special Advocates on Wednesday 13 August 2008, so that, in accordance with the Order of Sullivan J of 20 June 2008, (1) the Foreign Secretary could consider, after advice from [MI6] and [MI5] (if necessary), whether there were any matters in the open judgment which he considered would be contrary to the public interest to disclose and (2) the Special Advocates could consider whether there were matters in the closed judgment the disclosure of which would not be contrary to the public interest'.

600 Mohamed was originally charged on 7 November 2005 but those charges were suspended following the 2006 Supreme Court judgment in *Hamden v Rumsfeld* 548 U.S. 557.

examined Security Service witnesses in closed proceedings.[601] In its open judgment handed down in August 2008, the Divisional Court held that the Foreign Secretary was indeed under a duty to disclose the requested information,[602] not least because it had facilitated Mohamed's interrogation in Pakistan.[603] The proceedings were adjourned, however, pending (among other things) a decision by the Foreign Secretary on whether further PII claims would be made in respect of the material to be disclosed. In a closed judgment of 33 pages, the Divisional Court also analysed the closed evidence.[604] A second judgment was handed down a week later, indicating the further involvement of the special advocates in the PII process.[605]

248. In October 2008, a third judgment from the court revealed that portions of its first open judgment had been redacted at the request of the government because of concerns that it would harm the intelligence sharing relationship between the UK and the US.[606] It invited submissions from the media as to whether the redacted portions should be restored. In early February 2009, the Divisional Court handed down its fourth ruling in which it considered whether to make public the redacted parts of its first open judgment. The issue, it said:[607]

> is not the balance between the public interest and fairness to a litigant by making material available to him to enable a fair trial to take place (as has been the position in most cases …). It is a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability.

However, the Divisional Court heard argument from the special advocates that public interest immunity could not be invoked 'to prevent disclosure of evidence of serious criminal misconduct by officials of the United Kingdom'.[608] It also noted the evidence of the Editor of the Law Reports that:[609]

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[601] The open part of the cross-examination of Witness B by Binyam Mohamed's lawyer on 29 July 2008 was subsequently made public: see www.bailii.org/ew/cases/EWHC/QB/2008/B23.html.

[602] See e.g. n598 above, para 147(xii): 'To deny him [disclosure] at this time would be deny him the opportunity of timely justice in respect of the charges against him, a principle dating back to at least the time of *Magna Carta* and which is so basic a part of our common law and of democratic values'.

[603] Ibid, para 147(vi).

[604] See *Binyam Mohammed (No 3)* [2008] EWHC 2519 (Admin) at para 6.

[605] *Binyam Mohamed (No 2)* [2008] EWHC 2100.

[606] See, n604 above, paras 7, 11, 56-57. The judgment also noted an annex to the third judgment that had been kept private at the request of all parties. That annex was subsequently made public as *Binyam Mohamed (No 5)* [2009] EWHC 571 (Admin), detailing a plea bargaining agreement.

[607] *Binyam Mohamed (No 4)* [2009] EWHC 152 (Admin) at para 18 per Thomas LJ.

[608] Ibid, para 24.

[609] Ibid, para 16.

there has been a marked increase in the number of hearings held in secret, with the court being closed to law reporters and the press; consequently they have often been denied the opportunity of making submissions.

249. Although the Divisional Court rejected the special advocates' submission that there was no public interest immunity in material that showed criminal wrongdoing by British officials, it nonetheless accepted the submission of the special advocates and others that, in carrying out the PII exercise, 'the balance comes down firmly in favour of making the redacted paragraphs public'.[610] It ultimately concluded, however, that the Foreign Secretary's submission that disclosure would cause 'real and serious damage' to the government's intelligence-sharing arrangements with the US meant that there was a greater public interest in non-disclosure, at least for the time being.[611]

250. Less than three weeks after the Divisional Court's fourth judgment, Mr Mohamed was released from Guantanamo Bay and returned to the UK. In March 2009, the Attorney General announced a criminal investigation into allegations that British officials were complicit in his previous torture.[612] In April 2009, the Court of Appeal issued its judgment in *Secretary of State v AHK and others*.[613] Although the immediate facts concerned the appointment of special advocates in appeals against nationality decisions, the Court laid down a series of principles relevant to the appointment of special advocates in PII applications in civil cases generally. These principles are set out in the section on immigration proceedings above.

PART 3: SECRET EVIDENCE IN CRIMINAL CASES

251. Despite its rise and spread in civil cases over the past twelve years, English criminal law has – for the most part – remained free of secret evidence.

252. The rules of evidence have, of course, always been much stricter than in civil cases, although the past decade has seen a relaxation of many of the traditional exclusionary rules, such as hearsay, evidence of bad character, and so forth.[614] Despite the government's willingness to legislate to enable secret evidence to be used in other areas, however, any

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[610] Ibid, para 33.

[611] Ibid, paras 106-107.

[612] Written ministerial statement, Baroness Scotland of Asthal QC, Hansard, 26 March 2009, col WS51. In early May, the Divisional Court heard further submissions concerning the PII material, see e.g. BBC News, 'UK judges reopen Guantanamo case', 8 May 2009.

[613] See n522 above.

[614] See e.g. Part 11 of the Criminal Justice Act 2003.

suggestion that the basic guarantees of a criminal trial might be weakened for the sake of combating terrorism have been strongly resisted. When in February 2004, the Home Secretary David Blunkett floated the idea of holding criminal trials without juries in terrorism cases using secret evidence, six special advocates wrote a letter to *The Times* to make clear they would have no part in such a system:[615]

> We are convinced that both basic principles of fair trial in the criminal context and our experience of the system to date make such a course untenable. It would contradict three of the cardinal principles of criminal justice: a public trial by an impartial judge and jury of one's peers, proof of guilt beyond reasonable doubt, and a right to know, comment on and respond to the case made against the accused. The special advocate system is utterly incapable of replacing these essential fundamentals of a fair trial. An unfair trial determining guilt is not something we could be associated with.

In February 2007, Sir Ken Macdonald QC, the Director of Public Prosecutions between 2003 and 2008, strongly rejected the idea that the fight against terrorism required changes to the criminal trial: 'trials should be routinely open and reported before independent and impartial tribunals. So we can't have secret courts, we can't have vetted judges, and we can't have secret justice'.[616] And, as Lord Brown said in October 2007 in his judgment in *MB*, the right to a fair hearing is 'not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control'.[617] Whatever changes might be tolerated in civil cases, the right of a defendant to know the evidence against him in criminal cases has been preserved.

253. The rules of evidence are just some of the guarantees of a criminal trial to prevent an accused from being wrongly convicted. Unlike in almost all civil cases, the tribunal of fact in serious criminal cases is a jury rather than a judge. There is a much greater entitlement of defendants in criminal cases to the disclosure of unused material than there is in civil cases, as well as a much broader entitlement to legal aid. And the provisions of article 6(3) ECHR that relate specifically to criminal cases are more detailed and explicit than the more general provisions of article 6(1).

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[615] Letter from Nicholas Blake QC, Andrew Nicol QC, Manjit Gill QC, Ian Macdonald QC, Rick Scannell and Tom de la Mare to the Times, 7 February 2004. See also 'Lawyers attack Blunkett terror plan', *The Guardian*, 7 February 2004. See also e.g. Nicholas Blake QC, evidence to the Joint Committee on Human Rights, 12 March 2007, Q40: 'Let me make plain that a Special Advocate does not ensure a fair trial. That is absolutely impossible. Proceedings with a Special Advocate are not a fair trial so suggestions at one stage in 2002 that we might have criminal trials conducted in secret with Special Advocates is completely impossible, contrary, in my view, to the fundamental norm of fair trial values'.

[616] 'Security and Rights', speech to the Criminal Bar Association, 23 January 2007.

[617] [2007] UKHL 46 at para 91.

254. For these reasons, the use of secret evidence has made far fewer inroads into the criminal law over the last twelve years than in civil cases. However, it has not been entirely kept free: closed material is used in pre-charge detention hearings in terrorism cases, prosecutors and judges may consider the bearing that inadmissible intercept material has on the facts in a case, and there has been a veritable explosion in the number of anonymous witnesses – a practice that was for centuries viewed as beyond the pale but which has now been sanctioned by Parliament.

255. There have also been marked departures from the principles of open justice in a number of terrorist trials. While closed criminal trials do not involve the use of secret evidence, as such, it is still a matter of grave concern that the media and the public are prevented from knowing all the facts that have led to several people being convicted of extremely serious criminal offences.

256. A major positive development that has – unwittingly – emerged from the use of secret evidence in civil cases has been the introduction of special advocates in criminal cases to represent the interests of an accused during *ex parte* applications by the prosecution to withhold relevant unused material on public interest immunity (PII) grounds. Unlike civil cases involving secret evidence, there is no suggestion of the unused material being used against the defendant. It can, however, be vitally important for it to be disclosed in order for the defendant to receive a fair trial. The appointment of a special advocate in PII applications can be of major assistance to the defence. However, as the most recent review of disclosure by the Crown Prosecution Inspectorate has shown, there is good reason to believe that large amounts of relevant material is wrongly being withheld from defendants.

Pre-charge detention hearings

257. Under the Terrorism Act 2000, any person arrested without a warrant on 'suspicion of terrorism'[618] may be detained without charge for up to 28 days.[619] For detention for any period beyond 48 hours, however, judicial authorisation is required. Detention up to a total of 14 days may be authorised by a senior district judge;[620] detention for longer periods (up to the maximum of 28 days) requires the authorisation of a High Court judge. Applications to detain a suspect up to 14 days may be made by either the police or the Crown Prosecution Service

[618] See section 41 and Schedule 8 of the Terrorism Act 2000.

[619] Schedule 8 of the 2000 Act, as amended by section 25(7) of the Terrorism Act 2006. The original limits under the 2000 Act was 7 days. This was increased to 14 days by section 306 of the Criminal Justice Act 2003 and to 28 days by the 2006 Act.

[620] However, the maximum individual period a district judge may authorise (i.e. before fresh authorisation is required) is 7 days.

(CPS), most applications for authorisation are now handled by the CPS's Counter-Terrorism Division from the outset.[621]

258. The procedure in pre-charge detention hearings is governed by Schedule 8 of the 2000 Act. Among other things, it allows the judge to exclude the defendant and his lawyers 'from any part of the hearing'.[622] It also permits the police and CPS to apply *ex parte* to the judge for permission to withhold information from the defendant and his lawyers.[623] The judge may authorise non-disclosure where he is satisfied that there are reasonable grounds to believe that disclosure of the information would result in interference with ongoing terrorism investigations, the recovery of property, or harm to others.[624]

Ward v Police Service of Northern Ireland

259. These restrictions on disclosure were considered by the House of Lords in the 2007 case of *Ward v Police Service of Northern Ireland*.[625] Ward was an employee of the Northern Bank in Belfast who had been taken by armed men on the morning of December 2004, while his family were held hostage, and forced to participate in the bank's robbery of more than £26 million. The Police Service of Northern Ireland alleged that the IRA had been behind the robbery. The following November, Ward was arrested under the Terrorism Act on suspicion of involvement in the robbery.

260. After Ward had been detained for 24 hours, the police were granted a succession of extensions on the basis that 'further time was needed to complete the process of interviewing Mr Ward, to secure and preserve evidence and to question Mr Ward about it'.[626] The first extension was for 3 days, the second was for 60 hours. On the sixth day of Ward's detention, the police applied for a third extension of his detention, this time for an additional 48 hours. At the pre-charge detention hearing, the police gave evidence that they had reached a 'crucial stage' of the interview process, that Ward had been questioned on nine topics already, but that there were 'five further topics of questioning' that were outstanding.[627] The judge asked what the topics were, to ensure that the police were not simply requestioning Ward on matters covered previously. On the request of the police, the judge excluded Ward and his solicitor

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[621] All applications for pre-charge detention beyond 14 days are made by the CPS.

[622] Para 33(3) of Schedule 8.

[623] Para 34.

[624] The full grounds are set out in paras 33(2) and (3).

[625] [2007] UKHL 50.

[626] Ibid, para 6.

[627] Ibid, para 7.

from the hearing to sit in closed session which lasted 'nine or ten' minutes.[628] The judge then allowed Ward and his solicitor back in, but they were not told what had occurred in the closed session. After further cross-examination and submissions, the judge said that the police 'had provided him with information about the five outstanding topics and that he was more than satisfied that it was essential for the police to question Mr Ward about them', and granted the extension.[629] Two days later, Ward was charged with armed robbery.

261. Immediately following the pre-charge detention hearing, Ward launched an unsuccessful application for judicial review of the judge's decision to exclude him and his lawyer from the pre-charge detention hearing, and to withhold the information that was discussed there. On appeal to the House of Lords, the Law Lords noted that 'at first sight, it would seem obvious that the release of information of that kind is necessary if the person to whom the application relates is to have a fair hearing'. However, the Lords also noted that the context of the hearing was that the police were seeking more time to ask Ward questions and Ward was asking to know what those questions were:[630]

> the ground for the application was the need for further time to obtain relevant evidence from Mr Ward himself by questioning him. He was entitled to be told that this was the ground for the application. But there is no rule of law which requires the police to reveal to a suspect the questions that they wish to put to him when he is being interviewed. Nor are they required to reveal in advance the topics that they wish to cover, even in the most general terms, in the course of an interview. In some cases providing these details in advance will not prejudice their inquiries. But in others it may well do so. This is a judgment that must be left to the police. The interview must be conducted fairly. But advance notice of the topics to be covered is not a pre-requisite of fairness.

In such circumstances, the Law Lords reasoned, it was for the defendant's benefit – not to his detriment – that Schedule 8 allowed the judge to sit in closed session to examine the police's grounds for seeking further detention.[631] However, the House of Lords also conceded that 'there may be cases where there is a risk that the power [to withhold evidence] will operate to

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[628] Ibid, para 8.

[629] Ibid, para 8.

[630] Ibid, para 22.

[631] Ibid, para 28: 'the judicial authority's need to scrutinise may trespass upon the right of the police to withhold from a suspect the line of questioning they intend to pursue until he is being interviewed. If it does, it will not be to the detained person's disadvantage for him to be excluded so that the judicial authority may examine that issue more closely to see whether the exacting test for an extension that para 32 lays down is satisfied. The power will not in that event be being used against the detained person but for his benefit'.

the detained person's disadvantage'.[632] In such cases, the judge 'must always be careful not to exercise it in that way'.[633]

262. The Law Lords' decision in *Ward* is odd (to say the least) for at least two reasons. First, it is difficult to see what benefit there could have been in the police keeping secret from Ward the questions they were going to ask him in any event, still less use that secrecy as a basis for detaining him for longer. If they were keen to have his answers, after all, one would have thought that disclosing the questions would have been the best way to obtain them.

263. Secondly, although the House of Lords was clearly mindful of the contraversial nature of the pre-charge detention powers,[634] the compatibility of the provisions of Schedule 8 with article 5 ECHR or even common law fairness was nowhere discussed. While the Law Lords cannot be blamed for this – courts can only decide the issues that are raised before them and, for reasons unknown, Ward's lawyers did not raise compatibility with article 5 as an issue – their judgment in *Ward* was nonetheless sorely lacking in context. It is, after all, plain that Schedule 8 enables police and prosecutors to present to the judge in closed session not just their line of questioning but also the full range of sensitive intelligence material justifying their suspicions about the defendant's involvement in terrorism. Article 5 requires that defendants be able to challenge the legality of their detention, and yet Schedule 8 allows defendants to be denied access to the very material upon which that detention may be authorised.[635] The absence of any direct reference in *Ward* of the requirements of article 5 in this context meant that the House of Lords' analysis was hopelessly skewed.

264. The narrowness of the House of Lords decision in *Ward* also compares unfavourably with its 1947 ruling in the case of *Christie v Leachinsky*,[636] in which it had held that merely being arrested and held overnight without charge was a breach of the common law rule that any person arrested must be notified of the charge against him. As Lord Simonds said, 'if a man is to deprived of his freedom, he is entitled to know the reason why'.[637] Otherwise, he asked, 'how can the accused take steps to explain away a charge of which he has no

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[632] Ibid, para 29.

[633] Ibid.

[634] See e.g. ibid, para 4: 'Detention without charge for such extended periods is, of course, a very serious invasion of a person's article 5 Convention right to liberty'.

[635] In *R (Hussain) v The Honourable Mr Justice Collins* [2006] EWHC 2467, the Divisional Court held that an extension hearing before a High Court judge was a defendant's opportunity to 'canvas issues concerning the lawfulness of continued detention and to obtain a judicial ruling on those issues' and that '[t]he requirements of Article 5(4) ' in the present case 'were satisfied in that way by the procedure before [the High court judge]' (para 26 per Richards LJ).

[636] [1947] AC 573.

[637] Ibid, 592.

inkling?'[638] In Ward's case, the prosecution against him ultimately collapsed in October 2008 and he was aquitted on all charges.[639]

The Counter-Terrorism Bill

265. The nature of hearings under Schedule 8 was also an issue in the public debate over the government's proposal to extend the maximum limit of pre-charge detention to 42 days. Throughout debates on the Counter-Terrorism Bill, the government claimed that extension hearings were 'fully adversarial',[640] and this was supported by the then-Director of Public Prosecutions Sir Ken Macdonald QC who described them as 'very adversarial'.[641] In evidence to the Joint Committee on Human Rights in late 2007, however, Sue Hemmings, the head of the CPS's Counter-Terrorism Division, acknowledged that she was aware of at least two terrorism investigations in which evidence had been withheld from the defendant.[642] Her suggestion that the power to exclude defendants was nonetheless used infrequently was, moreover, contradicted by evidence from another witness, defence barrister Ali Bajwa:[643]

> I cannot recall a case – and I was involved in the three investigations, [Operations] Rhyme [the Dhiren Barot plot], Vivace [the July 21 plot] and Overt [the airline plot]– in which there was not a closed hearing of some kind. Now, that does not tally with what I am hearing from [the CPS witness], but there has been a closed hearing of some

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[638] Ibid, 593.

[639] See e.g. BBC News, '£26m bank robbery trial collapses', 9 October 2008.

[640] See e.g. Evidence of David Ford, Head of the Counter-Terrorism Bill Team to the Joint Committee on Human Rights, 20 September 2007, Q26: 'the [pre-charge detention] hearings that we have are already full adversarial hearings'. See also the letter from Tony McNulty MP, Minister of State for Policing, Security and Community Safety, to the Chairman of the JCHR, published in JCHR report *Counter-terrorism policy and human rights: 42 days* (HL 23/HC 156, 14 December 2007) describing extension hearings as 'fully adversarial'; the Government response to the Joint Committee on Human Rights 20th report of the 2007-8 session: 'We believe that proceedings for extensions to detention are already fully adversarial, with the suspect entitled to legal representation and to be present at the open part of the hearing. The information provided to the suspect both in writing in advance, and during the proceedings through representations and evidence is extensive and the suspect's lawyer is able to cross-examine the investigating officer to challenge the application rigorously'.

[641] Evidence to the House of Commons Home Affairs Committee, 21 November 2007:' I have not conducted one of these hearings but Miss Hemming has, head of our Counter-Terrorism Division, who sits behind me, as have senior members of her staff. Our assessment of these hearings is that they are very adversarial, the judges are extremely challenging, the hearings can last as much as a day on occasion and they are very hard-fought, hard-argued'.

[642] Evidence to the Joint Committee on Human Rights, 5 December 2007, Q171: 'I made some inquiries about this because the police, obviously, make most of the hearings up until the 14th day, and then we make them since. In the 17 applications that we have made from 14 to 28 days, there was one. I spoke to two very experienced senior investigating officers from the police and they have been making these applications since February 2001. I am told that each of them have made two applications for the judge to hear evidence with the suspect excluded. So I do not have statistics, but obviously those two pieces of information I have found out'.

[643] Ibid, Q172.

> kind. Plainly, I do not know what was discussed and how much evidence, if any, was called at the closed hearing, but we are told routinely, before we enter the room: 'We have been to see the judge in private and we have had a private hearing'. What was discussed we do not know.

He described the experience of representing one defendant, identified as P, who had been detained without charge during Operation Overt:[644]

> After seven days in detention, the police applied to extend P's detention. I knew that no evidence to incriminate P in any terrorism offence had been put to him in interview in those seven days. At the hearing of the application for further detention, I asked the officer whether there was any evidence which pre-dated P's arrest that had so far not been put to him in interview (if the answer was 'no', the officer would have admitted that my client was arrested and was being detained on no evidence; if 'yes', the police would found it difficult to persuade the judge that, having withheld material evidence for seven days, the investigation was being conducted diligently and expeditiously). In the event, the officer said that could not answer the question in the presence of the suspect and his representative. I pressed the officer to answer the question simply with a 'yes' or a 'no' but he would not. The judge decided that it was necessary to detain P for a further seven days and the investigation was being conducted diligently and expeditiously.

266. The government, however, continued to stress the adversarial aspects of pre-charge detention hearings in its discussion papers on the 42-day proposal. One Home Office paper claimed that applications to authorise pre-charge detention were 'usually strenuously contested':[645]

> The [police officer seeking the application] may be questioned by the defence solicitor about all aspects of the case. The judiciary examine every application very carefully and not all have been granted for the length of time requested. In the alleged airline plot, for example, one application was granted for less than the time requested.

However, the fact that the judiciary sometimes refuse to authorise longer periods of pre-charge detention hardly shows that the process is a properly adversarial one. After all, judges sitting alone regularly refuse *ex parte* applications and nobody would suggest that an *ex parte*

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[644] Memorandum from Ali Naseem Bajwa to the Joint Committee on Human Rights, 3 November 2007, published in the Joint Committee's report on the 42 day proposal, n640 above.

[645] *Options for pre-charge detention in terrorism cases* (Home Office, July 2007), pages 5-6.

procedure is therefore adversarial. Another Home Office paper – this one prepared by the CPS – appeared to give the concept of a 'fully adversarial' hearing new meaning:[646]

> The High Court Judge will need to be persuaded that [the grounds for authorising detention are made out]. This can be done with both open source material which is presented in the presence of the defence *and sensitive material which is presented in the absence of the defence*. The defendants, who are legally represented, are presented with a document setting out the state of the enquiry thus far and the future non-sensitive lines of enquiry, and can cross examine the senior investigating officer at length to test the strength of the application. (*please note – this is not a legal entitlement, but is done to assist the court and speed up the process*.) They are also allowed to make submissions arguing against the application.

So, while defendants in extension hearings may sometimes be given a summary of the evidence or the opportunity to cross-examine the investigating officer, the paper was careful to stress that these were not 'legal entitlements' or – to use the more common term –rights of any kind.

267. Despite its acknowledgment that defendants in extension hearings were not actually entitled to equality of arms, the CPS maintained that the 'sensitive material' used in closed hearings in detention cases was, in any event, different in kind from the material used in other kinds of closed proceedings:[647]

> All I can say is that I am told that these hearings that are in private are very, very different from the sort of hearings that we hear about in other types of procedures that are non-criminal, and that they do form a relatively small part of the application. It is not a situation where the police go to the judge and tell him all of the intelligence and hearsay information that they have on an individual and then proceed to make a short application in public; it is a very, very different process. That is what I am informed.

When asked, however, if intelligence material was ever used in pre-charge detention hearings, the head of the CPS's Counter-Terrorism Division admitted that she did not know.[648] And it

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[646] *Scrutiny of pre-charge detention in terrorism cases* (Home Office, October 2007), paras 5-6. Emphasis added.

[647] Evidence of Sue Hemming, Head ot the Counter-terrorism Division of the CPS to the Joint Committee on Human Rights, n642 above, Q178.

[648] Ibid, Q179: 'Again, I am afraid I do not have sufficient experience of those sorts of hearings to answer that question for you. From the information that I was given by the officers I spoke to, it was not that type of information, but I obviously cannot answer that about every hearing'. See also the evidence of the same witness to the House of Commons Public Bill Committee on the Counter-Terrorism Bill: 'I have seen the notes and work put into warrants of further detention by my lawyers, but I have not personally conducted one' (22 April 2008, col 55).

would be extremely surprising if such material were not used, if not by the CPS then at least by the police when seeking detention up to 14 days. After all, the main justification for introducing extended pre-charge detention in the first place was the need for investigators to have sufficient time to gather *admissible* evidence against suspects in terrorism cases.[649] The reasonable suspicion that the police need to arrest a suspect under section 41 of the 2000 Act may be founded upon material that is either inadmissible (e.g. intercept material, hearsay) or technically admissible but which the authorities are unwilling to use as evidence because it would imperil undercover agents, informants, or intelligence methods. As the head of the Metropolitan Police's Anti-Terrorism Branch claimed in 2007, 'at the time of [his] arrest there was not one shred of admissible evidence against [Dhiren] Barot'.[650] Although the test for authorising or extending detention under Schedule 8 does not require the judge to consider whether the police have reasonable grounds for suspecting the defendant of involvement in terrorism,[651] it is obvious that the easiest way to satisfy a judge that continued detention is necessary for the purpose of an ongoing terrorism investigation would be for the police to submit the closed material justifying their suspicions concerning the defendant.[652]

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[649] See also e.g. Letter from Anti-Terrorist Branch of the Metropolitan Police, 5 October 2005, printed as an appendix to the Home Affairs Committee, *Terrorism Detention Powers* (HC 910: June 2006): 'Public safety demands earlier intervention, and so the period of evidence gathering that used to take place pre-arrest is often now denied to the investigators. This means that in some extremely complex cases, evidence gathering effectively begins post-arrest, giving rise to the requirement for a longer period of pre-charge detention to enable that evidence gathering to take place, and for high quality charging decisions to be made'. See also e.g. the submissions of the UK government before the European Court of Human Rights in *Brogan v United Kingdom* (1988) 11 EHRR 117 at para 56: 'The [UK] government have argued that in view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was an indispensable part of the effort to combat that threat, as successive parliamentary debates and reviews of the legislation had confirmed …. In particular, they drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism. Time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces'.

[650] Deputy Assistant Commissioner Peter Clarke, Colin Cramphorn Memorial lecture, 24 April 2007. Barot subsequently pleaded guilty to conspiracy to murder and was sentenced to life imprisonment.

[651] The test under para 32 of Schedule 8 is whether the defendant's continued detention is necessary to enable the police to continue their investigations (by reference to various detailed grounds that include preventing the destruction of evidence, the recovery of property or preventing a terrorist attack, etc) and that the police investigation is being carried out 'diligently and expeditiously'.

[652] See e.g. evidence of Sue Hemming, n642 above, Q181: 'There is nothing specifically in the legislation, as far as I can see, that requires the judge to actually look at that evidence, but the reality of the situation is that when you are putting forward the case to actually extend, the applications change in nature, depending on the stage of the investigation …. So at the stage, certainly, when the CPS is involved there are some quite detailed discussion of what already exists and what sort of evidence the person is being held on, but there is no actual requirement for the court to ask the police to justify on what basis they arrested, but I would say that a lot of that information comes out as the applications are being made during the investigation'.

268. The use of closed material was nonetheless defended by the CPS on the basis that it is only used to detain suspects while investigations are ongoing[653] – there was no suggestion that secret evidence would ever be used against them at trial, if and when charges were eventually brought. What this ignores is that each person is not only entitled to an adversarial *trial* but to adversarial proceedings *whenever* they are detained, in order to challenge the legality of their detention: this is the ancient common law guarantee of habeas corpus and, since 1950, the guarantee of article 5(4). As the Grand Chamber of the European Court of Human Rights held in February 2009:[654]

> in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him.

However, the opportunity to challenge effectively the allegations against him is precisely what a defendant in a pre-charge detention hearing lacks, as the following exchange makes clear:[655]

> **The Earl of Onslow:** Mr Bajwa, in your experience, how precisely are terrorism suspects told of the grounds for suspicion and the evidence against them when they are arrested under section 41 of the Terrorism Act?
>
> ***Mr Bajwa:*** They are not.
>
> **Earl of Onslow:** They are not?
>
> ***Mr Bajwa:*** At the time of arrest they are told that they are suspected of being a terrorist or suspected of being involved in the commission, preparation or instigation of a terrorist offence.

269. Although the 42-day proposal was eventually dropped from the Counter-Terrorism Bill after the House of Lords voted 309-118 against the measures in October 2008, the use of pre-charge detention in terrorism cases continues. Of the twelve Pakistani students arrested in North-West England on suspicion of terrorism on 8 April, for instance, one was held for three

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653 Ibid, Q178: 'One thing that has struck me about this is that we are, obviously, dealing with an investigation—we are not dealing with a trial process. So, obviously, the police are entitled to carry out an investigation and to be given the right to investigate properly rather than giving full disclosure of absolutely everything to the suspect whilst they are investigating and while they are questioning'.

654 Note 104 above, para 204.

655 Evidence to the Joint Committee on Human Rights, 5 December 2007, Qs 189-190.

days, nine were held for 14 days, and two were held for 15 days.[656] None of the men were charged.

Anonymous witnesses

270. As discussed in Part I of this report, the right to confront one's accuser is an ancient right. It is, moreover, one that has been respected even in the face of 'extreme' witness intimidation.[657] At the height of the Troubles in Northern Ireland, Lord Diplock was tasked with investigating what measures could be taken to 'deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities'.[658] His report found that intimidation of prosecution witnesses was 'the main obstacle' to dealing 'effectively with terrorist crime in the regular courts of justice'.[659] Nonetheless, Lord Diplock concluded that 'this problem of intimidation cannot be overcome by any changes in the conduct of the trial', and that, among other things, the right to cross-examine adverse witnesses was a 'minimum requirement' for a criminal trial.[660] Even the abolition of the right to trial by jury in terrorism cases – one of Diplock's other recommendations[661] – was seen as a less damaging to the rule of law than removing the right of the accused to confront his accuser.

271. In the 1986 case of *R v Hughes*,[662] a majority of the New Zealand Court of Appeal held that an undercover police officer could not testify as a witness without his name and address being disclosed to the defence. One member of the majority, Sir Ivor Richardson, famously cautioned that witness protection measures, however well-intentioned, could not be allowed to trump the basic right of confrontation:[663]

> We would be on a slippery slope as a society if on a supposed balancing of the interests of the State against those of the individual accused the Courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial. Today the claim is that the name of the witness need not be given: tomorrow, and by the same logic, it will be that the risk of physical identification

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[656] See e.g. 'All 12 men arrested during anti-terror raids released without charge', The Guardian, 22 April 2009.

[657] [2008] UKHL 36 at para 6 per Lord Bingham.

[658] Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland (Cm 5185, December 1972), para 1.

[659] Ibid, para 7(a). See also para 7(c): 'Fear of intimidation is widespread and well founded'.

[660] Paras 7(b) and 20.

[661] Ibid, paras 35-41.

[662] [1986] 2 NZLR 129.

[663] Ibid, 148-149. Emphasis added.

> of the witness must be eliminated in the interests of justice in the detection and prosecution of crime, either by allowing the witness to testify with anonymity, for example from behind a screen, in which case his demeanour could not be observed, or by removing the accused from the Court, or both. *The right to confront an adverse witness is basic to any civilised notion of a fair trial.* That must include the right for the defence to ascertain the true identity of an accuser where questions of credibility are in issue.

The slope that Sir Ivor warned about was, however, precisely what British courts began slipping down shortly afterwards. In the 1990 case of *R v Murphy and another*,[664] the Northern Irish Court of Appeal upheld the decision of the judge presiding over a trial for the murder of two British army officers to allow several witnesses to give evidence behind a screen. This meant that they were visible to the judge and the lawyers on either side but not to the defendants or the public. The lawyers for the defendant did not object to this procedure, however, nor did they seek to challenge the credibility of the concealed witnesses.[665]

272. In a murder trial in the Old Bailey in March 1992, the judge allowed three witnesses to give evidence anonymously on the basis that 'if the wider interests of justice make it necessary for anonymity … then the interests of the defence must be subordinated to those wider interests'.[666] A month later, the Divisional Court upheld the decision of the Watford Magistrates to allow witnesses to a series of alleged assaults to give evidence at the committal hearing using pseudonyms, from behind screens concealing them from the accused (but not their lawyers), and with their voices electronically altered.[667]

273. By 1994, the Court of Appeal upheld the use of anonymity in another trial in the Old Bailey,[668] this time with the witness giving evidence from behind a screen, visible to the defence via video camera, but identified to them only as 'Miss A' of an unknown address. Lord Justice Evans accepted that the right of an accused to see and know the identity of his accusers was 'fundamental', but then said that it could nonetheless be denied, although 'only … in rare and exceptional circumstances'.[669] He then proceeded to set out some of the factors that would favour granting anonymity, including the importance of the evidence, the objective nature of the witness's fear of intimidation, and the need to minimise prejudice to the defendant.

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[664] [1990] NI 306. For an early criticism, see Marcus, 'Secret Witnesses' [1990] *Public Law* 207 at 220-223.

[665] Ibid, 332, 335.

[666] *R v Brindle and Brindle* (31 March 1992, unreported), cited in *R v Davis*, n657 above, at para 13.

[667] *R v Watford Magistrates' Court, ex parte Lenman* [1993] Crim LR 388.

[668] *R v Taylor and Crabb* (unreported, 22 July 1994, Court of Appeal Criminal Division).

[669] Ibid.

274. By the mid-1990s, the practice of courts granting anonymity orders had become somewhat regularised. In 1996, for instance, the Divisional Court upheld an appeal from the Director of Public Prosecutions against the refusal of the Liverpool magistrates court to allow undercover police officers to give evidence without first disclosing their true identities and addresses.[670] And by 2001, the House of Lords had endorsed the use of an affidavit from a witness identified only as CS/1 in an extradition hearing.[671]

275. The process for seeking anonymity orders varied, but inevitably involved a substantial amount of *ex parte* submissions by the prosecution to the judge sitting alone. By their very nature, the defence could not be allowed to test the prosecution's claims that it was necessary to grant anonymity due to a witness's fear of intimidation, without the identity of the witness being disclosed to the defence. In the case of undercover police officers giving evidence psuedonymously, the entire process of granting anonymity orders was dealt with on an *ex parte* basis.[672]

276. Undoubtedly the courts in this period were influenced by the parallel growth of measures to protect vulnerable witnesses in court proceedings, e.g. the provisions of the Youth and Criminal Evidence Act 1999, which allowed for child witnesses to give evidence via video-link. Similarly, the 1988 and 2003 Criminal Justice Acts both made provision for the use of statements from witnesses who are too afraid to attend court.[673] Even though these measures do not involve giving evidence anonymously, they were also departures from the established tradition of witnesses giving evidence in open court. Like the growth of secret evidence in other proceedings, the use of anonymous witnesses developed by analogy with existing statutory exceptions. And, like closed sessions and special advocates, the incidence of anonymous witnesses increased dramatically once the courts had sanctioned their use.

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[670] *R v Liverpool Magistrates' Court, Ex p Director of Public Prosecutions* (1996) 161 JP 43.

[671] *R(Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69.

[672] See Malcolm Swift QC, 'Witness anonymity: a slippery slope', *The Times*, 27 June 2008: 'The public may not appreciate that police applications for witness anonymity were conducted in conditions of secrecy. Prosecutors and policemen were able to see judges privately in the absence of defence representatives, to persuade Judges to grant anonymity on the basis of information that could never be verified or tested and to withhold any information from the defence that might tend to identify the witness'.

[673] See section 23(3)(b) of the Criminal Justice Act 1988 and section 116(2)(e) of the Criminal Justice Act 2003. The scope of the hearsay exception was considered in *R v Horncastle* [2009] EWCA Crim 694.

R v Davis

277. The use of anonymous witnesses was brought to a halt, at least temporarily, by the judgment of the House of Lords in *R v Davis* in June 2008.[674] Davis had been extradited from the United States to stand trial for the murder of two men. The trial judge granted anonymity to three witnesses who had identified Davis as the killer, but who feared for their lives if it became known that they had given evidence against him. The terms of the anonymity order allowed each witness to give evidence under a pseudonym, from behind screens, with their voices distorted. In addition their address and personal details were withheld from the defence, and Davis's counsel was not permitted to ask any question which might enable them to be identified.[675]

278. At trial, Davis denied he was the killer and suggested that the witnesses against him had given false testimony at the behest of his ex-girlfriend. Davis's counsel attempted to pursue this theory in his cross-examination of the anonymous witnesses but, the House of Lords found, 'was gravely impeded in doing so by ignorance of and inability to explore who the witnesses were, where they lived and the nature of their contact with the [accused]'.[676] Davis's account was put to one anonymous witness who may or may have not been his ex-girlfriend but this could not be determined due to the restrictions in place.[677] 'If the jury concluded that she was probably not the former girlfriend', said Lord Bingham, 'they would also conclude that the defence had been based on a false premise'.[678] In other words, the anonymity granted to the witnesses prevented Davis's counsel from being able to test their credibility in cross-examination.

279. In addition to recounting the long history of the common law right to confront one's accuser, the House of Lords also considered the right of an accused to cross-examine the witnesses against him under article 6(3)(d).[679] In *Kostovski v Netherlands*, for instance, the European Court of Human Rights noted that although article 6 did not forbid the use of anonymous informants at the investigation stage, the 'use of anonymous statements as

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[674] [2008] UKHL 36.

[675] Ibid, para 3. In cross-examining the witnesses, Davis's counsel was offered the opportunity to see the witnesses while giving evidence but he 'regarded it as incompatible with the relationship between counsel and client to receive information which he could not communicate to the appellant in order to obtain instructions, and he accordingly submitted to the restriction imposed on the appellant'.

[676] Ibid, para 32.

[677] Ibid.

[678] Ibid.

[679] See page 34 above.

sufficient evidence to found a conviction … is a different matter'.[680] Anonymous evidence was 'irreconcilable' with article 6, especially where the defendant's conviction had been based 'to a decisive extent' on the anonymous statements.[681] 'The right to a fair administration of justice', said the Court, 'holds so prominent a place in a democratic society … that it cannot be sacrificed to expediency'.[682] In the case of *Doorson*, by contrast, the Court rejected a complaint that the defendant had received an unfair trial because the appeal court 'did not base its finding of guilt solely or to a decisive extent on the evidence of' two anonymous witnesses.[683]

280. The House of Lords noted that the Court's requirement that 'no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses',[684] was not the only grounds on which anonymous evidence could breach article 6.[685] As Lord Mance observed in his analysis of the Strasbourg case-law, the use of anonymous evidence had been found to violate article 6 in the 2002 case of *Birutis v Lithuania*,[686] even though the convictions were not based 'solely, or to a decisive extent', on the anonymous evidence.[687] Lord Mance concluded that article 6 would not be satisfied not only where a conviction was based to a decisive extent on anonymous evidence but where anonymity prevented 'effective cross-examination' of the witnesses' credibility.[688]

281. Reviewing the various Court of Appeal decisions since 1990, the House of Lords ruled unanimously that the use of anonymous witnesses breached both the common law right to confront one's accuser and the right to a fair trial under article 6. 'By a series of small steps, largely unobjectionable on their own', Lord Bingham declared, 'the courts have arrived at a

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[680] (1989) 12 EHRR 434 at para 44.

[681] Ibid.

[682] Ibid.

[683] *Doorson v Netherlands* (1996) 22 EHRR 330, para 76.

[684] Ibid, para 25 per Lord Bingham..

[685] Indeed, Lord Mance suggested that – based on the Court's more recent rulings in cases of *Kok v. the Netherlands* (Application No 43149/98, 4 July 2000), *Visser v The Netherlands* (Application No 26668/95, 14 February 2002), and *Krasniki v Czech Republic* (Application No 51277/99, 28 February 2006) – 'it is considerably less certain [that] there is an absolute requirement that anonymous testimony should not be the sole or decisive evidence, or whether the extent to which such testimony is decisive may be no more than a very important factor to balance in the scales' (para 89). However, his suggestion that *Kok* and *Krasniki* do not rule out the use of anonymous evidence even where it is decisive seems to be a somewhat idiosyncratic reading of those judgments.

[686] *Birutis v Lithuania* (Applications Nos 47698/99 and 48115/99, 28 March 2002).

[687] Ibid, para 32.

[688] Ibid, para 96.

position which is irreconcilable with long-standing principle'.[689] Faced with cross-examining anonymous witnesses on the issue of credibility, the defence had been obliged 'to take blind shots at a hidden target'.[690] 'A trial so conducted', Lord Bingham said 'cannot be regarded as meeting ordinary standards of fairness'.[691] Nor was it enough to allow counsel to see the accusers as the trial judge in Davis's case had done, 'if they are unknown to and unseen by the defendant'.[692] In upholding the restrictions on Davis, Lord Bingham said, the Court of Appeal had failed to 'acknowledge that the right to be confronted by one's accusers is a right recognised by the common law for centuries'.[693] Lord Rodger was equally critical:[694]

> it is axiomatic that the common law is capable of developing to meet new challenges. But threats of intimidation to witnesses and the challenge which they pose to our system of trial are anything but new. In theory, the common law could have responded to that challenge at any time over the last few hundred years by allowing witnesses to give their evidence under conditions of anonymity. But it never did - even in times, before the creation of organised police forces, when conditions of lawlessness might have been expected to be far worse than today. Moreover, Lord Diplock saw the common law principle as so fundamental that he felt unable even to recommend that legislation should be passed to interfere with it.

The 2008 Act

282. The government did not share Lord Diplock's restraint. Rather than welcome the House of Lords' judgment in *Davis* as the vindication of an ancient common law right, the Justice Secretary instead described the Law Lords as having identified an 'unsuspected' and 'technical defect in the law', one which the government would shortly remedy.[695] As he told Parliament:[696]

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[689] Ibid, para 29. See also Lord Brown at para 66: 'the creeping emasculation of the common law principle must be not only halted but reversed'.

[690] This phrase – a quote from Lord Hewart CJ in *Coles v Odham Press* [1936] 1 KB 416 at 426 – was also used by Lord Bingham in *Roberts v Parole Board* to describe the task faced by special advocates representing a defendant whom they could not take instructions from: see ibid, para 32 and n385 above.

[691] Ibid.

[692] Ibid.

[693] Ibid, para 34.

[694] Ibid, para 44.

[695] Hansard, HC Debates, 26 June 2008: col 516.

[696] Ibid.

> Anonymous evidence is these days fundamental to the successful prosecution of a significant number of cases, some of which involve murder, blackmail, violent disorder and terrorism. Such cases could be jeopardised if we do not quickly fill the gap created by their Lordships' judgment.

Within three weeks of the judgment being handed down, the Criminal Evidence (Witness Anonymity) Bill was introduced in Parliament, and two weeks after that, the Bill became law.

283. The 2008 Act (as it became) allows for either party to apply to the court for witness anonymity orders. It requires that both parties must be given the opportunity to be heard in relation to an application, but it also provides for ex parte hearings in the absence of the defendant and his lawyer if 'appropriate to do so in the circumstances of the case'.[697] The Act sets out three conditions for the making of an order. It also sets out a number of considerations that the court must have regard to when deciding the conditions are met. The condition is that the measures proposed must be necessary to protect the safety of a witness, another person, prevent 'serious damage to property', or 'prevent real harm to the public interest'.[698] The second is that the measures 'would be consistent with the defendant receiving a fair trial'.[699] And the third is that it is 'necessary to make the order in the interests of justice' because it is both important that the witness testify and the witness 'would not testify if the order were not made'.[700] The considerations include the 'general right' of the defendant in criminal proceedings to know the identity of a witness in proceedings;[701] whether the witness's credibility would be an issue;[702] whether it might be the 'sole or decisive evidence implicating the defendant';[703] whether the witness's evidence could be properly tested 'without his or her identity being disclosed';[704] and whether it would be 'reasonably practicable' to protect the witness's identity by other means.[705]

284. In December 2008, the Court of Appeal considered the Act's provisions for the first time, and made a number of findings.[706] First, the Court held that nothing in the Act

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[697] Sections 3(6) and (7). Notably the provision for ex parte hearings cannot apply to an application for witness anonymity made by the defence.

[698] Section 4(3).

[699] Section 4(4).

[700] Section 4(5).

[701] Section 5(2)(a).

[702] Section 5(2)(b).

[703] Section 5(2)(c).

[704] Section 5(2)(d).

[705] Section 5(2)(f).

[706] *R v Mayers, Glasgow and others* [2008] EWCA Civ 2989.

'diminishes the overriding responsibility of the trial judge to ensure that the proceedings are conducted fairly'.[707] Secondly, it was clear that anonymity orders could only be made where the witness will not testify unless the order is made: 'That the witness might prefer not to testify, or would be reluctant or unhappy at the prospect, is not enough'.[708] Thirdly, the Court saw no reason why a special advocate could not sometimes be appointed to represent the interests of the defendant in an *ex parte* application for anonymity by the prosecution.[709] It suggested, however, that there was a significant difference between using special advocates in PII applications and applications for witness anonymity:[710]

> The former is concerned with the circumstances in which non-disclosure to the defence may be appropriate, the latter with whether sufficient and complete investigation and consequent disclosure have taken place. If the judge entertains reservations about the good faith of the efforts made by the prosecution investigation into any relevant consideration bearing on the question of witness anonymity, an application for witness anonymity will be met with a point blank refusal. The services of special counsel may however enable the judge to ensure that any investigative steps specific to the case, and not perhaps otherwise apparent, have been taken.

The Court stressed that the disclosure obligations on the prosecution in anonymity applications 'go much further than the ordinary duties of disclosure'.[711] The prosecution must instead be 'proactive', [712] and a 'detailed investigation into the background of each potential anonymous witness' will 'almost inevitably be required' in order to assess their credibility.[713]

285. Fourthly, the Court noted a gap in the statutory scheme. Because section 5(2)(c) of the Act requires the judge only to consider whether *each witness's* evidence would be 'sole or decisive', there is no statutory obligation to consider the *cumulative* effect of multiple anonymous witnesses, e.g. where no one witness gives decisive evidence against a defendant, but collectively the anonymous evidence is the sole or decisive basis of the conviction. In such cases, the Court said, 'it would be as well to investigate whether there is

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[707] Ibid, para 13.

[708] Ibid, para 26.

[709] Ibid, para 10: 'The principles which govern the use of special counsel to protect the overall fairness of the trial when the question whether information should be withheld from the defence is being addressed should be adapted when its possible use arises in the context of witness anonymity …. Sometimes special counsel may contribute significantly to the fairness of the process, sometimes not'.

[710] Ibid.

[711] Ibid.

[712] Ibid, para 12.

[713] Ibid, para 10.

any, and if so the nature of the link, between the witnesses'.[714] Fifthly, in the case of anonymity applications to protect the identity of undercover police officers, the Court suggested that 'it will be unusual for the defendant to be disadvantaged by ignorance of the true identity of the officer' even where the officer's credibility is at issue.[715]

286. Lastly, the Court considered the requirement to consider other practicable witness protection measures. In particular, the Lord Chief Justice said that anonymity orders should be regarded 'as the special measure of last practicable resort'.[716] However, he did not regard witness relocation as a 'practicable alternative' to witness anonymity:[717]

> We shall assume for present purposes that all the necessary funding would be available to relocate every anonymous witness, and provide the witnesses and their families with a new identity and employment. By definition, however, the witnesses would be cut off from all their roots, and have to start completely new lives: so would their spouses or partners and their children. The interference with the life of any such witness would be tumultuous, and would effectively penalise him for doing his duty as a citizen. Witness relocation can only be a practicable alternative in the rarest of circumstances, and certainly if in effect forced on the witness, would itself engage his or her right to a private life.

This analysis is simplistic, however, not least because the Court seems to have assumed that all witness relocation necessarily involved *permanent* relocation, i.e. providing 'the witnesses and their families with a new identity and employment'.[718] In fact, permanent relocation is itself only used in the 'rarest of circumstances'. Most witness relocation involves only temporary relocation, ranging from a night spent in a safehouse to longer-term relocation over weeks and months.[719] Although it is undoubtedly true that even short-term relocation may be extremely

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[714] Ibid, para 25.

[715] Ibid, para 35. It is apparent that more than half of anonymity orders are not sought by witnesses fearing intimidation, but by the police seeking protection for undercover officers: see n722 below. Anonymity orders, rather than public interest immunity, is now the preferred way of protecting the identities of undercover officers and informants.

[716] Ibid, para 8.

[717] Ibid, para 9.

[718] Chapter 4 of the Serious Organised Crime and Policing Act 2005 provides the statutory framework for protection arrangements in relation to a wide variety of individuals at risk, including witnesses, jury members, judges, police, prosecutors and prison officers (see Schedule 5). This includes, for instance, offences relating to the disclosure of a new identity of a protected person. According to the CPS, however, witness protection under the 2005 Act 'is generally directed to those persons who have provided crucial evidence and against whom there is a substantial threat. This does not preclude police forces and law enforcement agencies from offering protection measures to witnesses and others at risk' (CPS guidance on witness protection and anonymity, August 2008).

[719] See e.g. Fyfe and Mackay, *Making it safe to speak? A study of witness intimidation and protection in Strathclyde* (Scottish Office, December 1998): of 117 cases involving witness protection in the Strathclyde force area between September 1996

disruptive to a witness's private and family life, the Lord Chief Justice is surely wrong to suggest that relocation will only 'rarely' be a more proportionate measure than the drastic step of denying an accused person the right to confront a witness against him.

287. More generally, the Court's analysis failed to address whether cost itself could be a factor in assessing the practicability of alternative measures. After all, there are many other kinds of witness protection measures besides the grant of a new identity or relocation, whether temporary or permanent. As one police detective said in 1994, 'mostly people just need an officer in their home or at the very least an alarm or a telephone'.[720] Police protection, however, is extremely costly. It was estimated, for instance, that the annual cost of Special Branch protection for author Salman Rushdie during his fatwa was £1 million a year.[721] Even the installation of CCTV, a burglar alarm, or a hotline in a witness's home will typically be more expensive (not to mention more disruptive to the witness) than an application for their anonymity. Anonymity orders may be a measure of 'last practicable resort', but at what point does the relative cost of a witness protection measure make it impracticable?

288. This is not an academic question. The extraordinary growth in applications for anonymity orders since their introduction almost twenty years ago[722] is easy to understand

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and July 1998, only 37 were classified as 'level 1' cases involving a high or very high level of threat, and of those 37, only 14 cases involved the permanent relocation of witnesses. See also e.g. W Maynard, *Witness Protection: Strategies for Protection* (Police Research Group, Crime Detection and Prevention Series, Paper No 55, 1994) at p 30: ' Providing victims or witnesses with new identities, relocating them, or providing constant police protection would be - in the vast majority of cases - an inappropriate level of response'; and G Vermeulen, *EU Standards in Witness Protection* (2005), discussing the difference under Belgian witness protection legislation between 'ordinary protective measures' (including relocation for a maximum of 45 days) and 'special protective measures' (relocation for more than 45 days, grant of a new identity, etc). See also Italian witness protection legislation, which defines 'temporary' measures as witness relocation up to 180 days.

[720] Detective Superintendent Peter Beardon, the Deputy Head of the Criminal Investigation Department of the Avon and Somerset Police quoted in 'Police chiefs call for national witness protection scheme', *The Independent,* 10 April 1994: 'All forces can make vital witnesses and informants under threat 'vanish' into new identities. The costs are high - an average of £300,000 a case - but the numbers are few and almost always involve people whose position in or on the edge of the criminal underworld makes them vulnerable. *The real demand is for lower- level but time-consuming protection.* 'Mostly people just need an officer in their home or at the very least an alarm or a telephone - that is what we need to be able to provide,' said Mr Beardon' [emphasis added].

[721] *Daily Telegraph*, 'Rushdie does not need police guard say Asian peers', 19 June 2001.

[722] See Junior Justice Minister Lord Heath, HL Debates, Hansard, 10 July 2008, col 867: 'As at 25 June, the CPS had identified some 580 cases involving anonymous witnesses. This figure can be broken down into four categories. First, around 290 cases involve test purchases for drugs by undercover officers. Secondly, some 40 further cases involve other undercover operations by law enforcement agents. Thirdly, some 50 cases involve members of the public as witnesses; this figure will be made up of a mixture of cases involving innocent bystanders and those in which the anonymous witness will be associated with the accused in some way. Finally, there are approximately 200 cases where either the defendant has been convicted and awaits sentencing or the offender has been sentenced and the 28-day period for making an in-time appeal is still running'.

when one considers the limited budgets that most police forces have for witness protection.[723] In the United States, this budgetary trade-off between witness protection and witness anonymity is precluded by the Sixth amendment which guarantees defendants the right to confront their accusers. There is no question of resort to anonymity, however impracticable or expensive the alternatives may be. Like money for courtrooms and judges, the budget for witness protection is there seen simply as the inevitable cost of the right to a fair trial.

289. By contrast, it is shameful that, for almost twenty years, anonymous testimony was allowed to flourish in British courts. It is proof of Lord Shaw's warning, almost a century ago, and repeated by Lord Bingham in his judgment in *Davis*, that 'there is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure and at the instance of judges themselves'.[724] Even more shameful however is that, upon realising the extent of anonymous evidence, Parliament acted not to end its use but to defend and formalise it.

290. Of course, no one who is familiar with the problem of witness intimidation can doubt the good intentions of those who support witness anonymity orders. Nor is the Act without its safeguards. But good intentions cannot excuse Parliament's curtailment of a basic principle of fairness that others elsewhere – in Northern Ireland not the least – sacrificed much to defend. Nor is it an adequate answer to say that the Act's safeguards will probably prevent significant unfairness in most cases. Having already fallen halfway down a slippery slope, it is foolishness to seek to live there. In any event, Parliament will have a fresh opportunity in 2009 to restore the common law to its pre-1990 state, either by allowing the 2008 Act to expire[725] or by refusing to make fresh provision for witness anonymity orders as set out in Part 3 of the Coroners and Justice Bill.

Intercept material

291. The interception of private communications – including phone calls, emails, text messages, and even ordinary post – is a time-honoured intelligence- and evidence-gathering technique. Since 1984, however, the UK has barred the use of intercepted communications as evidence in legal proceedings[726] – the only common law country to do so.[727] The statutory bar

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[723] See e.g. *Cheshire Police revenue budget, capital programme and council tax precept for 2008/09* (Cheshire Police Authority, 26 February 2008), Appendix 4: 'Witness protection, intelligence support and administration of justice cost pressures were accepted as unavoidable and totalling £745,000'.

[724] *Scott v Scott* [1913] AC 417 at 477-478.

[725] Section 14 of the 2008 Act provides that it will expire on 31 December 2009, unless the Secretary of State makes an order extending its expiry up to a further year.

[726] Although the statutory bar has only been in place since the Interception of Communications Act 1984, for many years before that the British government maintained an informal ban on its use. This informal ban dates from at least the beginning of the

on using intercept material in court is currently contained in the Regulation of Investigatory Powers Act 2000, which states:[728]

> no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings which (in any manner) …. discloses, in circumstances from which its origin [from an interception warrant or an unlawful interception] may be inferred, any of the contents of an intercepted communication or any related communications data;

The Act similarly prohibits any evidence that would even 'tend to suggest' that an interception warrant has been applied for, or issued, or is about to be issued, etc.[729] However, various exceptions allow the use of intercept material not obtained via a warrant: e.g. where the interception was made with the knowledge of one party,[730] where it was made overseas,[731] or where the communication is to or from a prison.[732] In such cases, the evidence is admissible in criminal proceedings in the usual manner. Similarly, there is no bar to the use of evidence from surveillance that does not involve a direct interception of a private communication, e.g. a recording of a phone call made from a phone tap[733] would be inadmissible, but a recording of the same phone call from a listening device in the same room would be admissible.[734]

292. Exceptions are also made for the use of intercept material in some of the civil proceedings involving closed evidence and special advocates: SIAC, POAC, the High Court in control order hearings and asset-freezing hearings. [735] However, the Regulation of

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20th century. For further details see JUSTICE's report *Intercept Evidence: Lifting the ban* (October 2006) and the report of the Chilcot Review of Intercept as Evidence (January 2008). In February 2009, the Privy Council Intercept as Evidence Advisory Group released its interim progress report on the implementation of Chilcot's recommendations. A final report is expected before the end of summer 2009.

727 The status of intercept evidence in the Republic of Ireland is the same as that in the UK prior to 1984. There is no statutory bar but neither is it used by prosecutors.

728 Section 17(1)(a).

729 Section 17(1)(b).

730 Section 48(4).

731 Section 4(1).

732 Section 4(4).

733 In the days of analogue telephone lines, interceptions were made by directly tapping into the wire carrying the call. The advent of digital telephony has led to the development of different interception methods.

734 Part II of the 2000 Act governs directed and intrusive surveillance other than interceptions. For examples of admissible evidence from bugs see *R v Allsop and others* [2005] EWCA Crim 703; *R v E* [2004] EWCA Crim 1243; and *R v Smart and Beard* [2002] EWCA Crim 772 (DAT recordings of a suspect speaking into a telephone was not an 'interception' within the meaning of s1(1) of the 1985 Act).

735 Section 18(1), as amended by section 9 of the Prevention of Terrorism Act 2005 and section 69 of the Counter-Terrorism Act 2008.

Investigatory Powers Act also allows for disclosure of intercept material to a prosecutor in criminal proceedings:[736]

> for the purpose only of enabling that person to determine what is required by him by his duty to secure the fairness of the prosecution.

In other words, intercept material can be disclosed to a prosecutor not as evidence to be used at trial but in order to prevent a miscarriage of justice. If, for example, the police intercepted a telephone call showing that a key prosecution witness was lying, a recording of the call could then be disclosed privately to the prosecutor to ensure that either the prosecution was dropped or, at least, that the witness's evidence was withdrawn and any part of the prosecution case that relied on it was supported by alternative evidence. This, of course, puts enormous trust in the diligence of those responsible for interceptions to bring relevant material to the attention of prosecutors. If the most recent disclosure review by the CPS Inspectorate is anything to go by,[737] however, there is certainly serious reason to doubt that this is being done adequately in many cases.

293. The Act also gives judges the power to order disclosure of intercept material 'in a case in which that judge has ordered the disclosure to be made to him alone'.[738] In order to do so, the judge must be satisfied that 'the exceptional circumstances of the case make the disclosure essential in the interests of justice'.[739] It is, of course, impossible to see how the judge could direct this without first inspecting the intercept material, and the normal procedure would most likely be for the prosecution to make an *ex parte* application inviting the judge to direct disclosure to herself. Crucially, if the judge agrees that there are 'exceptional circumstances' requiring disclosure, she may direct the prosecutor to make 'any such admission of fact as that judge thinks essential in the interests of justice'.[740] If, for example, the judge is satisfied on the basis of the intercept material that one of the prosecution's allegations is unsustainable (e.g. that the accused was in London on the night of the murder), she can direct the prosecution to withdraw it (by directing the prosecution to admit that the accused was not in London on the night of the murder).

294. In these circumstances, then, intercept material is a form of secret evidence that is disclosed to the prosecutor and the judge but not to the defence, and used to determine facts in criminal proceedings. The fact that disclosure will mostly work to the benefit of the

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[736] Section 18(7)(a).

[737] See para 315 below.

[738] Section 18(7)(b).

[739] Section 18(8).

[740] Section 18(9).

defendant in such cases is beside the point. In every other civilised country, intercept material is used daily as evidence in open court. It is not only entirely improper for a judge sitting alone to usurp the role of the jury by determining facts in a criminal trial based on secret evidence, it is also utterly unnecessary.

Closed trials

295. In February 2009 in one of the several Divisional Court judgments in the Binyam Mohammed case, Lord Justice Thomas noted evidence of increasing resort to secrecy in court hearings:[741]

> As the Editor of the Law Reports has pointed out in his submissions to us, there has been a marked increase in the number of hearings held in secret, with the court being closed to law reporters and the press; consequently they have often been denied the opportunity of making submissions.

Publishing Lord Justice Thomas's remarks, the Guardian newspaper reported that:[742]

> Journalists trying to cover these cases are being placed in an increasingly precarious position. In one case a reporter was threatened with arrest for an article in which he wrote of evidence heard in public but given in a criminal trial that was partially heard in secret. He was told he might be arrested and that he and the defence barrister should 'not leave the country'. The prosecution mistakenly thought he had used material heard in secret.

The report concluded:[743]

> Although the government does not keep records of the number of applications for criminal proceedings to be heard in private … increasing numbers of prosecutions under anti-terrorism laws and the use of special courts are making it harder for the press to cover many trials.

296. Although the principle of open justice is 'so fundamental that supporting citation of authority is not required',[744] the courts have an inherent power to exclude the press and the

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[741] See n609 above.

[742] Afua Hirsch, 'Lawyers see threat to open justice in growing number of secret trials', *The Guardian*, 9 February 2009.

[743] Ibid.

[744] *R v A and others*, n750 below, at para 32 per Judge P. But see Lord Shaw in *Scott v Scott* [1913] AC who famously described closed hearings as 'an attack upon the very foundations of public and private security'.

public 'in the interests of justice'.[745] However, part 16 of the Criminal Procedure Rules 2005 deals with how this power is normally to be exercised in a wide variety of cases, including restrictions on reporting the identity of children and young persons, and enabling things like bail applications to be dealt with in chambers.[746] Rule 16.10, however, allows parties to apply for 'all or part' of a criminal trial to be held *in camera*, with the public and media excluded, 'for reasons of national security or for the protection of the identity of a witness or any other person'.[747]

297. A closed criminal trial is, of course, not the same thing as a closed hearing in a civil case. Unlike the latter, only the media and the public are excluded from a closed trial: the defendant and his lawyers are present throughout and hear all the evidence that is heard by the judge and jury.[748] Nonetheless, a closed trial is still a major departure from the principle of open justice. After all, the criminal law provides for the most serious punishments that the state may inflict on an individual. The rule of law requires that those who are subject to the law (i.e. the public) are entitled to know how it is applied. And democratic transparency requires that those who make the law (i.e. the voting public) are entitled to know that it is being applied correctly. As we have already seen elsewhere, there are dangers involved when courts and prosecutors become accustomed to secrecy.

R v Amin

298. In November 2005, Sir Michael Astill, a judge sitting in the Old Bailey, ordered that 'for reasons of national security and the avoidance of harm to the due administration of justice', part of the trial of Salahuddin Amin for conspiracy to cause explosions (the so-called 'Fertiliser plot')[749] would be held *in camera*.[750] Amin had been arrested on a flight from Pakistan to

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[745] *R v Yam*, n768 below, at para 6 per Lord Phillips CJ. See also the grounds set out under article 6(1) at para 69 above.

[746] SI 2005/384.

[747] Ibid, rule 16.10(1). Rule 67.2 allows any 'aggrieved' person to appeal a judge's decision under 16.10. Rule 67.2(6) gives the Court of Appeal discretion whether to hold a hearing to determine the issue of leave to appeal, but rule 67.2(7) prevents the Court from holding a hearing to determine the appeal itself. In *A and others*, n750 below at para 37, the Court of Appeal held that this restriction was not incompatible with article 6.

[748] See e.g. the Court of Appeal ruling in *A and others*, n750 below, at para 22: 'orders for in camera hearings are more likely to be of concern to the media rather than the defendant. He will be present during any in camera hearings, together with his legal advisers. So, in the normal course, the difficulties for the media, responsible for properly informing the public, will be more striking than any potential problems for the defendant. That said, this is a case where the issues raised are of particular sensitivity, involving as they do, the trial of allegations of a major terrorist conspiracy, and, on the basis of the statement issued on his behalf, that A was a victim of torture, currently itself a general issue of public concern and importance'.

[749] In March 2004, Amin's co-accused were arrested as part of Operation Crevice in which more than 1,300 pounds of ammonium nitrate fertiliser were seized. See e.g. 'Seven with alleged Al-Qaeda links deny plotting terror bomb campaign', *The Guardian*, 22 March 2006.

London in February 2005. Prior to his arrest, he had been detained in Pakistan for several months, during which time he alleged he had been tortured by Pakistani, British and American intelligence officials.[751] In particular, the judge directed that, although Amin's own account of his treatment could be published:

> evidence relating to, or any reference to, the events touching or concerning [Amin's] treatment out of this jurisdiction, from the commencement of the investigation to the time of his arrest on 8 February 2005, [is] to be given *in camera*.

Sir Michael acknowledged 'the importance of the principle of open justice and the special function of the media' but held that the order was necessary as publication of the details of the evidence relating to Amin's treatment 'could give rise to a substantial risk to national security'.[752] The judge also made the cryptic suggestion that publication of the evidence might 'obstruct the identification' and potential prosecution of 'those who it is in the public interest should be tried'.[753]

299. The judge's ruling was appealed to the Court of Appeal the following month. There it was suggested that the evidence *in camera* related to investigations made by the prosecution as to Amin's treatment in Pakistan, including material that might assist Amin in his defence.[754] The Court also noted that the judge had made his ruling only after adversarial argument from both parties, including submissions from representatives of the media.[755] However, the Court rejected the argument that the media should have had disclosure, at least in summary, of the *in camera* material:[756]

> When an application for an *in camera* hearing is being made, it is self-evident that if it is to be justified on the grounds of national security, or the protection of the identity of witnesses, some at least of that material is almost certainly bound to be highly

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[750] See *R v The Crown Court at the Central Criminal Court ex parte A and others* [2006] EWCA Crim 4 at para 6.

[751] Ibid, para 2.

[752] Ibid, para 7. See also the Court of Appeal, ibid: 'The starting point is that every infringement of the principle of open justice is significant' (para 22); and 'The principle of open justice, whether in the Court of Appeal, or at the court of trial, is so fundamental that supporting citation of authority is not required' (para 32).

[753] Ibid, para 7.

[754] Ibid, para 10: 'following the assertions made by the [Amin's] solicitor after the committal, and in the light of the defence case statement, the authorities in this country made efforts to discover, so far as they could, whether there was, indeed, any material which might enable [Amin] to advance arguments against the admissibility of evidence obtained in this country, or indeed to support any application that his future trial might amount to an abuse of process. In short, the order against which this appeal is now brought relates to material which the prosecution wishes to disclose to the defendant'.

[755] Ibid, para 19.

[756] Ibid, para 20.

sensitive, and cannot be made available for dissemination …. If counsel representing media interests are put into possession of the same material as the judge before he makes his decision, the purpose of an in camera hearing would be defeated.

300. The Court also rejected the argument that it was irrational for the judge to conclude that there would be a risk to national security if the evidence were disclosed to the public, given that it would not be withheld from Amin himself:[757]

> Simply because the order made by the judge was subject to the inevitable limitations created by the entitlement of the defendant and his legal advisers to be present throughout the trial, and to provide the defence with material which may be of possible assistance to him, it does not follow that the order for an in-camera hearing was flawed or irrational.

In April 2007, Amin was convicted of conspiracy to cause explosions, along with four others, and sentenced to life imprisonment. However, the fact that the prosecution was willing to tolerate disclosure to someone later proved to be a terrorist continues to raise doubts about the need for secrecy in the first place. More generally, if the prosecution was prepared to tolerate this kind of disclosure (to the accused and his lawyers but not to the public at large) in Amin's case, then it raises questions about the government's failure to do so in civil proceedings involving secret evidence.[758]

301. In July 2008, the Criminal Division of the Court of Appeal ruled on Amin's application leave to appeal his conviction, together with those of his four co-defendants.[759] The court's judgment, although open, contained thirty-four redactions, for example:[760]

> We must analyse the facts in some detail. In March 2004, [**redaction]** the authorities in Pakistan to detain Amin **[redaction]** although residing in Pakistan at the time, Amin was a British citizen with a UK passport…
>
> During the course of these many and various interviews **[redaction]** Amin made detailed and extensive admissions about terrorist activity in Pakistan.[761]

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[757] Ibid, para 41.

[758] See e.g. *BB v Secretary of State for the Home* Department (SC/39/2005, 14 November 2006) in which SIAC rejected an interlocutory application for disclosure of the closed material to the parties but with the press and public excluded: ''We cannot conceive of a single instance in which the exclusion of the press or public would permit disclosure of any material to [a defendant] which would otherwise remain closed. In reality such material would be open' (para 30 per Ouseley J).

[759] *R v Khyam and others* [2008] EWCA Crim 1612.

[760] Ibid, para 42.

> The interviews conducted **[redaction]** of Amin in Pakistan were directed to possible intelligence of value to public safety here. Once in the UK he was interviewed as a suspect. Both in the UK and in Pakistan, when seen **[redaction]** he was treated with due courtesy.

Amin's application for leave to appeal was refused although his tariff was reduced.

R v Ahmed

302. In September 2007, Rangzieb Ahmed was arrested at Heathrow airport after being deported from Pakistan. He was charged with possession of various items for the purposes of terrorism, including two books and a rucksack containing traces of explosives, and subsequently with being a member of Al Qaeda and directing its activities. At a pre-trial hearing, Ahmed alleged that he had been detained in Rawalpindi and tortured by the Pakistani intelligence service, with the collusion of British and American officials.[762] His lawyers sought to have the charges against him dismissed on the grounds that it would amount to an abuse of process for him to be tried following mistreatment by British officials. After hearing evidence about Ahmed's treatment in open court, Mr Justice Saunders then heard evidence from MI5 officers *in camera*, with the press and public excluded.[763]

303. In his ruling, Mr Justice Saunders dismissed Ahmed's application. He agreed that Ahmed had been detained illegally in Pakistan and may have been tortured.[764] However, he rejected Ahmed's claims that MI5 had been responsible for his ill-treatment by Pakistani intelligence officials:[765]

> It may be that Rangzieb Ahmed suffered physical injury at the hand of agents of the Pakistanis at a later stage, including the removal of fingernails but for very good reason the focus of this enquiry has been on the early stages of his detention. I specifically reject the allegations that the British authorities were encouraging torture. I simply have found no evidence to support that suggestion. I am not satisfied that the British authorities assisted or encouraged the Pakistanis to unlawfully detain and ill

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[761] Ibid, para 44.

[762] Duncan Gardham, 'Al Qaeda terror trial: Rangzieb Ahmed torture claims', *Daily Telegraph*, 18 December 2008.

[763] Ian Cobain, 'What terror jury was not told: 'They tore my nails out. Then I was interrogated by MI5', *The Guardian*, 19 December 2008.

[764] Daily Telegraph report, n762 above.

[765] Ibid.

treat Rangzieb Ahmed in such a way as to amount to an abuse of the process of the court.

However, the judge also said that 'much of the evidence' concerning Ahmed's ill-treatment, including part of his own ruling on Ahmed's application, had to remain closed for reasons of national security.[766] In Ahmed's subsequent trial at Manchester Crown Court, the jury were not told of his questioning by MI5 officials while in detention in Pakistan.[767] He was convicted in December 2008 of membership of a proscribed organisation, directing terrorism and possession of an article for a purpose connected to terrorism, and sentenced to life imprisonment.

R v Yam

304. In January 2008, Mr Justice Ouseley sitting in the Old Bailey made an order for excluding the press and public from part of the trial of Wang Yam for the murder of author Allen Chappelow.[768] Prior to the ruling, the Times newspaper speculated that Yam 'may have links with British Intelligence' and may have worked as a 'low-level informant' for MI6.[769] In response, Mr Justice Ouseley ruled that 'speculation [in the article], whether accurate or inaccurate, which purports to reveal the matters which were considered in camera ... may itself be a contempt of court'.[770] The Attorney General was invited to consider contempt of court proceedings against two of the journalists involved.[771]

305. The prosecution's application for excluding the public took place partly *in camera*, and resulted in two judgments: one open and one closed. The judge concluded that, if the press and the public were not excluded, 'serious risks would be taken', that may lead to the prosecution being withdrawn (presumably to prevent disclosure of information contrary to the public interest).[772] On appeal, the Criminal Division of the Court of Appeal also issued an open and a closed judgment.[773] As well as upholding the judge's ruling, it also endorsed his finding

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[766] Ibid.

[767] Guardian report, n763 above.

[768] [2008] EWCA Crim 269.

[769] Frances Gibb, 'Why is the Home Office trying to stage a murder trial in secret?', *The Times*, 13 December 2007. See also, Richard Norton-Taylor and David Leigh, 'Media challenge national security claim for secrecy in murder trial', *The Guardian*, 15 January 2008.

[770] Guardian report, February 2009, n742 above.

[771] Ibid.

[772] *R v Yam*, n768 above, para 7.

[773] Ibid, para 4.

that the interests of justice 'could never justify excluding the press and the public if the consequence would be that the trial would not be fair'.[774]

306. After an eight week trial held partly in secret, Yam was found guilty in March 2008 on two dishonesty offences but the jury failed to reach a verdict on the charge of murder.[775] In January 2009, following a retrial in which, again, 'most of the evidence was heard in secret', Yam was convicted of Chappelow's murder.[776]

Public interest immunity applications

307. Little good has emerged from the use of secret evidence in British courts over the past twelve years. However, perhaps the single most unexpected benefit has been the adaptation of the special advocate procedure to represent the interests of defendants in public interest immunity ('PII') applications. This section looks at way in which PII works in criminal cases and the way in which the *ad hoc* appointment of special advocates to represent the interests of the accused has worked to reduce the inherent unfairness of *ex parte* proceedings.

308. The basic rule of disclosure in criminal cases is that the prosecution must disclose any material that weakens its own case or strengthens that of the defence.[777] As Lord Bingham said:[778]

> Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

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[774] Ibid, para 6.

[775] See e.g. 'Jury discharged in trial of man for murder of reclusive writer', 1 April 2008.

[776] David Brown and Frances Gibb, 'MI6 informant Wang Yam found guilty of killing millionaire author to steal his identity', *The Times*, 17 January 2009.

[777] See section 3(1)(a) of the Criminal Procedure and Investigations Act 1996 Act (as amended by section 32 of the Criminal Justice Act 2003): the prosecution must disclose any material 'which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused'. See also *R v H* [2004] UKHL at para 14: 'Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made'.

[778] *R v H* [2004] UKHL 3 at para 14. However, 'there is no obligation at all to disclose any sensitive material which is 'either neutral in its effect or which is adverse to the defendant, whether because it strengthens the prosecution or weakens the defence' (ibid, para 17).

As in civil cases, PII principles nonetheless allow for relevant information to be withheld where its disclosure would be contrary to the public interest.[779] However, unlike in civil cases where the court is required to balance the competing public interests between disclosure and non-disclosure, the 'overriding requirement' in criminal cases is 'fairness to the defendant'.[780] As in civil cases, the application to withhold material from the defendant will almost certainly involve an *ex parte* hearing in the absence of the accused and his lawyers. Indeed, in the most sensitive cases, the defence may not even be notified that the prosecution has applied for material to be withheld. Inevitably, the defendant will be disadvantaged by his or her inability to gainsay the prosecution's submissions about the sensitive material.

309. Following the collapse of the Matrix Churchill trial in 1992, the law governing PII in criminal cases came under intense scrutiny.[781] The Scott report[782] subsequently concluded that:[783]

> for the purposes of criminal trials, the balance must always come down in favour of disclosure if there is any real possibility that the withholding of the document may cause or contribute to a miscarriage of justice. The public interest factors underlying the PII claim cannot ever have a weight sufficient to outweigh that possibility.

This led to the Criminal Procedure and Investigations Act 1996 which sets out the current statutory rules governing PII in criminal cases.[784] Even before the Act was introduced,

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[779] Section 3(6) of the Criminal Procedure and Investigations Act 1996 prohibits the court from disclosing any material that it concludes is not in the public interest. The issue of withholding of such information in criminal cases is an old one: see e.g. *R v Akers* (1790) 6 Esp 127, 170 ER 850: 'The defendant's counsel have no right, nor shall they be permitted to enquire the name of the person who gave the information of the smuggled goods' and the rule subsequently set out in *Hardy's case* (1794) 24 St Tr 199 against the identification of informants. And see later in *Marks v Beyfus* (1890) 25 QBD 494 at 498 per Lord Esher MR: 'I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and *that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail*' [emphasis added].

[780] *R v H*, n778 above, para 22.

[781] See para 241 above. See also the decision of the Court of Appeal in *R v Ward* [1993] 1 WLR 619 at 674: 'An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial'. See further Clive Walker and Keir Starmer, *Miscarriages of Justice* (OUP, 1999), pp 174-176.

[782] Scott report, n586 above.

[783] Ibid, volume 3, section K, para 6.12. See also Scott VC, 'The Use of Public Interest Immunity Claims in Criminal Cases' [1996] 2 *Web JCLI* 9: 'In the context of the criminal trial how can there be a more important public interest than that the defendant should have a fair trial and that documents which might assist him to establish his innocence should not be withheld from him'.

however, one academic suggested the possible use of special counsel to try and overcome the unfairness of *ex parte* PII proceedings:[785]

> [One] way of introducing a counter-balance to the government's perspective within [PII] proceedings would be to devise procedures to open up argument as part of the inspection process. Plainly this could not involve the other party to the litigation unless some kind on Chinese wall were to operate between the client and counsel, something of which the courts have disapproved in similar contexts on the grounds that it undermines the professional relationship of trust which should subsist between them … However, an independent person acting as amicus curiae might be able to argue before the court the reasons favouring disclosure, having had sight of the documents…

310. The possibility of using special advocates in PII applications in criminal cases was first noted by the Grand Chamber of the European Court of Human Rights in February 2000. In three judgments handed down on the same day – *Fitt,*[786] *Jasper*[787] and *Rowe and Davis,*[788] all of which concerned criminal trials in which material had been withheld from the accused on PII grounds – the Grand Chamber noted that special advocates had been introduced in SIAC and Northern Ireland proceedings following its earlier judgments in *Chahal*[789] and *Tinnelly*.[790] In two of the cases, *Fitt* and *Jasper*, the Grand Chamber concluded that appointment of a special advocate had not been necessary.[791] In both cases, the defendants had received notice of the prosecution's *ex parte* application to withhold material before the trial and had been given the opportunity to make submissions to the trial judge before he considered the material in closed session. As the Grand Chamber observed:[792]

> the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of

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[784] See n779 above.

[785] Ian Leigh, 'Reforming Public Interest Immunity' [1995] 2 Web JCLI. Leigh suggested that the Parliamentary Commissioner for Administration might be an appropriate official to make submissions in such cases.

[786] (2000) 30 EHRR 480.

[787] (2000) 30 EHRR 441.

[788] (2000) 30 EHRR 1.

[789] See para 81 above.

[790] See para 227 above.

[791] See *Jasper*, n787 above, para 55; *Fitt*, n786 above, para 48: 'the Court does not accept that such a procedure was necessary in the present case'.

[792] *Jasper*, ibid, para 52. See also *Fitt*, ibid, at para 45 and *Rowe and Davis*, n788 above, at para 61.

investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.

311. In *Rowe and Davis*, by contrast, the material had been withheld from the defendants at trial without any PII application being made. It was not until the Court of Appeal that the prosecution sought (and was granted) leave to withhold the material in question. The Grand Chamber held that the prosecution's unilateral decision to secretly withhold material from the defence at trial was a violation of article 6.[793] In addition, it held that the PII procedure before the Court of Appeal was unable to 'remedy the unfairness' at trial, particularly seeing as the appeal court was dependent on many of the findings of fact at trial.[794] However, although the Grand Chamber again noted the possibility of using special advocates in PII proceedings, it found it unnecessary to consider whether they were required in the defendants' case.

312. In September 2001, Lord Justice Auld reported on his review of the criminal justice system.[795] He noted 'widespread concern' in the legal profession about the 'lack of representation for the defendant's interests' in *ex parte* PII hearings, and 'wide support' for the defendant's exclusion to be 'counterbalanced by the introduction of a 'special independent counsel''.[796] Noting that special advocates had already been introduced before SIAC, Auld endorsed the proposal, on the basis that it would 'restore some adversarial testing of the issues presently absent in the determination of these often critical and finely balanced applications'.[797]

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[793] *Rowe and Davis,* ibid, para 63: 'Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of article 6(1)'.

[794] Ibid, para 65: 'the Court of Appeal was obliged to carry out its appraisal *ex post facto* and may even, to a certain extent, have unconsciously been influenced by the jury's verdict of guilty into underestimating the significance of the undisclosed evidence'.

[795] *The Review of the Criminal Courts in England and Wales* (September 2001).

[796] Ibid, para 193. Compare, however, Butterfield J's comments in his review of criminal investigations and prosecutions conducted by HM Customs and Excise, at p 264: 'There was, perhaps surprisingly, very little concern expressed to the Review about the [PII] process itself by those who are involved in it, whether as prosecutors, defenders or judges …. A few to whom we spoke raised the possibility of the appointment of an independent counsel who could be given access to the material and in effect represent the interests of the defendant. There are, it seems to me, considerable practical and ethical difficulties in the way of such a proposal, and it received little support'.

[797] Ibid, para 194. See also recommendation 206: 'A scheme should be introduced for instruction by the court of special independent counsel to represent the interests of the defendant in those cases at first instance and on appeal where the court now considers prosecution applications in the absence of the defence in respect of the non-disclosure of sensitive material'. However, Auld cautioned that: 'even the introduction of special counsel to such hearings would not solve the root problem to which I have referred of police failure, whether out of incompetence or dishonesty, to indicate to the prosecutor the existence of critical information. Unless, as I have recommended, the police significantly improve their performance in

313. In the July 2003 case of *Edwards and Lewis v United Kingdom,*[798] the defendants complained that the trial judge's decision to withhold certain material on PII grounds had prevented them raising the issue of police entrapment at their trial. Noting Lord Justice Auld's recommendation concerning the use of special advocates in PII applications, the European Court of Human Rights held that the PII procedure failed to comply with article 6's requirements of adversarial proceedings and equality of arms, and did not incorporate 'adequate safeguards to protect the interests of the accused'.[799]

314. The Court's ruling in *Edwards and Lewis* was among those considered by the House of Lords in *R v H* in 2004.[800] In *H*, the prosecution appealed the decision of the trial judge to appoint a special advocate to represent the interests of defendants in relation to its PII application. Noting the use of special advocates elsewhere, Lord Bingham said:[801]

> There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII matters, a defendant in an ordinary criminal trial, as distinct from proceedings of the kind just considered. But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial.

'In appropriate cases', therefore, the Law Lords held that the appointment of a special advocate 'may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected'.[802] However, the House of Lords took care to point out that the use of special advocates involved both ethical and practical challenges. First, a special advocate who represents the interests of a party without being instructed by, or answerable to, him, 'is acting in a way hitherto unknown to the legal profession'.[803] Secondly, the appointment of a special advocate would 'add significantly to the cost of the case', since the advocate would likely have to be instructed throughout the course of proceedings to assist

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that basic exercise, there will be no solid foundation for whatever following safeguards are introduced into the system' (ibid, 197).

[798] Judgment of the Fourth Chamber, 22 July 2003.

[799] Ibid, para 59.

[800] [2004] UKHL 3.

[801] Ibid, para 22.

[802] Ibid, para 36

[803] Ibid, para 22.

the court with its 'continuing duty to review disclosure'.[804] Consequently, the House of Lords held, the appointment of a special advocate:[805]

> will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.

315. It is unknown how many special advocates have been appointed in criminal cases to assist with PII applications since the House of Lords approved their use in 2004. However, there is reason to think the number is not high. Of the 152 cases examined in the Crown Prosecution Service Inspectorate's 2008 review of disclosure, for instance, only 59 of those cases involved sensitive material, and only 14 involved PII issues.[806] There was no reference to a special advocate being appointed in any of the cases examined. Not only did the Inspectorate find evidence of poor handling of PII material by the CPS,[807] it also suggested that the low numbers of PII applications were partly due to the fact that police officers responsible for initial disclosure are wrongly classifying large amounts of disclosable material as 'sensitive'.[808] For example:[809]

> A common justification for treating material as sensitive is that it 'reveals police methods', however this should always be carefully scrutinised since there are relatively few techniques used by the police which are not quite widely known – especially to criminals and their legal advisers. Where new techniques are developed for obtaining evidence they tend inevitably to be revealed in court over time. An example is the use of mobile phone records. Records of telephone contact have been used to support allegations of conspiracy for many years, *it is not a secret method*. Apart from the identity of the individual administering the records in question, there is

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[804] Ibid.

[805] Ibid.

[806] HM Crown Prosecution Service Inspectorate, *Disclosure: A thematic review of the duties of disclosure of unused material undertaken by the CPS* (May 2008).

[807] Ibid, para 9.18: 'Because the numbers of PII cases identified are small statistics have to be approached cautiously. Fourteen cases were identified in our sample which involved PII issues and 12 of those were assessed as containing material which should have been disclosed to the defence. Of those 12 the information available was sufficiently clear to assess compliance in nine cases. Of those nine in only three did we find that PII was handled appropriately in all respects. Of particular concern was that in only four of the 12 cases with disclosable material were adequate reasons given for applying or not applying for a PII ruling'.

[808] Ibid, para 2.27: 'The dangers are that material of which the defence should be aware is never transferred to the MG6C so that its existence is not known to them, or that prosecutors do not examine truly sensitive material because of it being obscured in lists of items that do not really belong on the sensitive schedule'.

[809] Ibid, para 9.3. Emphasis added.

no information which needs protecting; indeed, the prosecution routinely adduce such evidence.

In a sample of 77 cases containing material 'believed by the disclosure officer to be sensitive', the CPS Inspectorate found that less than 20% was properly assessed as sensitive material.[810] The Inspectorate concluded:[811]

> Given the proportion of cases which were inappropriately identified by officers as containing sensitive material, there is a high statistical probability that the existence of material remains unknown to the defence when they should have been made aware of it. Because of the frequency of this, there is a significant risk that miscarriages of justice may occur.

PART 4: SPECIAL ADVOCATES

316. Like SIAC itself, special advocates were generally greeted as a positive development when first introduced. Rather than allow the government to make decisions concerning deportation on national security grounds that were essentially unchallengeable, special advocates offered defendants the opportunity – however attenuated – for the evidence against them to be tested. It was only after 9/11 and SIAC's shift from an immigration tribunal to a *de facto* anti-terrorism court that special advocates began to be seen more negatively.[812] By December 2003, Amnesty International – who only six years early had commended the Canadian use of security-cleared counsel to the European Court of Human Rights in the *Chahal* case[813] – had condemned SIAC's proceedings as a 'perversion of justice'.[814]

317. Special advocates, however, are not the cause of unfairness in proceedings. Rather, they are merely the most common and most visible symptom of the unfairness caused by the decision to allow evidence to be withheld from the defendant. At least in theory, special

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[810] Ibid, para 9.9.

[811] Ibid, para 9.11. Emphasis added. See also para 9.13: 'Given that we found that 76.6% of material should not have been assessed as sensitive, and that a significant amount of material is assessed as sensitive by disclosure officers, this indicates the existence of significant amounts of unused material which may be going without adequate scrutiny by either party'.

[812] See e.g. *MH and others v Secretary of State for the Home Department* [2008] EWHC 2525 (Admin) at para 11 per Blake J: 'Special advocates have not been greeted with universal enthusiasm since they were first used. Claimants or immigration appellants have tended to resist the use of an SA to deny them the ordinary course of an immigration or other appeal, because such procedures substantially restrict their ability to prosecute an appeal'.

[813] See para 338 below.

[814] Amnesty International press release, 'UK: Terrorism ruling - proceedings amount to a perversion of justice', 29 December 2003.

advocates are meant to offset this unfairness by recreating an adversarial process in the defendant's absence. As this Part details, the practice is somewhat different. Nonetheless, despite a great deal of evidence that has mounted up over the years to the contrary, the government and even many judges have shown a great deal of faith in the ability of special advocates to test effectively the government's case in closed session.

318. As this Part will show, special advocates operate under so many limitations – not the least of which is their inability to take instructions from those they represent – that it makes a mockery of any suggestion that they could ever be an adequate substitute for a fair trial in open court. However, although special advocates are no substitute for the disclosure of evidence to a defendant, it is also frequently overlooked that a large part of their job is in fact *arguing* for that disclosure. As Mr Justice Blake, a former special advocate, noted in the case of *MH and others*:[815]

> Despite all the limitations on the ability of [special advocates] to achieve substantive justice, the experience of those … who have seen the [special advocate] system in action demonstrates that that it provides a benefit certainly favour in the field of submissions about disclosure. What is disclosed after [a special advocate's] intervention is almost always considerably more than the executive proposed to give before it. In nearly ten years experience as a special advocate, I cannot recall an occasion when absolutely nothing was added to the [defendant's] state of knowledge after the disclosure process was complete. I am aware that that experience is not unique.

Moreover, this disclosure function of special advocates is completely separable from the use of secret evidence. It is because of this that special advocates have the potential to play a valuable role in public interest immunity applications, in both civil and criminal cases. Ironically, while the government has been keen to use of secret evidence wherever possible for the sake of protecting a sensitive public interest, it has become increasingly wary of the courts' own attempts to appoint *ad hoc* special advocates to test the government's refusal to disclose material. Indeed, so useful has the device become, that the government has no clear idea of the total number of special advocates appointed. Most recently, this has led the Attorney-General to intervene in a series of cases to assert her right to refuse to appoint special advocates where requested to do so by the courts.

319. The potential utility of special advocates has also been noticed outside the UK. Indeed, when special advocates were first introduced in 1997, the government thought it was copying a Canadian system. It only later emerged that the Canadian system then in use was

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815 [2008] EWHC 2525 (Admin) at para 36. See the discussion at para 220 above.

very different from what was instituted in the UK (a fact which would have been known much earlier, if only the government had bothered to look into it). Ironically, Canada has now reintroduced special advocates and paid much closer attention to the UK experience. Australia, New Zealand and Hong Kong have each experimented with their own variations.[816]

The origin of special advocates

320. The idea of appointing counsel to represent the interests of a party who is unable to give instructions is not a new one.

The devil's advocate

321. In 1587, for instance, Pope Sixtus V established the Sacred Congregation of Rites in order to deal 'juridically' with the Roman Catholic Church's process of canonization. Bishops would appoint a *postulator causae* to present the evidence of a candidate's heroic virtues before the Congregation. In the early eighteenth century, however, Pope Clement XI sought to introduce an element of adversarial proceedings into what was otherwise an inquisitorial process by giving the *promotor fidei* the task of testing the case for canonization by, for example, offering natural explanations for alleged miracles and suggesting earthly motives for apparently virtuous acts. The *promotor* – better known by his informal title, the 'devil's advocate' – was not introduced for the sake of fairness to any party (absent or otherwise) but to help ensure the *accuracy* of the outcome, by 'doing everything possible to ensure that the future veneration of those newly beatified or canonized, and confidence in their intercession, would not be impaired by things either concealed or wrongly presented'.[817]

Amicus curiae and litigation friends

322. The common law too has several kinds of advocates without instructing clients, the oldest of which – the *amicus curiae* – derives from Roman law but was recognisable in England from the time of Edward I.[818] The common law commitment to adversarial proceedings meant that judges rely more heavily than in inquisitorial proceedings on the contest between the parties to ensure that all relevant issues were properly addressed. However, from time to time, cases would emerge in which the adversarial clash of arms failed

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[816] For a discussion of the US experience since 9/11, including the use of security-cleared counsel in military commissions, see 'Secret evidence in the War on Terror' [2005] 118 *Harvard Law Review* 1962-1984.

[817] Heiner Grote in Fahlbusch (ed), *The Encyclopaedia of Christianity* (1999) p380. The promotor's role was reduced in 1983, following which the number of canonizations increased markedly.

[818] See e.g. Maitland and Pollock, *History of English Law Before the Time of Edward I*, Vol. 1 (1898) p 216: 'In [1292] King Edward directed his justices to provide for every county a sufficient number of attorneys and apprentices from among the best, the most lawful and the most teachable, so that king and people might be well served'.

to produce the necessary illumination, either because of the limited nature of the parties' interests or simply because one party was not represented. Just as the devil's advocate was introduced to compensate for the shortcomings of the Congregation's inquisitorial methods, so too did the role of the *amicus* grow out of the limitations of adversarial proceedings. The role of the *amicus*, also known as a 'friend of the court', was 'to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal arguments on his behalf'.[819]

323. However, although *amici curiae* historically were asked to fill a number of different roles, their function has narrowed over time as some of those roles have been filled by more permanent office-holders.[820] Whereas previously the court might direct an *amicus* to represent a child's interests in proceedings, for instance, the appointment of a guardian *ad litem* (now known as a litigation friend) is most often performed nowadays by the Official Solicitor and CAFCASS.[821] Unrepresented parties may otherwise look to legal aid, a range of pro bono assistance schemes, or a Mackenzie friend[822] to help them with their case. In 2001, a memorandum between the Lord Chief Justice and the Attorney-General adopted the new term, 'advocate to the court', in order to reflect the modern *amicus'*s narrower role:[823]

> It is important to bear in mind that an Advocate to the Court represents no-one. His or her function is to give to the court such assistance as he or she is able on the relevant law and its application to the facts of the case. An Advocate to the Court will not normally be instructed to lead evidence, cross- examine witnesses, or investigate the facts. In particular, it is not appropriate for the court to seek assistance from an

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[819] *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 266 per Salmon LJ. See also e.g. Andrea Loux, 'Third Party Interventions in Criminal Appeals', in Freeman (ed) *Current Legal Problems* (2000) at 455: an amicus could be appointed 'either where a party is absent or where the court finds itself in need of specialist legal expertise'.

[820] Interestingly, an *amicus curiae* and amicus briefs are the US terms for what in the UK are known as third party interveners' and 'third party interventions' respectively. This reflects one of the historical roles of *amici curiae* as acting in the public interest, a function which in the United States gradually became the main mechanism whereby interveners could seek to assist the court in cases of public importance.

[821] See Civil Procedure Rules, Part 21: a litigation friend must be appointed in any proceedings involving a child under 18 or a mentally incompetent adult. The litigation friend's responsibility is to 'fairly and competently conduct proceedings on behalf of the child' or incompetent adult (Browne and O'Hare, *Civil Litigation* 12th ed (Sweet and Maxwell, 2005), p 88). See also the memorandum between the Attorney General and the Lord Chief Justice, *Requests for the appointment of an advocate to the court* (December 2001), para 11: 'A request for an Advocate to the Court may be made to the Official Solicitor or CAFCASS (Legal Services and Special Casework) where the issue is one in which their experience of representing children and adults under disability gives rise to special experience'.

[822] Not to be confused with a litigation friend (the new term for a guardian *ad litem*), a Mackenzie friend is a lay adviser who assists a litigant in person but does not represent them in court.

[823] Ibid, para 4.

Advocate to the Court simply because a defendant in criminal proceedings refuses representation

324. As the memorandum explains, the Attorney may appoint an advocate 'when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument'.[824] This is because of the 'public interest in the highest quality of decision-making, particularly in those cases which will set precedents'.[825] An example of this was the conjoined twins case where, in addition to the counsel appointed by the guardians *ad litem* of each twin,[826] the Attorney appointed counsel to act as *amicus curiae* to assist the court.[827] However, the Attorney's appointment of an *amicus* or advocate to assist the court is distinct from cases in which the Attorney may herself intervene as a party in her capacity as 'the guardian of the public interest'.[828] Different again is the Attorney's role representing the government in litigation.

325. It is also important not to confuse the limited role of an *amicus* or advocate to the court in the UK with how they are used in other common law jurisdictions, which is often closer to their more flexible, historical function. In the United States in particular, an *amicus* is a much more wide-ranging role and is the common term for what in the UK would be called a third-party intervener in the public interest.[829]

Canadian SIRC counsel

326. The first known use of security-cleared counsel to act in relation to classified material on behalf of a party that did not have such clearance was before the Canadian Security Intelligence Review Committee (SIRC). Established in 1984, and composed of five members of Canada's Privy Council (mostly former federal cabinet ministers), SIRC is not a court.

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824 Ibid, para 3.

825 Lord Goldsmith QC quoted in Zander, *The Law Making Process*, (CUP, 2004) at p 416

826 One twin was represented by the Official Solicitor while the court appointed a private solicitor to act as *guardian ad litem* for the other.

827 *Re A (Children)* [2000] EWCA Civ 254.

828 Memorandum, n821 above, para 5(ii). See also *R v H* [2004] UKHL 3 at para 46: 'It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as an independent, unpartisan guardian of the public interest in the administration of justice'. However, the dual role of the Attorney as a government minister and an independent public official has proved increasingly problematic in recent times, see e.g. the House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General* (HC 306, June 2007); 1st report of the Joint Committee on the Draft Constitutional Renewal Bill (HC 551/HL 166: July 2008).

829 See Zander, n825 above, pp 416-417.

Instead its primary function is to review the activities of the Canadian Security Intelligence Service (CSIS), including the hearing of complaints.[830]

327. However, between 1984 and 2002, SIRC was also tasked with reviewing reports issued by government ministers for the exclusion of permanent residents on national security grounds.[831] Although most of its review was conducted by way of *ex parte* and *in camera* hearings,[832] defendants nonetheless had the right to an oral hearing and SIRC's procedure rules provided that:[833]

> it is within the discretion of [SIRC] in balancing the requirements of preventing threats to the security of Canada and providing fairness to the person affected to determine if the facts of the case justify that the substance of the representations made by one party should be disclosed to one or more of the other parties.

328. In order to introduce a degree of procedural fairness, SIRC on its own initiative began the practice of appointing security-cleared counsel to cross-examine security intelligence agents during *in camera* sessions and to assist it in deciding how much material could be safely disclosed to the defendant.[834] As a former legal advisor to SIRC described it in 1990:[835]

> The [SIRC] counsel is instructed to cross-examine witnesses for the Service with as much vigour as one would expect from the [defendant's] counsel. Having been

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[830] See the Canadian Security Intelligence Service Act, RSC 1984 c.21 (now RSC 1985, c. C-23). Generally speaking, SIRC performs the same oversight function as the UK's Intelligence and Security Committee, although it reports to the federal Parliament rather than directly to the Prime Minister as the British ISC does. However, the British ISC does not hear individual complaints against the security and intelligence services: these are dealt with by the Investigatory Powers Tribunal (see paras 223-226 above).

[831] See section 39(2) of the Canadian Immigration Act 1976 (as amended by the 1985 Immigration Act) and section 38(c) of the 1984 CSIS Act (both subsequently amended by the Immigration and Refugee Protection Act, S.C. 2001, c. 27).

[832] Strictly speaking, a permanent resident subject to removal proceedings on grounds of national security did not apply to SIRC for review: instead referral to SIRC took place automatically following the initial ministerial decision to remove.

[833] Ibid, rule 46(2)(a) of the Rules of Procedure of the Security Intelligence Review Committee in relation to its function under paragraph 38(C) of the Canadian Security Intelligence Service Act (March 1985) and section 48(2) of the CSIS Act. C.f. section 46 which requires SIRC to send to the complainant 'a statement summarizing such information available to the Committee as will enable the complainant to be as fully informed as possible of the circumstances giving rise' to the decision complained of.

[834] See Ian Leigh, 'Secret Proceedings in Canada', (1996) Osgoode Hall Law Journal 113-175 at 159-171; M. Code and Ken Roach 'The Role of the Independent Lawyer and Security Certificates' (2006) 52 Crim LQ 85.

[835] Murray Rankin, 'The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness' (1990), 3 *Can J Admin L & Prac* 173 at 184. See also Leigh, ibid, at 163: 'One counsel who had acted in some twenty or so cases before SIRC described the role as being threefold: first, to assist the members of [SIRC] in the conduct of the proceedings (with an emphasis on providing a fair and competent hearing); second, to help the [defendant] in what was described as a 'bizarre situation'; and third, to cross examine CSIS evidence in the *in camera* portion of the proceedings'.

> present during the unfolding of the [defendant's] case, the [SIRC] counsel is able to pursue the same line of questions. In addition, however, since [SIRC] counsel has the requisite security clearance and has had the opportunity to review files not available to the [defendant's] counsel, he or she is also able to explore issues and particulars that would be unknown to the [defendant's] counsel.

The advisor conceded, however, that 'a great deal turns on the ability of [SIRC] counsel to perform effectively in this unfamiliar role'.[836]

329. In particular, although SIRC counsel were under an obligation not to disclose the contents of the closed material, no specific rules were made to govern communication between the SIRC advocate and the defendant either before of after receipt of the closed material. As a consequence, the responsibility not to disclose closed material in the course of questioning was left to the special advocate in each case. As a 2007 study commissioned by the Canadian Federal Court Service found:[837]

> SIRC … counsel are able to maintain contact with the [defendant] and his or her counsel throughout the process. SIRC lawyers or legal agents may, therefore, question the [defendant] even after the former are fully apprised of the secret information against the latter. In so doing, they take special care not to disclose (even involuntarily) secret information.
>
> Even with this restriction, one of SIRC's … counsel told us that this questioning, done in an oblique manner to avoid involuntary disclosures of secret information, is central in unearthing potentially exculpatory information and observed that some cases at least have turned on information obtained from the named person in this manner.
>
> After reviewing the CSIS file, SIRC … counsel will have contact with the [defendant] and their counsel to converse and to obtain a list of questions that these persons may wish to have asked during the secret proceeding. Likewise SIRC … counsel may have contact with the [defendant] after a summary of information tabled in the secret proceedings has been provided to the latter. After reviewing the summary, the [defendant] may wish to have additional CSIS witnesses appear before the Committee and hence be cross-examined by SIRC counsel.

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836 Rankin, ibid.

837 Craig Forcese and Lorne Waldman, 'Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings' (Canadian Centre for Intelligence and Security Studies, August 2007), p 9.

> We were told that neither SIRC inhouse or outside counsel have ever received any complaints from the government that this contact with the named person has resulted in an involuntary disclosure injurious to national security

However, the ability of defendants to provide questions to be asked in closed session was not seen as a particular benefit:[838]

> Counsel to SIRC, [defendant's] counsel and SIRC all expressed scepticism about the practical utility of this facility. Both SIRC personnel and counsel to SIRC argued that, through ignorance of aspects of CSIS evidence, such questions tended to be peripheral to the central issues in the hearing. Likewise, without knowledge of CSIS's evidence, counsel to the [defendant] faced inevitable difficulties in preparing for this vicarious cross-examination.

Similarly, one SIRC counsel described the process of providing a summary of the closed material to defendants as 'fairly uninformative and of little assistance'.[839]

330. In 1992, the Canadian Supreme Court considered the appeal of one Joseph Chiarelli, a permanent resident of Canada who had been convicted of possessing drugs for supply and made subject to a deportation order.[840] During his deportation hearing, the government issued a report excluding Chiarelli on the basis of alleged involvement in 'organised criminal activity', and the report was referred to SIRC for review.

331. Unlike most cases before SIRC, however, the closed material did not relate to national security but to evidence given police informants. Prior to the hearing, Chiarelli was provided with a 'Statement of Circumstances giving rise to the making of a Report by the Solicitor General of Canada and the Minister of Employment and Immigration to the Security Intelligence Review Committee', which 'set out the nature of the information received by the Review Committee from the Ministers, including that the respondent had been involved in drug trafficking, and was involved in the murder of a named individual'.[841] Chiarelli was also provided with an 'extensive summary of surveillance of his activities' and a 'Summary of Interpretation of Intercepted Private Communications relating to the murder of Domenic Racco'.[842] The hearing before SIRC last two days, the first *in camera* and the second with Chiarelli and his lawyer present. Chiarelli was also provided with a summary of the evidence presented on the first

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[838] Leigh, n834 above, pp 163-164.

[839] Ibid, p 164.

[840] *Canada (Minister of Employment and Immigration) v Chiarelli* [1992] 1 SCR 711.

[841] Ibid.

[842] Ibid.

day. Refusing Chiarelli's appeal, the Supreme Court held that the nature of the proceedings against him did not engage his right to life, liberty and security under section 7 of the Canadian Charter of Rights and Freedoms. Even if it did, however, the Court held that the terms of SIRC's review did not breach the 'principles of fundamental justice' under that section. As Mr Justice Sopinka held:[843]

> [The] various documents gave [Chiarelli] sufficient information to know the substance of the allegations against him, and to be able to respond. It is not necessary, in order to comply with fundamental justice in this context, that the [defendant] also be given details of the criminal intelligence investigation techniques or police sources used to acquire that information.

332. Following the Immigration and Refugee Protection Act 2002, statutory responsibility for the review of removal decisions against permanent residents of Canada passed from SIRC to the federal courts (essentially harmonising the procedures for review with those for removal of non-permanent residents). The federal court review procedures under the 2002 Act made no provision for the use of security-cleared counsel and instead operated a system of closed proceedings without representation of any kind for the defendant.[844]

The Queensland public interest monitor

333. Less than three weeks before the Westminster Parliament enacted the Special Immigration Appeals Commission Act 1997, the Queensland Parliament passed the Police Powers and Responsibilities Act 1997, creating among other things the office of Public Interest Monitor.[845] Under the 1997 Act, the Monitor is not only tasked with supervising police compliance with applications for search warrants and surveillance warrants, but also:[846]

> to appear at any hearing of an application to a Supreme Court judge or magistrate for a surveillance warrant or covert search warrant to test the validity of the application, and for that purpose at the hearing—
>
> > (i) present questions for the applicant to answer and examine or cross-examine any witness; and

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[843] Ibid.

[844] Indeed, the courts declined to appoint them: *Re Harkat* 2004 FC 1717, (2004) 125 CRR (2d) 319.

[845] Act No. 67 of 1997, received royal assent on 1 December 1997. The SIAC Act did not receive royal assent until 17 December.

[846] 82(2)(b) of the 1997 Act, now section 326(b) of the Crime and Misconduct Act 2001.

(ii) make submissions on the appropriateness of granting the application;

Because police applications for search warrants and surveillance warrants are inevitably made *ex parte* without the defendant's knowledge, the Public Interest Monitor therefore aims to introduce an element of adversarial proceedings into what is otherwise a one-sided process. However, the Monitor's task is not to represent the interests of the absent party as such, but the public interest more generally:[847]

> Discharge of the Public Interest Monitor's functions requires a delicate balancing of two competing facets of public interest. The first is the public interest in ensuring that serious criminal conduct is detected, prevented and, where possible, made the subject of successful prosecution by our law enforcement and prosecutorial authorities, particularly during a time of rapid technological change. The second, and no less important, is that fundamental rights of individual members of our community, such as the right to privacy, are respected and interfered with as little as possible in the process of detecting, preventing and punishing that serious criminal conduct.

334. Accordingly, the Monitor is involved not only in the hearing itself but also before the hearing engaging with the police as to the need for the warrant and the evidence supporting it:[848]

> The legal officer of the relevant agency … advises what the application is about and answers questions from the Monitor about relevant matters. Draft affidavits and warrants are then delivered to the Monitor or Deputy as early as is practicably possible for his or her consideration. This is the point where the Monitor or Deputy then asks more specific questions, makes particular recommendations, makes targeted suggestions and might express some initial views about the application and matters relevant to it. The Monitor or Deputy makes his or her support, conditional support, neutral position or opposition to the application known. Not infrequently, the law enforcement agencies adopt a modified stance to the application having heard the Monitor's views. Sometimes they even drop the notion of proceeding with the application at all. Often, additional evidence is provided with a view to satisfying concerns expressed by the Monitor.

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847 Report of the Public Interest Monitor, October 2006, para 8.

848 Ibid, para 10. See also para 11 describing the procedure in hearings: 'Sometimes, but not often, applicants or other witnesses are required to attend before the judge or magistrate to be questioned by the Monitor or, on occasions, by the judge. This has happened in the period covered by this report on a number of occasions. Oral submissions are also made and sometimes, having heard comments from the judge or magistrate made during the hearing of the application, the Monitor and the representative of the applicant agree on a modified position'.

The contribution of Monitors at *ex parte* hearings has been received positively by the courts:[849]

> It is the experience of the Monitor and the Deputy Public Interest Monitors that the Supreme Court judges and the magistrates get much assistance in their decision making on warrant applications from the submissions and positional stances of the Monitor and the Deputies. Indeed, we have been expressly told this in formal meetings held with the Chief Justice and Judge Administrator of the Supreme Court and the Chief Magistrate and Deputy Chief Magistrate of the Magistrates Courts.

335. The origins of the Monitor lay in the case of Matthew Heery, a campaigner for a the National Party, who was suspected by the Criminal Justice Commission of electoral offences in relation to the Mundingburra by-election. Following an investigation in which Heery's home was bugged and more than 600 hours recorded, Heery was acquitted on a single count. The Queensland Supreme Court subsequently ruled the Commission's surveillance unlawful.[850]

336. In addition to challenging the police case in applications for search and surveillance warrants, the Monitor is also able to act in control order cases,[851] although unlike warrant applications she is not entitled to disclosure of the closed material. In May 2009, the Queensland Telecommunications Interceptions Act 2009 expanded the Monitor's functions to include testing of *ex parte* applications for interception warrants.[852]

337. Despite their contemporaneous development, there is no evidence that either the creation of special advocates in the UK or the establishment of the Public Interest Monitor in Queensland influenced the other. Nonetheless, like SIRC counsel and special advocates, the Monitor represents another attempt to reduce unfairness by introducing a degree of adversarial testing into what are otherwise *ex parte* proceedings. Uniquely, however, it does so not only by reference to the defendant's interest but also to the public interest in procedural fairness.

The 1997 Act

338. In its 1996 judgment in the *Chahal* case, the European Court of Human Rights held that the UK had violated Mr Chahal's right under article 5(4) because he had been unable to challenge the classified material that formed the basis of the Home Secretary's decision to

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[849] Ibid, para 12.

[850] See 'Qld Supreme Court rules CJC bugging unlawful', 24 March 2000.

[851] Section 104.14 of the Anti-Terrorism Act (No 2) 2005.

[852] See e.g. 'Queensland gets phone-tapping laws', AAP, 21 May 2009.

deport him on grounds of national security.[853] The Court observed that, although 'the use of confidential material may be unavoidable where national security is at stake',

> This does not mean … that the national authorities can be free from effective control by the domestic courts whenever they chose to assert that national security and terrorism are involved.

In particular, the Court noted the Canadian example cited by some of the intervenors:[854]

> The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13 … in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.

In the context of Article 13, the Grand Chamber again noted the Canadian example:[855]

> Amnesty International, Liberty, the AIRE Centre and JCWI drew the Court's attention to the procedure applied in such cases in Canada. Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.

It is seems, however, that the interveners misapprehended the relevant law in Canada, and this led the Grand Chamber to refer to a situation different from that which actually existed. First of all, the use of special counsel by SIRC was not a form of 'judicial control'. SIRC was not a 'court' presided over by 'a Federal Court judge', but a committee composed largely of former government ministers. Secondly, there was no statutory provision for the use of SIRC

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853 *Chahal*, n123 above, paras 124-133.

854 Ibid, para 131.

855 Ibid, para 144.

counsel in a quasi-adversarial role, neither in the 1976 Immigration Act, in the 1984 CSIS Act or in SIRC's procedure rules. It was, instead, a procedure devised entirely by SIRC itself. Thirdly, and most significantly for the UK, there was no formal bar on communication between the SIRC counsel and the defendant they represented, even after they had viewed the closed material.[856]

339. When the Special Immigration Appeals Commission Bill was first published in June 1997, the 'Canadian' use of special advocates was commended by the government and others. For instance:[857]

> To ensure that the case against the [defendant] is properly scrutinised in his or her interests, Clause 4 provides certain safeguards. These necessarily fall short of full disclosure of national security information, *but they build on Canadian procedures for dealing with similar cases which were commended by the European Court*. In particular, the commission will be able to appoint a person--counsel--to help it in its examination of the security evidence, and in particular to look at that evidence as if on behalf of the [defendant].[858]
>
> As the Minister has indicated, *the Bill is to some extent modelled on Canadian immigration law,* as suggested not I think by the court but by Justice,[859] Liberty, the Aire Center and the JCWI in their amicus brief to the European Court.[860]
>
> One of the reasons that I am so complimentary to Ministers and officials is that *they have looked carefully at the Canadian immigration law and practice and procedure which was commended by the European Court of Human Rights*. I do not go into

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[856] See para 329 above.

[857] Not all Parliamentarians were so keen on the Canadian example, however. Lord Thomas of Gresford said: ' My other main objection is the nature of the commission itself. It may have a Canadian flavour; however, I do not think that it thereby answers all the problems. I know of no judicial process in this country, whether a court or a tribunal, dealing with the liberty of the individual which does not tell him the substance of the allegations that he faces' (HL Debates, 5 June 1997: col 747) and 'We already have a well developed system to deal with problems of national security and I wonder why we have to go to Canada for a code of this sort to deal with this matter. It is for the Government to justify why proceedings of this nature require such overwhelming secrecy of the Canadian flavour, such secrecy that not even the appellant himself can know the full extent of the allegations against him or be present at the hearing' (ibid, col 748).

[858] Lord Williams of Mostyn, HL Debates, 5 June 1997: col 736. Emphasis added.

[859] This is incorrect. JUSTICE's intervention in *Chahal* did not refer to the situation in Canada, nor did it commend the use of special advocates. See *Chahal*, n853 above, para 144.

[860] Lord Lester of Herne Hill, HL Debates, 5 June 1997, col 742. Emphasis added.

> much detail, but they have produced a solution which improves upon the Canadian position.[861]

If, however, government ministers and officials had actually 'looked carefully at the Canadian immigration law and practice and procedure', they would have discovered that the situation in Canada was not as had been described in *Chahal*. As it emerges, they did not. After the *Chahal* judgment, neither the Home Office, the Foreign Office nor the Attorney General's office made any inquiries to the Canadian government concerning the Canadian use of special counsel.[862] Nor did they carry out any research of their own into the Canadian legislation, procedure or practice.[863] Nor does Hansard show any attempt by the government to correct the record on this matter. Instead, government ministers and officials were apparently content to accept compliments for work they had not done.

340. At Second Reading in the House of Lords, the government's idea of a special advocate was still somewhat hazy, something more akin to an *amicus* to assist the court in 'its examination of the security evidence, and in particular to look at that evidence as if on behalf of the [defendant]', rather than as a straightforward advocate for the defendant in closed session.[864] By the time the Bill had reached committee stage in the Lords, though, several of the key features of the concept of special advocate had emerged:[865]

> We concluded in particular that to ensure the independence of a special advocate it would be more appropriate if the person were to be appointed by the Attorney-General or his or her equivalent. We also take the view that the role of the special advocate should be to represent the interests of the [defendant] in those parts of the proceedings from which he and his legal representative are excluded. That will probably mean that he or she will need to be present throughout the proceedings. Finally … we believe it important to make it clear that the special advocate will not

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861 Lord Lester of Herne Hill, HL Debates, 23 June 1997, col 1438. Emphasis added.

862 Letter of Foreign Office to JUSTICE dated 2 October 2008 (Freedom of Information Act request 0768-08); letter of Home Office to JUSTICE dated 2 October 2008; letter from the Attorney General's Office to JUSTICE dated 22 October 2008. JUSTICE made requests under the Freedom of Information Act for 'details of any requests by the UK government to the government of Canada concerning the Canadian use of special advocates or special security-cleared counsel (along the lines of that provided by the Special Immigration Appeals Commission Act 1997 (UK)) between 1 November 1996 [the month of the Chahal judgment] and 17 December 1997 [the date the 1997 Act was passed]; and 'details of any research undertaken into the Canadian law relating to special advocates or special security-cleared counsel (along the lines of that provided by the Special Immigration Appeals Commission Act 1997 (UK)) between 1 November 1996 and 17 December 1997'. The Foreign Office had no information of any requests or research, the Home Office confirmed it held no record of any research undertaken and the Attorney General's office confirmed the same.

863 Ibid.

864 Lord Williams of Mostyn, 2nd reading , HL Debates 5 June 1997, col 736, Emphasis added.

865 Ibid, HL Committee 23 June 1997, Col 1437. Emphasis added.

have a client relationship with the [defendant]. We do not judge the situation to be workable on any other basis.

341. This apparent need to remove the client relationship was made explicit in the Commons, where it was explained that, although the special advocate 'will look at the evidence as if he were doing so on behalf of the [defendant] … there will not be the lawyer-client relationship, where the special advocate is required to disclose all information to the client'.[866] Explaining the role of the special advocate, Home Office ministers used the analogy of litigation friends in cases involving children and the mentally incapable:[867]

> the special advocate is like a person who is appointed by a court to represent a minor – a child – or someone with a psychiatric or mental problem. That person does not take instructions from the client and he is not obliged to do what the client says.

342. The minister conceded, though, that the special advocate must nonetheless 'make a judgment about the way in which the [defendant] would have wanted his case argued'.[868] This analogy with a litigation friend or guardian *ad litem* is of course flawed. The reason a special advocate is not responsible to the person whose interests he represents is not because of any belief that that person is either too young or too ill to give proper instructions. After all, even litigation friends owe a duty to those they represent.[869] Instead, any disability suffered by the defendant represented by a special advocate is that imposed by the government's non-disclosure of the evidence in question. In the basest terms, the reason why Parliament severed the professional relationship between special advocates and those they represent was because any advocate who withheld evidence from his client would otherwise be disbarred.[870]

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[866] Home Office Minister Mike O'Brien, 2nd reading, HC Debates, 30 October 1997, Col 1056. He later explained that: 'a special advocate is not obliged to disclose information that he may become privy to. He does not have the lawyer-client relationship that one commonly expects, so the special advocate will not take any instructions from the appellant' (ibid, col 1071).

[867] Ibid, col 1070-1071, emphasis added. See also 3rd reading, HC debates, 26 November 1997, col 1039: 'the special advocate has an obligation to seek to represent the appellant's interests without taking instructions from him. As I have mentioned in previous debates, that is not completely unprecedented. Perhaps it has never been done on this scale and in this way, but it happens in cases involving people with psychiatric problems and with minors. Their lawyer sometimes has to exercise independent judgment in the way in which he represents that person'.

[868] HC debates, 3rd reading, 26 November 1997, Col 1039.

[869] Family Procedure Rules, Practice Direction Part 7, rule 2.1: 'It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a child or patient. He must have no interest in the proceedings adverse to that of the child or patient and all steps and decisions he take in the proceedings must be taken for the benefit of the child or patient'.

[870] See e.g. Code of Conduct of the Bar of England & Wales (8th ed, October 2004), para 303(a): A barrister 'must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any professional client or other intermediary or another barrister'.

343. The statutory basis for the appointment of special advocates was ultimately set out in section 6 of the Act. Subsection 1 states that:

> The [Attorney General][871] may appoint a person to represent the interests of [a defendant] in any proceedings before the Special Immigration Appeals Commission from which the [defendant] and any legal representative of his are excluded.

Additionally, section 6(4) provides that a special advocate 'shall not be responsible to the person whose interests he is appointed to represent'. Together with the SIAC procedure rules, section 6 of the 1997 Act has been the model for all subsequent provision for the use of special advocates, both statutory and non-statutory.

The SIAC procedure rules

344. Shortly after the 1997 Act came into force, rules were made under the Act governing SIAC's procedures.[872] They imposed a general duty on the Commission to ensure that information is not disclosed contrary 'to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm a public interest'.[873] The 1998 rules also described the functions of special advocates as follows: [874]

> The function of the special advocate is to represent the interests of the [defendant] by -
>
> (a) making submissions to the Commission in any proceedings from which the [defendant] and his representatives are excluded;
>
> (b) cross-examining witnesses at any such proceedings; and
>
> (c) making written submissions to the Commission.

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[871] Under section 6(2), appointments in England and Wales may be made by either the Attorney General or the Solicitor General. The Lord Advocate is responsible for appointments in Scotland, while the Advocate General for Northern Ireland is responsible for appointments in Northern Ireland.

[872] Special Immigration Appeals Commission Rules 1998 (SI 1998/1881).

[873] Ibid, rule 3(1) (now rule 4 of the 2003 rules). In *BB v Secretary of State for the Home* Department (SC/39/2005, 14 November 2006), SIAC rejected the submission that the rule allowed any discretion for SIAC to allow for disclosure of closed material to the defendant only, but not to the press or public.

[874] Ibid, rule 7(4). The rule is now set out in rule 35 of the 2003 procedure rules (SI 2003/1034), as amended by para 20 of the Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007.

345. In addition, the 1998 rules established the cornerstone of the special advocate procedure: the prohibition on communication between a special advocates and the defendant once the special advocate has viewed the closed evidence:[875]

> the special advocate may not communicate directly or indirectly with the [defendant] or his representative on any matter connected with proceedings before the Commission.

This rule was subject to two exceptions. First, the special advocate could communicate with the defendant 'at any time before' the Home Secretary discloses the closed material to him.[876] Secondly, after having seen the closed material, the special advocate could apply to SIAC for directions 'authorising him to seek information in connection with the proceedings' from the defendant and his lawyers.[877] However, any such request was subject to the objections of the Home Secretary.[878]

346. In 2003, the government issued revised procedure rules for SIAC.[879] The core duty of SIAC to prevent the release of information contrary to the public interest remained the same, as did the functions of special advocates. And while the essence of the prohibition on communication was unaltered, the rules governing the procedure were considerably expanded. Under rule 36, the prohibition on the special advocate's communication was not restricted to the defendant and his lawyer. Instead, rule 36(2) provided that:[880]

> After the Secretary of State serves material on the special advocate … the special advocate must not communicate with *any* person about any matter connected with the proceedings…

At the same time, rule 36(3) set out several exceptions to this rule: special advocates do not need directions from SIAC to communicate with SIAC, the Secretary of State or her lawyers, the Attorney or her lawyers, and any other person except for the defendant and his lawyers, 'with whom it is necessary for administrative purposes for him to communicate about matters not connected with the substance of the proceedings'.[881] Rule 36(4) and (5) retained the procedure allowing the special advocate to seek permission from SIAC to communicate with

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[875] Ibid, rule 7(5).

[876] Ibid, rule 7(6).

[877] Ibid, rule 7(7).

[878] Ibid, rule 7(8).

[879] Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034).

[880] Rule 36(2) of the 2003 Rules. Emphasis added.

[881] Ibid, rule 36(3)(d).

the defendant after viewing the closed evidence. And, in another new addition, rule 36(6) made clear that the defendant and his lawyers are free to pass information in writing *to* the special advocate on a one-way basis even after the special advocate has viewed the secret evidence. The special advocate cannot reply without permission, however, other than to acknowledge safe receipt.[882]

347. In 2007, SIAC's procedure rules were amended to give special advocates the additional function of 'adducing evidence'.[883] In May 2009, a former special advocate described their functions in the following terms:[884]

> The special advocate will argue that the information to be relied upon in closed [session] can be disclosed in whole or in part in one form or another without risk of endangering national security ... The special advocate will argue that there has been insufficient disclosure to SIAC and the special advocate of material open or closed made relevant in the proceedings that may undermine the case of the [Secretary of State] against the [defendant].
>
> The special advocate will test the assertions of oral evidence by the [Secretary of State] in cross examining witnesses as to the basis for their assertions. The special advocate will submit that the material is insufficient to sustain the reasonable grounds for suspecting the person to be the risk alleged. The special advocate will review the closed grounds of SIAC in dismissing the appeal and promote an appeal on the basis of an error in law in assessing the closed case.

The growth of special advocates

348. As we have seen from the survey of civil and criminal proceedings in Parts 2 and 3 of this report, the use of special advocates has increased dramatically since they were first introduced under the 1997 Act. Although the first special advocates were appointed under statute, the 2000 decision of the Court of Appeal in *Rehman* identified an inherent common law power of the courts to appoint a special advocate on an *ad hoc* basis where necessary to do justice.[885] Since then, both statutory and *ad hoc* appointments of special advocates have grown considerably, as well as the number of statutes authorising their use. Indeed, as the

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[882] Ibid, rule 36(6)(b).

[883] Rule 35(b) of the 2003 Rules as amended by rule 20 of the Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007,

[884] Mr Justice Blake, 'The UK Experience of Special Advocates', paper delivered at the Danish Institute for Human Rights, 4 May 2009, p2.

[885] See para 96 above.

organisation Reprieve has discovered through a series of FOI requests, their use has grown to such an extent that the government has no clear idea of how many special advocates have been appointed since 1997.

349. Nor has the growth of special advocates has not been restricted to the UK. This section gives details of how the UK model of special advocates has been increasingly adopted in other common law jurisdictions, including Canada, Hong Kong and New Zealand.[886]

Statutory special advocates

350. When SIAC was first created, one government minister stressed that the likely number of cases heard by the new body would be 'very small indeed'.[887] Another predicted that, at most, only a handful of cases would be heard each year.[888] Initially this prediction held: between August 1998 (when the 1997 Act was brought into force)[889] and September 2001, SIAC heard only three appeals.[890]

351. However, the number of bodies before which a special advocate could be appointed grew almost immediately. Within a year of the 1997 Act being passed, special advocates could also be appointed in two different kinds of proceedings in Northern Ireland.[891] By the end of 2001, another four tribunals had been empowered to appoint them, including the

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[886] Australia has copied the UK system of control orders with the use of closed evidence but without any provision for special advocates (other than the role of the Queensland Public Interest Monitor). See schedule 4 of the federal Anti-Terrorism Act (no 2) 2005 and the judgment of the High Court of Australia in *Thomas v Mowbray* [2007] HCA 33, particularly the dissent of Kirby J at para 365: 'Other countries with legal systems generally similar to those of Australia have either legislated for, or required the availability of, special advocates in circumstances where accused persons are not entitled to access to the full case against them on grounds, asserted by the executive, of national security. There is no similar facility in [the 2005 Act] for an independent person to have access to the executive's material or to controvert the veracity of the evidence relied upon. To expect a court to rely for its decisions solely upon the evidence supplied by the very officers seeking to secure or uphold the control order, is fundamentally inconsistent with the adversarial and accusatorial procedures, observed by the Australian judiciary until now in serious matters affecting individual liberty, as contemplated by Ch III of the Constitution'.

[887] Lord Williams of Mostyn said that 'the numbers likely to be involved are very small indeed. The panel which advised the Home Secretary in the past has in the past six years dealt with only six cases which were not Gulf War related' (HL Debates, 5 June 1997, Col 751).

[888] Home Office minister Mike O'Brien said 'about five cases a year would be the most that we would think likely, in the normal course of events, to come before the commission' (HC Debates, 30 October 1997, Col 1054).

[889] See Special Immigration Appeals Commission (Commencement No 1) Order 1998 (SI 1998/1336) and Special Immigration Appeals Commission (Commencement No 2) Order 1998 (SI 1998/1892).

[890] See paras 91-100 above. A fourth pre-9/11 appeal concerning Youssef, an Egyptian national, was lodged but never heard: see n167 above.

[891] These were the Northern Ireland Sentence Review Commissioners (Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 (SI 1998/1859), made July 1998) and the tribunal in Northern Ireland to review national security certificates in discrimination claims (section 91 of the Northern Ireland Act 1998, enacted November 1998).

Proscribed Organisations Appeals Commission and the Employment Tribunal in 2001 and the Pathogens Access Appeals Commission in 2001.[892]

352. Following 9/11, the number of cases before SIAC increased dramatically, with the first decision in relation to eleven detainees being handed down in August 2002. The following year, SIAC heard thirteen cases, with a further seven in 2004. There was a slight dip in the number of cases before SIAC in 2005, following the repeal of Part 4 allowing indefinite detention and the introduction of control orders (which involved appeals before the High Court rather than SIAC): only five cases were heard. Following the government's 'new approach' to deportation after 7/7 however, the numbers revived, and SIAC heard eighteen cases in 2006, eight in 2007 and seven in 2008. As of the beginning of June 2009, SIAC has heard six cases, including four applications for bail.

353. Although SIAC has heard 63 cases since 9/11, the total number of special advocates differs for at least three reasons. First, depending on the complexity of the case, a defendant will sometimes be appointed two special advocates: a senior barrister and a junior barrister. Secondly, some of the cases involve multiple defendants, while others involve the same defendant in more than one case. Secondly, some special advocates have acted for more than one defendant.[893] Based on an analysis of all reported cases, we calculate that a total of 30 special advocates have been appointed in SIAC cases since 1997, nineteen alone of which were appointed in the year after 9/11.[894]

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[892] The Proscribed Organisations Appeals Commission was established by section 5 of the Terrorism Act 2000 and empowered to appoint special advocates under para 5(4) of schedule 3 of the same. The Employment Tribunal was given the power to appoint special advocates under section 67A(2) of the Race Relations Act 1976, as amended by section 8 of the Race Relations (Amendment) Act 2000. The Pathogens Access Appeals Commission was created by section 70(1) of the Anti-Terrorism Crime and Security Act 2001 and empowered to appoint special advocates by para 5(3) of schedule 6 of the same Act. The other body empowered to appoint special advocates before 2002 was the Northern Ireland Life Sentences Review Commissioners: see the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564).

[893] While the general rule is that special advocates cannot be appointed in any case in which they have already seen some of the closed evidence (e.g. in a case involving an alleged co-conspirator), there is obviously a benefit to the appointment of a special advocate with experience of closed proceedings. As a former special advocate has written: '[special advocates] are now trained in the workings of the security services, build up a certain degree of experience as to how the service works and what to look for and why, and can provide a certain level of protection against arbitrary decision making' (Mr Justice Blake, 'The UK Experience of Special Advocates', n884 above, p6).

[894] Attorney General's Review of the Year 2001/2002, p 28: 'During the last 12 months the Attorney General appointed a total of 19 Special Advocates for the purpose of hearings before SIAC and a total of three Special Advocates for the purpose of hearings before POAC.'

354. Five special advocates have been appointed to appear in cases before the Proscribed Organisation Appeals Commission since it was created in 2000,[895] although it has heard only one appeal in the past five years.[896] In their 2005 judgment in the case of *Roberts v Parole Board*, a majority of the House of Lords also identified a hitherto unsuspected power on behalf of the Parole Board under the Criminal Justice Act 2003 to appoint a special advocate.[897] Only one special advocate has been appointed so far under this provision, however.

355. In control order hearings before the High Court under the Prevention of Terrorism Act 2005, Lord Carlile reports that there were 50 special advocates at the end of 2008, eight of which had been appointed in 2007 and seven in 2008.[898]

356. One special advocate has so far been appointed in a hearing before the Employment Tribunal.[899] According to the Attorney General's office, a special advocate has also been appointed to appear in a case in the Family Division of the High Court.[900] However, there has been no reported judgment in this case. In total, we estimate that a total of 88 special advocates have been appointed under explicit statutory authority since 1997.

Ad hoc *special advocates*

357. In addition to special advocates appointed under statute, however, there have also been several *ad hoc* appointments by courts using their inherent common law power to do justice.[901] The courts' ability to appoint special advocates using this power was first identified in civil cases in the 2000 judgment of the Court of Appeal in *Rehman*[902] and in criminal cases in the 2004 House of Lords judgment in *R v H*.[903]

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[895] Ibid. A further two special advocates were appointed in *Lord Alton of Liverpool and others v Secretary of State for the Home Department* (PC/02/2006, 30 November 2007), discussed at para 235 above.

[896] Ibid.

[897] See *Roberts v Parole Board*, paras 175-177 above.

[898] Lord Carlile of Berriew QC, *Fourth report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (3 February 2009), para 65.

[899] See page 113 above.

[900] Letter from the Treasury Solicitor's Department to Reprieve dated 13 May 2009 (Freedom of Information Act request).

[901] See e.g. Lord Diplock in *Bremer Vulcan v South Seas Shipping Ltd* [1981] AC 909 at 977C-H: 'The High Court's power to dismiss a pending action for want of prosecution is *but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice.* Such a power is inherent in its constitutional function as a court of justice*'* [emphasis added].

[902] See page 44 above.

[903] See page 167 above.

358. From our survey of reported cases, we have identified nine cases in which an *ad hoc* special advocate was appointed.[904] However, these are certainly not the only cases. The Attorney's reference to the appointment of an *ad hoc* special advocate in an unreported Family Court case illustrates the problem. After all, reported judgments cover only a small proportion of the total number of cases at any given time. While, in principle, cases in which a special advocate has been appointed are more likely to be reported because they are more noteworthy, there is no guarantee that a case will be reported. It is therefore likely that an unknown number of appointments have gone unreported. In particular, the fact that there are no reports of *ad hoc* special advocates being appointed in relation to PII applications in criminal cases since their use was authorised by the House of Lords does not mean that no special advocates have been appointed.

359. Indeed, it has become apparent that even the government does not know how many special advocates have been appointed since 1997, whether *ad hoc* or statutory. In 2002, the Attorney General's Office published its first review of the year, which contained the number of special advocates appointed in the past 12 months.[905] The Office's first annual review was also apparently the last,[906] and no further details have ever been published. An FOI request by Reprieve in 2009 revealed that the Attorney held appointment information 'in relation to civil and public law proceedings only'.[907] The Office stated that, in this context, there were currently 51 barristers on the Attorney's panel of special advocates 'who have been appointed at various times since 1997', and that it was aware of a further ten barristers who had been on panel but subsequently left.[908] It suggested that additional information might be held by the Special Advocates' Support Office ('SASO'), the part of the Treasury Solicitor's Department which is responsible for instructing special advocates. SASO replied that its records only went back to February 2006 when it commenced operation, and that it was aware of 83 special advocates having been instructed since that date.[909] In little more than a decade since special advocates were introduced, therefore, the government no longer has a grasp on the full extent of their use in civil and criminal proceedings.

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[904] These are *Rehman* (see p44), *Farooq* (p113), the CAAT case (p114), *B v Secretary of State for Transport* (see note 479) *Clive Roberts* (p115), *MH and others* (p118), *Brady* (p125), *Al Rawi* (p131) and *Binyam Mohammed* (p131).

[905] See n894 above.

[906] The Law Officers (the Attorney, the Solicitor-General, Treasury Solicitor and DPP) have subsequently published a joint annual departmental report. Although it makes reference to the Attorney's role in appoint special advocates, it contains no figures on the number of appointments.

[907] Letter from the Attorney-General's Office to Reprieve dated 20 April 2009.

[908] Ibid.

[909] Letter from the Treasury Solicitor's Department to Reprieve dated 13 May 2009.

Canada

360. Under the Immigration and Refugee Protection Act 2002, SIRC's role in immigration cases was replaced by Federal Court review involving closed proceedings and secret evidence without representation of any kind for the defendant. In the February 2007 case of *Charkaoui v Canada (Citizenship and Immigration)*,[910] the Canadian Supreme Court considered the compatibility of the 2002 Act with the right to procedural fairness under section 7 of the Canadian Charter.

361. The Supreme Court unanimously held that 'by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the [defendant's] interests', the Federal Court review procedure under the 2002 Act 'unjustifiably violates' the principles of fundamental justice under section 7.[911] As Chief Justice McLachlin said, a judge sitting alone in closed session is:[912]

> not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?

If the principles of fundamental justice under section 7 in the context of cases involving national security were to be satisfied, 'either the person must be given the necessary information, or a substantial substitute for that information must be found'.[913] The Supreme Court noted the possibility of using of special advocates as one way to try to provide necessary disclosure to an appellant,[914] whether based on SIRC counsel or the UK model.[915] However, it also noted that the UK model had 'been criticised for not going far enough' towards protecting defendants' rights.[916]

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[910] [2007] 1 SCR 350.

[911] Ibid, para 3.

[912] Ibid, para 64. See also e.g. para 60: 'It is one thing to deprive a person of full information where fingerprinting is at stake, and quite another to deny him or her information where the consequences are removal from the country or indefinite detention'.

[913] Ibid, para 61.

[914] Ibid, paras 70-84.

[915] The Supreme Court noted that the European Court of Human Rights in *Chahal* had 'commented favourably' on the use of special advocates, 'identifying it as being Canadian in origin (perhaps referring to the procedure developed by SIRC)' (ibid, para 80).

[916] Ibid, para 47.

362. In February 2008, the Canadian Parliament passed legislation[917] to provide for the appointment of special advocates to represent the interests of defendants in closed proceedings under the 2002 Act. Although the special advocate is required to seek the permission of the court to communicate with the defendant after seeing the secret evidence,[918] unlike the UK there is no formal requirement to notify the government of the proposed communication to allow objections to be raised. However, the issue is currently the subject of continuing litigation, as part of a more general challenge to the compatibility of the new procedure with section 7 of the Charter.[919]

Hong Kong

363. The introduction of special advocates in Hong Kong in appeals against proscription was proposed by clause 15 of the National Security (Legislative Provisions) Bill introduced in 2002. This was modelled explicitly upon the UK provision for special advocates before SIAC and the Proscribed Organisations Appeals Commission.[920] However, the Bill was withdrawn in 2003 following widespread protests.

364. A special advocate was appointed in 2004 by the Court of First Instance in the matter of *PV v Director of Immigration*,[921] a judicial review of the Director's refusal to release the defendant on immigration bail. Mr Justice Hartmann accepted the Director's claim of public interest immunity in certain documents that formed the basis of his decision,[922] but cited the decision of the House of Lords in *R v H* as authority for the appointment of a special advocate to make submissions on the closed material *in camera* on the defendant's behalf.[923] As the judge explained:[924]

> The consequence of my order of non-disclosure was that [the defendant's counsel] was unable to advocate the [defendant's] case as to why he should no longer be

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[917] An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, SC 2008, c.3.

[918] Ibid, section 85.4(2): 'After [the closed] information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding *only with the judge's authorization and subject to any conditions that the judge considers appropriate* [emphasis added]'.

[919] See e.g. *Re Almeri* [2008] FCJ No 1488.

[920] See report of the Bills Committee on National Security (Legislative Provisions) Bill, LC Paper No. CB(2)917/04-05(02)..

[921] HCAL 45/2004, 16 July 2004.

[922] Ibid, para 11(iii).

[923] Ibid, para 14.

[924] Ibid, para 42.

> detained without any knowledge of the real reason for his detention in the first place. That not only placed [the defendant's counsel] in an invidious position, it deprived me of the benefit of submissions made in the interests of the [defendant] going to the weight of the reasons for his ongoing detention. It was for these reasons that the procedure of appointing a special advocate was adopted. I believe it is the first time the procedure has been adopted in Hong Kong.

In the subsequent case of *V v Director of Immigration*,[925] the Court of First Instance found it unnecessary to appoint a special advocate as the court decided the documents were not relevant to the determination of the judicial review.[926]

New Zealand

365. The first and only special advocates to be appointed in New Zealand involved the case of Ahmed Zaoui, an Algerian asylum-seeker certified by the government as a risk to national security.[927] In proceedings under the Immigration Act 1987, the Inspector General of Intelligence and Security appointed two special advocates in 2005 to represent Zaoui's interests as part of the Inspector's statutory review of the secret evidence in his case. However, the certificate was withdrawn by the government in September 2007.

366. There is as yet no statutory provision for the appointment of special advocates in immigration proceedings in New Zealand. An Immigration Bill introduced in August 2007 included provision for their use in such cases.[928] However, the Bill is understood to have lapsed following the change in government at the end of 2008.

The limitations of special advocates

367. Despite the claims of government and others that special advocates are an adequate safeguard against the unfairness caused by the use of secret evidence,[929] special advocates

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[925] HCAL 60/2005, 17 October 2005.

[926] Ibid, at para 16 per Chu J.

[927] *Attorney General v Zaoui and others* [2005] NZSC 38.

[928] See John Ip, 'The Rise and Spread of the Special Advocate', (2008) *Public Law* 717 at 730.

[929] See e.g. Lord Goldsmith QC: 'I think that this is the best procedure that one can in principle find of being able robustly to test closed material once one has taken the view that it ought to be possible in certain circumstances to rely upon closed material' (evidence to the House of Commons Constitutional Affairs Committee, 8 March 2005, Q197); Tony McNulty MP (Home Office Minister): the special advocate system 'was broadly afforded a clean bill of health by the House of Lords' (Public Bill Committee on the Counter-Terrorism Bill, 13 May 2008, col 442); Lord Carlile QC: 'Once again this year I have received no complaints about the special advocate procedure in control order cases … The special advocates are skilled and conscientious, and certainly useful. They have had an effect in the outcome of cases, and in all cases have been of

operate under a number of limitations that make them a paltry substitute for a fair trial in open court. This section looks in particular at four key limitations on special advocates: (i) the prohibition on their communication with defendants; (ii) the limitations on their access to evidence, including their practical inability to call witnesses, absence of disclosure of unused material and their lack of access to expertise; (iii) the absence of any mechanism to ensure their accountability; and (iv) the lack of formal judicial control over their appointment. The first two of these are substantive limitations, while the latter two are formal. As we will see, each of these limitations may be mitigated to some extent by sensible reform. But no amount of reform can hope to overcome the inherent unfairness of the procedure itself.

Communication

368. Once a special advocate has been served with closed evidence, she is prohibited from discussing it with anyone other than the court, the lawyers for the government, and the Special Advocate Support Office.[930] Most of all, she cannot have any direct communication of any kind with the defendant and his lawyers, other than to write to acknowledge receipt of any information sent to her.

369. This inability to communicate means that the special advocate is unable to discuss the secret evidence with the defendant and take his instructions on how to proceed. In a hearing in open court, counsel act on instructions from their clients. Having discussed the evidence and the merits of the case with the client, they do, of course, exercise their own professional judgment on how the case ought best to be run and advise their clients accordingly, but it is always the client and not the advocate who has the final say.[931] In particular, counsel is utterly reliant on the client for instructions on how to respond to allegations put by the other side. If, for example, the prosecution alleges that the accused met an Al Qaeda operative named Hassan in Manchester on the night in question, it is not open to his counsel to invent a reply. The advocate is bound to put her client's case and not her own.

370. It is clear, therefore, that the prohibition on communication between special advocates and defendants concerning the secret evidence puts special advocates in an impossible position. The special advocate can have no meaningful instructions from the defendant in relation to the government's allegations and therefore can only speculate as to what might be

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great assistance to the Court. Their use has been studied, with favourable comment, by other jurisdictions' (4th report under the 2005 Act, n898 above, para 65).

930 See e.g. rule 36(2) of the 2003 SIAC procedure rules, and rules 76.25(2) and 79.20(2) of the Civil Procedure Rules Identical provisions apply to special advocates under other statutory schemes. In cases of ad hoc appointments, the same restrictions are deemed to apply: see e.g. *Secretary of State for the Home Department v AHK and others* [2009] EWCA Civ 287, paras 17-35.

931 The exception is, of course, that counsel may not act unethically or illegally.

said in reply. If the secret evidence contains the allegation that the defendant met an Al Qaeda operative named Hassan in Manchester on the night in question, then clearly it is information that the government does not wish to be disclosed to the defendant for fear of compromising national security, methods of interception or the identity of an informant, etc. This was the predicament that Lord Bingham likened to 'taking blind shots at a hidden target'.[932]

371. In principle, however, special advocates may seek the permission of the court to put questions in writing to the defendant.[933] However, any proposed communication is subject to the objections of the Secretary of State. So, in the hypothetical example, the special advocate might ask for the court's permission to ask the defendant if he was in Manchester on the night in question, and if he met anyone. However, the Secretary of State could object that, by specifying the date and the location, this would thereby alert the defendant to the fact that the security service knew of the alleged meeting, thereby enabling the defendant to guess at the source of the evidence (whether interception, surveillance or informant, etc). Even if the special advocate were to apply to ask an apparently non-leading question, e.g. where the defendant was on the night in question, the government may nonetheless object because even knowledge of the date of the alleged meeting might inadvertently reveal sensitive information. Generally speaking, the more relevant the question the special advocate would like to ask, the more likely it is to inadvertently reveal secret material to the defendant.

372. Moreover, the very process of allowing the Home Secretary to object to a special advocate's proposed communication with the defendant is a fundamental break with the principle of free, confidential and uninhibited communication between lawyer and client.[934] A defendant can have little confidence in a procedure that allows any exchange of information with the special advocate to be subject to both judicial and executive scrutiny.

373. This prohibition on communication has attracted widespread criticism, including the House of Commons Constitutional Affairs Committee, the Joint Committee on Human Rights, the Council of Europe Commissioner on Human Rights, and even a Canadian Senate committee studying the use of special advocates.

374. Following the Belmarsh judgment in December 2004, the Constitutional Affairs Committee commenced an inquiry into the operation of SIAC and its use of special advocates. Among the evidence to the Committee was a submission from nine serving special advocates, highlighting the difficulties they faced due to the prohibition on communication with the

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932 See n690 above.

933 See e.g. rule 36(4) of the 2003 SIAC procedure rules, and rules 76.25(4) and 79.20(4) of the Civil Procedure Rules

934 See e.g. *R v Daly* [2001] 2 AC 532; *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165.

defendant.[935] First, they noted that although special advocates could communicate with defendants *before* looking at the secret evidence, 'such communication is, in any event, unlikely to be of much use … since [the special advocates] do not at this stage know the nature of the closed case the [defendant] has to meet'.[936] Secondly, even though rule 36(4) of the SIAC procedure rules allows the special advocates to seek permission to communicate with defendants after they have seen the secret evidence:[937]

> this power is in practice almost never used, not least because any request for a direction authorising communication must be notified to the Secretary of State. So, the Special Advocate can communicate with the appellant's lawyers only if the precise form of the communication has been approved by his opponent in the proceedings. Such a requirement precludes communication even on matters of pure legal strategy (i.e. matters unrelated to the particular factual sensitivities of a case).

In the absence of effective instructions, the special advocates described the very limited role they are able to play in closed hearings:[938]

> Special advocates can identify (by cross-examination and submissions) any respects in which the allegations made by the Home Secretary are unsupported by the evidence relied upon and check the Home Secretary's evidence for inconsistencies. But special advocates have no means of knowing whether the [defendant] has an answer to any particular closed allegation, except insofar as the [defendant]has been given the gist of the allegation and has chosen to answer it. Yet the system does not require the Secretary of State necessarily to provide even a gist of the important parts of the case against the [defendant] in the open case which is provided to the [defendants]. In these situations, the special advocates have no means of pursuing or deploying evidence in reply. If they put forward a positive case in response to the closed allegations, that positive case is inevitably based on conjecture. They have no way of knowing whether it is the case that the [defendant] himself would wish to advance. The inability to take instructions on the closed material fundamentally limits the extent to which the special advocates can play a meaningful part in any appeal.

375. In April 2005, the Constitutional Affairs Committee published its report, recommending among other things that the government 'reconsider its position' concerning the ban on

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[935] Written evidence to the House of Commons Constitutional Affairs Committee, Ev 38: evidence submitted by a number of special advocates, 7 February 2005, paragraph 9.

[936] Ibid, para 9.

[937] Ibid.

[938] Ibid, para 10.

communication between special advocates and defendants. The Committee suggested that it 'should not be impossible' to construct 'appropriate safeguards' to protect national security in such cases and increased communication 'would go a long way to improve the fairness of the Special Advocate system'.[939] However, the government strongly opposed any move to allow greater communication between special advocates and defendants, arguing that the grant of permission for special advocates to communicate after seeing the secret evidence was 'not just a theoretical possibility':[940] In particular it claimed that special advocates had:[941]

> *obtained permission in a number of cases* to communicate legal points and factual matters that have emerged from cross-examination in a closed hearing but which can be disclosed without damaging national security.

Although the government accepted that the permission procedure 'might require the special advocate to disclose his thinking to the Secretary of State', it claimed that the process 'could be relied on more widely' if the special advocate needed specific instructions, 'so long as the questions were framed in such a way that it did not compromise national security'.[942]

376. In June 2005, the Council of Europe Commissioner on Human Rights, then Mr Alvaro Gil-Robles, strongly criticised the use of secret evidence and special advocates in control order hearings. Such proceedings, he said, were 'inherently one-sided' and fell 'some way short of guaranteeing the equality of arms'.[943] Not only did control orders on the basis of reasonable suspicion alone 'obviously flout' the presumption of innocence, but proceedings could only be considered 'to be fair, independent, and impartial with some difficulty'.[944]

377. In February 2007, following the judgment of the Canadian Supreme Court in *Charkaoui*,[945] the Canadian Senate Committee on the Anti-Terrorism Act published a report containing a number of recommendations, including the adoption of a special advocate procedure. However, the Committee noted that the 'inability of the special advocate to communicate with the affected party or his or her counsel after attending in camera hearings

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[939] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission ('SIAC') and the use of Special Advocates* (HC 323: 3 April 2005), pp 44-46.

[940] Government Response to the Constitutional Affairs Select Committee's Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates, Cm6596, June 2005), page 8.

[941] Ibid. Emphasis added.

[942] Ibid.

[943] Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom 4th – 12th November 2004 for the attention of the Committee of Ministers and the Parliamentary Assembly (CommDH (2005)6) dated 8 June 2005, para 21.

[944] Ibid.

[945] See paras 360-362 above.

or receiving confidential information has been criticized in the United Kingdom'.[946] It concluded that, where a special advocate was only able to communicate with the defendant *before* seeing the secret evidence 'his or her role is rendered much less effective, as he or she is unable to meaningfully test the reliability of a specific piece of classified or sensitive information, or the validity of keeping it confidential'.[947] Accordingly, it recommended that special advocates:[948]

> be able to communicate with the party affected by the proceedings, and his or her counsel, after receiving confidential information and attending in camera hearings, and that the government establish clear guidelines and policies to ensure the secrecy of information in the interest of national security.

A subsequent study commissioned by the Canadian federal court service that looked in detail at the UK system found that the UK model 'suffer[s] from a number of shortcomings, many of which do not exist in the model employed by the Canadian SIRC'.[949] In particular, it found that the UK special advocate system was substantively no better than a judge sitting alone:[950]

> the inability of [special advocates in the UK] to continue to communicate (in any meaningful sense) with the [defendant] after counsel has reviewed the secret ('closed') information, along with the apparent difficulties special advocates have in obtaining full disclosure of the entire file, so undermine the special advocates' ability to be effective that the procedure does not provide a viable and satisfactory alternative to the existing Federal Court model in Canada.

378. In March 2007, the parliamentary Joint Committee on Human Rights took oral evidence from four serving special advocates: Nicholas Blake QC, Andrew Nicol QC, Judith

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946 Special Senate Committee on the Anti-Terrorism Act, *Fundamental Justice in Extraordinary Times* (February 2007), p 35.

947 Ibid, pp 35-36.

948 Ibid, p42.

949 Forcese and Waldman, 'Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings' (Canadian Centre for Intelligence and Security Studies, August 2007), p (ii).

950 Ibid, p (viii). See also p61: 'a system in which the special advocate has no meaningful contact with the named person once the former has seen secret information and where full disclosure is not made to the special advocate is no better than simple *ex parte* adjudication before an experienced and earnest Federal Court judge, knowledgeable in security intelligence matters'.

Farbey and Martin Chamberlain.[951] The special advocates once again indicated serious and continuing problems with the prohibition on their communication with defendants:[952]

> [T]here are cases where all the material evidence is closed, there is nothing in open, and the difficulty is that when the [defendant] is given a short open statement, he has no idea whether this is 1% of the evidence against him or 99%. He simply has no way of knowing …. In some cases he does not know even the gist of what is being said in respect of 99% of the case.
>
> [Unfairness] is inherent. It is irreducible in the sense that, as long as the [defendant] does not know [the secret evidence], there is always going to be the fertile possibility that explanations or responses that could be given are not, because that material has not been disclosed to the only person who could provide them. The system of Special Advocates can never overcome that irreducible element of unfairness but, having accepted that, I think that the functions that we try to perform can at least mitigate it and is better than not having a system where there is a partisan representative.[953]

379. The special advocates also made clear that the procedure for seeking permission to communicate with defendants was only used by special advocates for procedural points rather than substantive issues:[954]

> [The permission procedure] is not used in any contentious issue for the very reason that it would not be approved if this meeting or this communication was to be anything to do with the substantive closed case, because the anxieties of those who are supplying the information and the nature of the information is that any form of communication after you go closed would inadvertently or otherwise—I think inadvertently is probably the principal cause of concern—alert the person whose interests you are representing to something about the case.

380. In its report, the Joint Committee described the special advocates' evidence as 'disquieting' and 'portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure'.[955] In particular, the Joint Committee declared that it was 'essential' for the prohibition on communication between

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[951] Evidence to the Joint Committee on Human Rights, 12 March 2007, published in *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (HL 157/HC 790: 30 July 2007).

[952] Evidence of Martin Chamberlain to the Joint Committee on Human Rights, 12 March 2007, Q46-47.

[953] Evidence of Andrew Nicol QC, ibid, Q38.

[954] Ibid, Q44.

[955] Joint Committee report, n951 above, at para 192.

special advocates and appellants to be 'relaxed'.[956] In a subsequent 2008 report, the Joint Committee endorsed the suggestion of Neil Garnham QC, another serving special advocate, that special advocates should be able to apply to the court for permission to ask questions to the defendant *without* having to give notice to the Secretary of State.[957]

381. In October 2008, the Court of Appeal in *AF and others* considered the special advocates' submission that, because the Home Secretary had the right to object to any application for permission, 'the request [to communicate with a defendant] would only be likely to be granted in relation to allegations by the [government] which are already part of the open case'.[958] The majority of the Court of Appeal, however, said that 'the doubts expressed by the special advocates seem to us to be too gloomy'.[959] It referred to Baroness Hale's comments in *MB,* suggesting that 'the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client', together with other safeguards, meant that closed evidence would not necessarily need to be disclosed.[960] The Court of Appeal suggest with 'with an appropriately flexible attitude' on the part of the Home Secretary, 'it will be possible to afford the [defendant] with an appropriate measure of procedural protection'.[961]

382. However, as a serving special advocate, has pointed out,[962] the only instance of permission being granted the Court of Appeal was able to refer to was a case in which an unusually large amount of information had already been given in open session.[963] He cautioned that a great deal of discussion about secret evidence rested on the mistaken assumption that most of what was withheld was the specifics of open allegations:[964]

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[956] Ibid, para 205: 'In our view it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocate and the controlled person …. With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information is not disclosed. We therefore recommend a relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the special advocate has seen the closed material'.

[957] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Counter-Terrorism Bill* (HL 50/HC 199: 7 February 2008), paras 67-69.

[958] *AF and others*, n347 above, para 73.

[959] Ibid, para 74.

[960] *MB v Secretary of State for the Home Department*, n330 above, para 66.

[961] *AF*, n347 above, para 74.

[962] Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 314-326 at p 322.

[963] The case the Court of Appeal referred to was *Secretary of State for the Home Department v AP* [2008] EWHC 2001 (Admin).

[964] Chamberlain, n 962 above, at p 323.

> A casual reader of the [House of Lords] decision in *MB* might get the impression that what is generally withheld from the controlled person amounts to no more than the precise details of the allegations and the means by which they are known. In fact, almost all cases involve some allegations that are known only from closed sources and therefore cannot, in the Security Service's view, be disclosed to the controlled person *at all*, even in gisted form. And some cases are based almost entirely on such allegations. In *AF,* one of the cases before the House of Lords with *MB,* 'very little indeed' was disclosed to the controlled person. In such a case, the fairness of the procedure as a whole depends entirely on the ability of the Special Advocates to challenge the closed case.

383. In her judgment in *AF and others* in June 2009, Baroness Hale conceded that her earlier view in *MB* about the ability of special advocates to rebut the Secretary of State's case was 'far too sanguine'.[965]

> the special advocates tell us … that the scope for contesting the Secretary of State's objections to disclosure is very limited and the vast majority of those objections are upheld. It appears that the objections are often in the nature of class claims, relating to the sort of information it is, rather than specific to the particular case.

Limitations on access to evidence

384. In any ordinary litigation, a barrister does not conduct a case alone. Barristers are briefed by solicitors representing the client, and the barrister works closely with her instructing solicitor to ensure that all aspects of the case are properly addressed. In any ordinary litigation, the lawyers representing a party would be able to call evidence on behalf of that party. This is particularly important to be able to rebut the evidence given on the other side.

385. In any ordinary litigation of any complexity, the lawyers representing a party would have the opportunity to consult experts relevant to the case at hand to enable them to interpret technical evidence, to advise them of relevant issues that are not apparent to a non-expert, and to help them to rebut the expert evidence given by the other party. For example, in any case involving forensic evidence, the defence could be expected to consult a forensic expert; a medical negligence case would require a medical expert; a construction dispute might require an engineer, and so on. And in any ordinary litigation, the parties have a right to disclosure not only of all the evidence against them but also all the relevant unused material held by the other side.

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[965] *AF and others v Secretary of State for the Home Department* [2009] UKHL 28 at paras 101, 104-105.:

386. When special advocates were first introduced in 1997, however, there was little provision for professional support, no ability to call witnesses, no access to experts and no entitlement to disclosure of relevant unused material. Special advocates were formally instructed by lawyers in the Treasury Solicitor's Department but those lawyers did not have security-clearance. This meant that the special advocate had to deal with the closed material entirely on their own, without the kind of professional assistance that they would have in any other case.[966] In evidence to the House of Commons Constitutional Affairs Committee in 2005, one special advocate described the situation as follows[967]

> the truth is that special advocates are simply operating on their own with no substantive assistance. They do their best to test the closed material, looking for internal inconsistencies and comparing it with what is known to us to be already in the public domain. The limitations of the latter are, it seems to me, implicit in the system as it operates at present because we have no secretariat, we have no solicitor who can see the closed material and we have no expert assistance on which we can call, so it is something of a feeling of being one man and his dog or perhaps two men and their dogs trying to analyse what is invariably voluminous material and often complex material.

The inability to consult experts and call witnesses to rebut the government's secret evidence was also cited as a major obstacle. Had the special advocates been confronting the government's evidence in non-secret proceedings, they would be able to consult independent experts, for example, 'those with particular knowledge of the political situation in a particular country or region or, in some cases, scientific or technical experts'.[968] This was particularly important because, in cases involving indefinite detention or deportation, when faced with a question about a coded conversation or the reliability of a source, SIAC would treat the

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[966] See e.g., Ev 38: evidence submitted by a number of special advocates to the House of Commons Constitutional Affairs Committee, 7 February 2005, para 11: 'Special Advocates are instructed by a Law Officer through an instructing lawyer employed by the Treasury Solicitor's Department, who is not security cleared. Whilst the instructing lawyer in our cases has performed his role in an exemplary and scrupulously independent fashion, it is in principle unsatisfactory (and unnecessary) for the instructing lawyer to be employed by the Government. The fact that the instructing lawyer is not security cleared means that he has been unable to perform certain functions which he could otherwise usefully have carried out. These include (i) checking whether documents which the Home Secretary objects to disclosing to the appellant are available from publicly available sources; (ii) corresponding with the Home Secretary and SIAC in relation to closed hearings; (iii) copying and distributing closed documents and (iv) keeping a record of closed materials, judgments and rulings. The lack of a person able to perform these functions adds significantly to the burden imposed on Special Advocates'.

[967] Evidence to the House of Commons Constitutional Affairs Committee, 22 February 2005, Q4. See also Q39: 'When you receive your first set of instructions in this, you do feel as if you are walking into something of a vacuum. Your solicitor can know nothing about the detail of the case and there is no express provision for you even to consult other Special Advocates, although we have devised an informal method of doing so, conscious always of the fact that we can reveal nothing about the facts of our particular case or anybody else's, including other Special Advocates'.

[968] Note 966 above, para 18.

assessment of witnesses for the security service in the same way that 'a judge in civil proceedings would treat (for example) the evidence of a doctor or surveyor or engineer giving expert evidence'.[969] Not only do special advocates have 'no access to any such experts' – including interpreters,[970] they had no opportunity to call expert evidence in reply.[971]

387. Following the Committee's inquiry, the government agreed to established the Special Advocates' Support Office (SASO) within the Treasury Solicitor's Department to provide not only administrative but professional support to special advocates, including instructing solicitors with the necessary security clearance to view the closed material.[972] The government also agreed to amend the procedure rules to allow special advocates to call expert evidence.[973] However, the government resisted the Committee's recommendation that serving or former members of the security and intelligence services be allowed to assist special advocates in assessing the closed material.[974] The government replied that:[975]

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[969] Ibid, para 29. By contrast, the evidence of defence witnesses in open session has not been as favourably received by SIAC: see e.g. *U v Secretary of State for the Home Department* (SC/32/2005, 14 May 2007), at para 34: 'The claims [of hearing ill-treatment] is said to have been made by two men whose credibility has not been the subject of a reasoned judgment by a British court. It is reported via campaigning lawyers in Algeria, whose views are clearly hostile to those of the Algerian Government. Without criticising the good faith of their reporting, there is no indication that they subjected 'Q's and 'H's claims to critical analysis'.

[970] Ibid, para 18.

[971] Ibid, para 29.

[972] *Special Advocates: A guide to the Role of Special Advocates and the Special Advocates Support Office: Open Manual* (December 2006), para 85: 'SASO is part of the Attorney General's and General Private Law Team in TSol, and operates on a Chinese wall basis with the TSol teams who represent the Government in cases in which Special Advocates appear. SASO comprises SASO (Open) and SASO (Closed). SASO (Open) lawyers and administrators do not have security clearance and accordingly only have access to open material. Only they communicate with the [defendants'] representatives. SASO (Closed) lawyers and administrators are security cleared and therefore have access to both open and closed material. As a result, SASO (Closed) are not permitted to communicate with the [defendants'] representatives'.

[973] Government Response to the Constitutional Affairs Select Committee's Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates, Cm6596, June 2005), page 10: 'As regards expert evidence more generally, in principle it is open to Special Advocates, in an appropriate case, to seek the assistance of experts and to call expert evidence (subject to the agreement of the Commission). Whilst it is not possible to give an unlimited commitment to the funding of such expert evidence, this will be considered on a case-by-case basis should the situation arise. Security clearance of the particular expert would also, of course, be required'. See e.g. the Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007 (SI 2007/1285), rules 20 and 27; Civil Procedure Rules 76.25(b) and 79.19(b).

[974] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission ('SIAC') and the use of Special Advocates* (HC 323: 3 April 2005), para 97: ''The Government could… usefully consider whether intelligence service personnel could be provided in support of Special Advocates in the handling of closed material, and whether Special Advocates could be enabled to appoint and call evidence from appropriately cleared experts'.

[975] Government Response to the Constitutional Affairs Committee, n973 above, p 13.

> Even if … a member of the Security Service were willing personally to undertake the role (which is highly unlikely), to ask such a person to provide arguments to the Special Advocate to undermine an assessment made by one of his colleagues - in effect to act against the interests of national security - would place that employee in an invidious position. It is difficult to see how he could perform this role consistent with his duties of confidence and loyalty. The same is true of retired members of the Agencies, with the additional difficulty that, after a period of time, their expertise in intelligence work is likely to become outdated.

388. However, apart from the introduction of security-cleared solicitors and increased administrative support from SASO, the position of special advocates has not improved. In evidence to the Joint Committee on Human Rights in March 2007, one then-serving special advocate gave an example of the problems with lack of access to research expertise and language experts:[976]

> There was a document that seemed to be highly sensitive, a document from a very senior Al Qaeda suspect to another very senior dangerous player …. That was a closed document until a Security Service witness, who was giving evidence about it, explained that this document had been published by the Iraqi government on the internet a year previously and therefore it should never have been closed but of course, since it was published in Arabic and not many of us are Arabic linguists and able to do the research, none of us could make this point until we heard that. Once that point was made, the document became open and it became quite an important opportunity for the [defendant] to deal with some observations in it. That was an example of not having their language skills and internet skills to research that job.

389. The special advocates also identified the lack of full disclosure to the special advocates themselves as a serious problem. As SIAC itself noted in 2003, there is no provision for the disclosure of relevant unused material held by the government to the special advocates themselves.[977] The following exchange before the Joint Committee illustrates that, despite their security clearance, the special advocates themselves are aware of not receiving all relevant material:[978]

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[976] Nicholas Blake QC, evidence to the Joint Committee on Human Rights, 12 March 2007, Q43.

[977] *Ajouaou v Secretary of State for the Home Department* (SC/10/2002, 29 October 2003), para 52: 'The SIAC Act and the Procedure Rules do not contain any provision for disclosure of unused material to the special advocates; there is no equivalent to the disclosure process applicable to criminal proceedings and there would be obvious difficulties in any such system'.

[978] Nicholas Blake QC, evidence to the Joint Committee on Human Rights, 12 March 2007.

Mr Blake: it … may be necessary to strike a note of caution for this Committee as to what it is that the Special Advocate will have seen. It is by no means everything.

Q49 Chairman: So you still even under this system do not get all the evidence anyway?

Mr Blake: To dignify it as 'evidence' may itself be an enormous leap. Material, shall we say. No.

Chairman: I would have thought that most of us understood the way the system operates is that you get to see everything that there was so that you can make the best of it, but that is not the case.

Q50 Lord Plant of Highfield: Do you actually know that there is more that you are not getting or are you assuming that there is more that you are not getting?

Mr Blake: We discussed outside how to answer that question. I think it is very important to stress that what I am about to say is a very abstract answer based upon your assumptions rather than upon my experience, if I can preface it in that way.

Q51 Chairman: We can ask the question but you could not possibly comment?

Mr Blake: It would certainly be wrong for the Committee to assume that we are acting on all that we could plausibly know or believe to exist and in certain areas the barriers to what is even available for investigation come down earlier than in other areas …. [Some classes of material] are particularly sensitive and we do not get anywhere near certain topics.

390. In any event, the government's various amendments to allow special advocates to call witnesses have had 'no effect in practice'.[979] This is because any witness called would be unable to give evidence in closed session in relation to the secret evidence without first being granted the necessary security-clearance. As Lord Bingham asked in the *Roberts* case in 2005:[980]

> even if a [special advocate] is free to call witnesses, it is hard to see how he can know who to call or what to ask if he cannot take instructions from the [defendant] or divulge any of the sensitive material to the witness.

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[979] Chamberlain, n962 above, p 319.

[980] [2005] UKHL 45 at para 18.

For the same reasons, special advocates remain unable to obtain expert assistance: any expert would similarly need to be security-cleared to advise on the closed material. Thus, despite continued efforts on the part of the special advocates to identify suitable witnesses and despite the change of rules to allow them to be called, there has not been a single case of a witness being called by a special advocate.

Lack of accountability

391. A special advocate is formally appointed not to represent the defendant but to 'represent the interests' of the defendant.[981] In addition, the special advocate is 'not responsible to the person whose interests he is appointed to represent'.[982] The consequences of this are twofold. First, the special advocate is not professionally accountable to the defendant. Secondly, it is open in principle to the special advocate to determine the defendant's interests in a manner inconsistent with the defendant's express wishes.

392. The first point has so far been academic.[983] There has been no suggestion that any of the special advocates appointed since 1997 have acted unprofessionally in representing the interests of defendants. On the contrary, the standard of advocacy has been reported to be very high.[984] In spite of the absence of a formal professional relationship, special advocates by-and-large appear to treat defendants as their clients, albeit clients they are barred from communicating with. Moreover, most misconduct by a special advocate would be likely to be detected either by the court or by SASO. Nonetheless, the lack of formal accountability of special advocates is puzzling. Even litigation friends, who act for children and mentally incapable people, owe a duty to those they represent.[985] Alone in the legal profession, only special advocates appear to be 'representative but not responsible'.[986]

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[981] See e.g. section 6(1) of the 1997 Act and para 7(1) of the schedule to the 2005 Act.

[982] See e.g. section 6(4) of the 1997 Act and para 7(5) of the schedule to the 2005 Act.

[983] See e.g. Susan Nash and Andrew Boon, 'Special Advocacy: Political Expediency And Legal Roles In Modern Judicial Systems' (2006) *Legal Ethics* 101-124.

[984] See e.g. Lord Carlile, 4th report under the 2005 Act, n898 above, para 65: 'The special advocates are skilled and conscientious, and certainly useful. They have had an effect in the outcome of cases, and in all cases have been of great assistance to the Court'.

[985] Family Procedure Rules, Practice Direction Part 7, rule 2.1: 'It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a child or patient. He must have no interest in the proceedings adverse to that of the child or patient and all steps and decisions he take in the proceedings must be taken for the benefit of the child or patient'.

[986] Dicey, *An Introduction to the Study of the Law of the Constitution*, p 55. Dicey was speaking of the colonial governments of the Bahamas, Barbados and Bermuda, in the sense that their governments were representative (the executive was drawn from those elected to the legislature) but not responsible (the executive was not accountable to the legislature).

393. In 2005, the Lord Chancellor conceded that special advocates 'plainly owe a duty to the person who is the subject matter of the proceedings'.[987] He also agreed that the government needed to think 'about how we make them accountable' but said that it was 'very, very difficult'.[988] To date, however, no further work appears to have been done to address the issue. Neither does the Bar Council nor the Bar Standards Board appeared to have addressed the ethical issues raised by barristers acting without formal accountability in this capacity. Although there is no reason in principle why a special advocate should not be accountable to her profession even if she is not liable in tort to the defendant, there would still be formidable practical difficulties in holding a disciplinary hearing about a special advocate's conduct of a case in closed session.

394. By contrast, the second point – the possible divergence between a defendant's interests and his wishes – was confronted early on by SIAC in Abu Qatada's case.[989] Before the hearing, the defendant made clear he would not attend the open hearings or otherwise participate in the proceedings because he considered them unfair, and because he had 'no faith in the ability of the system to get at the truth'.[990] His lawyers similarly did not participate in the open hearings. When the closed hearings began, the two special advocates appointed to represent Abu Qatada notified SIAC 'that after careful consideration they had decided that it would not be in [his] interests for them to take any part in the proceedings'.[991] For itself, SIAC found that the evidence against Abu Qatada was so strong 'that no special advocate however brilliant' could have persuaded it otherwise and thus 'the absence of the special advocates has not prejudiced' the defendant'.[992] However, SIAC made clear its displeasure at the special advocates' decision:

> We do not doubt that the Special Advocates believed they had good reasons for adopting the stance that they did and we are equally sure that they thought long and hard about whether they were doing the right thing. But we are bound to record our clear view that they were wrong and that there could be no good reason for not continuing to take part in an appeal which was still being pursued. To do so could not conceivably compromise the [defendant's] desire not to appear to add any credence to the system which he regarded as inherently unfair.

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[987] Lord Falconer QC, evidence to the House of Commons Constitutional Affairs Committee, 1 March 2005, Q115.

[988] Ibid.

[989] *Abu Qatada v Secretary of State for the Home Department* (SC/15/2002, 8 March 2004).

[990] Ibid, para 5.

[991] Ibid, para 8.

[992] Ibid, para 9.

Lord Carlile, too, described it as an 'unacceptable result' for SIAC to ever be left 'with an unrepresented appellant in open session and the absence of partisan scrutineers of evidence given in closed session'.[993] In his annual review of the operation of indefinite detention under Part 4 in 2004, he recommended that special advocates be prevented from withdrawing from cases even where they perceive it to be in the defendant's interest.[994]

395. However, following a complaint from SIAC to the Solicitor General concerning the special advocates' conduct in Abu Qatada's case, the Solicitor General took the view that she would not interfere 'in any way with the professional judgment of special advocates and will not require them to perform a function which they consider to be contrary to the interests of the [defendant]'.[995] In subsequent proceedings involving Abu Qatada,[996] and at least two other SIAC appeals,[997] the special advocates withdrew from part or all of the closed proceedings where they took the view that that this was in the defendants' interests.

396. In truth, the statutory distinction between representing a defendant and representing a defendant's interests would seem to be a distinction without a difference. For, as long as the defendant is a mentally competent adult, there can be no basis for suggesting that she is not always the best judge of her own interests.[998] In such circumstances, therefore, there ought to be no possibility for any advocate – special or otherwise – to act contrary to the known wishes

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[993] Lord Carlile, *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003,* para 78.

[994] Ibid, para 80: 'it should be made clear that the role of the special advocate excludes the conclusion that 'the interests of the appellant' can be served by a withdrawal from any part in the closed proceedings before SIAC. In many cases, the silence of an advocate may be judicious and even a welcome relief at times – but the unusual role of the special advocate should require attendance and the willingness to act at all times'.

[995] SASO Open Manual, n972 above, para 84. Had the Solicitor-General decided otherwise, this would have run contrary to what Home Office Minister Mike O'Brien told Parliament during debates on the 1997 Act: 'the special advocate must make a judgment about the way in which the [defendant] would have wanted his case to be argued' (3rd reading, HC debates, 26 November 1997, col 1039).

[996] See *Abu Qatada v Secretary of State for the Home Department* (SC/15/2005, 27 February 2007), paras 15-17: the special advocates followed the defendant's lawyers in addressing the issue of safety on return but not the alleged threat posed to national security. The special advocates also argued for disclosure of the secret evidence to Abu Qatada.

[997] *S v Secretary of State for the Home Department* (SC/25/2003, 27 July 2004), para 38: 'At the outset of the closed session Mr Garnham QC explained that the Special Advocates had concluded that they did not intend to ask questions of the closed witnesses or make submissions in the closed proceedings. Mr Garnham made it clear that in reaching that conclusion the Special Advocates had proceeded upon the basis that their statutory duty was to form their own independent judgement as to how the interests of the Appellant were best promoted in closed session, paying great weight to the position adopted by the Appellant (that he did not wish to participate in the proceedings), but not being bound by it if they concluded that a different approach would be in the Appellant's best interests'; *B v Secretary of State for the Home Department* (SC/9/2005: 30 July 2008), para 11: 'Having considered their position in connection with these proceedings, they concluded that it would not further the interests of the appellant for them to cross-examine the Secretary of State's national security witness or make submissions on that aspect of the case'.

[998] See e.g. *Re MB (Caesarean)* (1998) BMLR 175.

of the person whose interests they purport to represent (save to the extent that they would oblige the advocate to act unethically or illegally). That special advocates should be invited to draw a distinction where none exists is yet another shortcoming of the special advocate system.

Lack of judicial control over appointment

397. Just as the Attorney-General has always been responsible for the appointment of *amicus curiae*, she has always been responsible for the appointment of special advocates.[999] This reflects her role, in England and Wales at least, as the head of the Bar and the idea that she is, again in principle, better-placed than the courts to determine which lawyer would be best-suited to the task at hand.

398. Unlike an *amicus*, however, a special advocate represents the interests of one of the parties. There is, therefore, a potential conflict of interest in any case in which the government is a party that the Attorney, a minister of the Crown and the government's chief Law Officer, is responsible for appointing the defendant's representative. Nor is this an academic point. In *A and others (No 1)*, for instance, the Attorney was personally responsible for presenting the Secretary of State's case before the Court of Appeal and the House of Lords.[1000] In *R v H*,[1001] concern over the Attorney's dual role led both the High Court and Court of Appeal to question her suitability to appoint special advocates.[1002] The House of Lords, however, rejected the submission that the Attorney should hand off responsibility for appointing special advocates, describing doubts about her role as 'misplaced':[1003]

> It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as an

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[999] Where the appointment is governed by statute (e.g. section 6(2) of the 1997 Act), either the Attorney General or the Solicitor General may appoint a special advocate in England and Wales, the Lord Advocate is responsible for appointments in Scotland, while the Advocate General for Northern Ireland is responsible for appointments in Northern Ireland.

[1000] See [2002] EWCA Civ 1502 and [2004] UKHL 56. To avoid the appearance of a conflict of interest, the Solicitor General was actually responsible for the appointment of special advocates during the SIAC appeals.

[1001] [2004] UKHL 3. See the discussion at page 167 above.

[1002] See e.g. the decision of the Court of Appeal [2003] EWCA Crim 28 at para 33: 'a trial judge can and should invite the Attorney General to appoint special independent counsel from an approved Panel to take part in the proceedings in the way which we shall identify. *Because the Attorney-General supervises prosecutions, this is by no means ideal*. But it seems the only available route, pending legislation to provide a suitably-funded alternative permitting the appointment of counsel by the court itself, such as can occur, for example, for the cross-examination of rape complainants under section 38(4) and (5) of the Youth Justice and Criminal Evidence Act 1999 and Crown Court Rules 1982 rule 24C and under section 4A of the Criminal (Insanity) Act 1964' [emphasis added].

[1003] *R v H*, n1001 above, para 46.

> independent, unpartisan guardian of the public interest in the administration of justice …. It is in that capacity alone that he approves the list of counsel judged suitable to act as special advocates or, now, special counsel, as when, at the invitation of a court, he appoints an *amicus curiae*. Counsel roundly acknowledged the complete integrity shown by successive holders of the office in exercising this role, and no plausible alternative procedure was suggested. It would perhaps allay any conceivable ground of doubt, however ill-founded, if the Attorney General were to seek external approval of his list of eligible advocates by an appropriate professional body or bodies, but such approval is not in current circumstances essential to the acceptability of the procedure

399. Although the 1997 Act provides that the Attorney General 'may' appoint a special advocate to represent a defendant's interests in closed proceedings, it was – until recently at least – widely assumed that this was simply another instance of a duty framed as a discretion. There are, after all, a number of statutes which appear to give a public official a discretionary power, which the courts have subsequently held they actually under a duty to exercise in particular way.[1004] In 2002, for instance, Lord Goodhart QC asked if there were any circumstances in which it was 'envisaged that the Attorney]-General might not appoint a special advocate?'.[1005] Baroness Scotland, then Leader of the House of Lords but presently the Attorney, replied on behalf of the government that:[1006]

> it is envisaged that the Attorney-General will in practice appoint a special advocate where a party or his legal representative are to be excluded from the hearing. The Attorney-General will seek representations from the [defendant] or his legal representative before official nomination of the special advocate. On issues of conflict of interest that may arise, we are satisfied that the decision of the Attorney-General is ECHR compliant and is not subject to judicial review. A special advocate is appointed by the Attorney-General but not instructed by him. I hope that that assists the noble Lord.

1004 See e.g. sections 21(1) and 26(1) of the National Assistance Act 1948, which states that a local authority 'may' make arrangements for community care for persons in need. The courts have consistently held that sections 21 and 26 in fact impose a duty on local authorities to arrange care: see e.g. YL (Official Solicitor) v Birmingham City Council [2007] UKHL 27 at para 16 per Lord Bingham: 'Sections 21 and 26 of the National Assistance Act 1948 confer statutory powers and impose a statutory duty. The duty is imposed on the relevant local authority'. See also e.g. section 55(5) of the Nationality Immigration and Asylum Act 2002 which grants the Secretary of State a 'power' to provide support to an otherwise ineligible asylum seeker to prevent a breach of Convention rights. In *R v Secretary of State for the Home Department ex parte Limbuela and others* [2005] UKHL 66, the House of Lords held that 'where (and to the extent) that exercise of the power is necessary, the Secretary of State is subject to a duty, and has no choice, since it is unlawful for him under section 6 of the 1998 Act to act incompatibly with a Convention right' (para 5 per Lord Bingham).

1005 Hansard HL Debates, 10 July 2002, col 761.

1006 Ibid, col 762.

The Special Advocates Support Office similarly confirmed that:[1007]

> In practice, although the legislation provides that the law officer 'may' appoint a Special Advocate to act in the interests of any Appellant, the law officer will invariably agree to appoint a Special Advocate in any case where it is proposed to withhold material.

400. The assumption that the courts, and not the Attorney, had the final say in the appointment of special advocates was also reflected in the language the courts themselves. In R v H, for instance, the House of Lords made clear that although the Attorney General plays a part in the appointment process, the question of *whether* to appoint a special advocate is for the court alone to determine:[1008]

> None of these problems should deter *the court from appointing* special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until *the trial judge is satisfied* that no other course will adequately meet the overriding requirement of fairness to the defendant.

401. Since 2008, however, the Attorney General has begun to intervene in cases in order to assert her right to refuse to appoint special advocates in certain cases. In the case of *Murungaru*,[1009] for example, the Attorney intervened before the Court of Appeal in July 2008 to advise that, while she 'always gives careful consideration' to requests for the *ad hoc* appointment of special advocates, she:[1010]

> does not always necessarily agree to make an appointment. Accordingly, in response to the question from the Court, she does consider that the appointment of a special advocate is a matter for her discretion.

In his judgment, Lord Justice Sedley noted that the court's inherent common law power to appoint an *ad hoc* special advocate was based upon the statutory model set down in the 1997

[1007] SASO Open Manual, n972 above, para 16.

[1008] *R v H*, n1001 above, para 22. Emphasis added.

[1009] *Murungaru v Secretary of State for the Home Department and others* [2008] EWCA Civ 1015.

[1010] Para 16 of the skeleton argument of the Attorney General in *Murungaru*, ibid.

Act, a model which 'invites but does not require the Attorney to comply with the tribunal's request'.[1011] He cautioned that:

> This makes it of even greater importance that requests for the appointment of a special advocate should not be made where the Attorney could legitimately take an opposite view of the need for one. The constitutional and forensic misfortune which a refusal on her part would represent needs no elaboration.

402. In the subsequent case of *MH and others*, Mr Justice Blake observed that the Attorney 'has become reluctant to accede to requests to appoint special advocates' in circumstances 'where it is concluded that they are merely perceived as desirable rather than being necessary'.[1012] On appeal, the Master of the Rolls reviewed the previous cases in which the courts had considered whether to request the appointment of an *ad hoc* special advocate and said:[1013]

> The cases do not explore the circumstances in which the Attorney General might decline to do so or in which such a decision might be challenged and on what basis. As we have already indicated, that problem does not arise here because the Attorney General has indicated a willingness to accept the judge's invitation. We would only comment in passing that, except perhaps in exceptional circumstances, we would expect the Attorney General to comply with the court's request, just as she ordinarily complies with a court's request to appoint an *amicus curiae* (or friend of the court).

403. In September 2008, JUSTICE wrote to the Attorney General inviting her to disclaim any discretion to refuse to appoint a special advocate where a court had decided that an appointment was necessary in the interests of justice.[1014] In January 2009, the Attorney rejected this suggestion:[1015]

> This Office's position is that the Attorney General's discretion extends to the question of whether to appoint a special advocate at all. The case law … supports that position.

[1011] *Murungaru*, n1009 above, para 18. Lord Justice Sedley also said that 'in the words of the (undated) memorandum agreed between the Lord Chief Justice and the Attorney-General, the special advocate represents no one'. However, the memorandum that the judge was referring to was the 2001 memorandum concerning the appointment of advocates to the court (see n821 above). Lord Justice Sedley was therefore confusing the roles of *amici curiae* and special advocates. In *Secretary of State for the Home Department v AHK and others* [2009] EWCA Civ 287, however, the Master of the Rolls said that the 'role of the special advocate is that identified in the cases; it is not the same as an *amicus curiae*' (para 37(ix).

[1012] *MH and others v Secretary of State for the Home Department* [2008] EWHC Admin 2525 at para 13.

[1013] *Secretary of State for the Home Department v AHK and others* [2009] EWCA Civ 287 at para 21.

[1014] Letter from JUSTICE to the Attorney General dated 16 September 2008.

[1015] Letter from the Attorney General's Office to JUSTICE dated 20 January 2009.

The Attorney General will always give careful consideration to requests for the appointment of special advocates where they are made in non-statutory situations, but she will not always necessarily agree to make an appointment.

404. The Attorney's position, however, entails an obvious conflict of interest. For the question of whether or not to appoint a special advocate will only arise in a case where disclosure is already an issue. And in almost every case, either the government or (in criminal cases) the Crown will be a party, arguing that disclosure of material would be contrary to the public interest, e.g. the Binyam Mohammed case. Unlike the question of *whom* to appoint, any decision by the Attorney as to *whether* to appoint a special advocate would inevitably require her to assess the merits of the defendant's case. No reasonable bystander could be expected to take seriously her claim to be neutral when making such a decision. For the Attorney to refuse to give effect to a court's decision to appoint a special advocate in a case where the government was opposing disclosure would not only trespass on the constitutional role of the courts. It would also make her judge, if not in her own cause, then at least that of her fellow government ministers.

405. In fact, there is no obvious need for the Attorney to have a role in appointing special advocates in the first place. As the Court of Appeal pointed out in *R v H*, there are several statutes under which the courts may appoint counsel directly without her acting as intermediary. [1016] This includes the power of the court in a case where the accused is on trial for rape and is representing himself, to appoint counsel to act for him in order to prevent him from conducting the cross-examination of children or vulnerable witnesses in person.[1017] Similarly, the court may appoint counsel to act for a defendant in a criminal trial where the defendant has been found unfit to plead, but it nonetheless falls to the jury to determine whether the offence was committed.[1018] While it may be appropriate for the court to select counsel from the Attorney's standing list of special advocates (in order to avoid delays in obtaining security clearance), there is no reason why the court could not make the appointment directly without the Attorney being involved.

PART 5: A RETURN TO OPEN JUSTICE

406. The previous Parts of this report have looked at the principles of a fair trial, and how these principles have been repeatedly breached by the use of secret evidence in criminal and civil cases since 1997. However, developments in the law relating to public interest immunity

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[1016] [2003] EWCA Crim 28 at para 33(v).

[1017] Sections 38(4) and (5) of the Youth Justice and Criminal Evidence Act 1999. See also rule 24C of the Crown Court Rules 1982 as amended by the Crown Court (Amendment) Rules (SI 2000/2093).

[1018] Section 4A(2)(b) of the Criminal Procedure (Insanity) Act 1964.

have also shown that there is a way to use special advocates without resorting to secret evidence. This Part sets out the core arguments against the use of secret evidence. It also proposes some changes to the current law in order to strengthen disclosure, as well as to ensure that every court and tribunal in the UK respects the basic principles of a fair hearing.

The case against secret evidence

407. 'Evidence', wrote Jeremy Bentham, 'is the basis of justice'[1019] and publicity its 'very soul'.[1020] A great foe of the exclusion of evidence in general, Bentham was especially critical about the possibility of excluding the evidence of one party in particular:[1021]

> to exclude evidence from one side only, leaving the door open to it on the other side, is the sort of arrangement which, to judge of it in the abstract, could have been dictated, one should have thought, by no other principle than of determination to do injustice.

The 'tendency of such an arrangement to give birth to misdecision', he suggested, was 'too palpable to be a matter of doubt to anyone'. Indeed, the idea of preventing one party from giving evidence on an issue was so intuitively wrong that it produced 'a mechanical and instinctive idea of one of the most revolting modifications of injustice'.[1022] That both sides must be free to comment on the evidence before the court was, to Bentham, equally self-evident: 'admission of counter-evidence is one of those securities, of the necessity of which, much (it may be thought) would not require to be said'.[1023]

408. Bentham was similarly a vicious critic of secrecy in the courts. 'In the darkness of secrecy', he wrote:[1024]

> sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice.

[1019] Bentham, *Rationale of Judicial Evidence, especially applied to English practice* (1827) at 1.

[1020] 'Draught of a New Plan for the Organization of the Judicial Establishment in France.' *The Works of Jeremy Bentham,* vol 4 (1843), p. 316: 'Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial'.

[1021] Bentham, *Rationale of Judicial Evidence, especially applied to English practice* (1827) at 542.

[1022] Ibid, 541.

[1023] Bentham, *Rationale of Judicial Evidence, especially applied to English practice* (1827) at 541.

[1024] 'Constitutional Code, Book II, ch. XII, sect. XIV.' *The Works of Jeremy Bentham*, vol 9 (1843) at page 493.

So influential were Bentham's writings on the subject that, more than a century later, they featured heavily in the judgment of Lord Shaw in *Scott v Scott*,[1025] who famously described 'publicity in the administration of justice' as 'one of the surest guarantees of our liberties' and the use of closed hearings as 'an attack upon the very foundations of public and private security'.[1026] Besides quoting from Bentham at length, Lord Shaw also quoted the nineteenth century historian Hallam:[1027]

> Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.

409. This principle of open justice is today considered to be 'so fundamental that supporting citation of authority is not required'.[1028] It may seem surprising, then, in light of this principle and the various principles that make up the right to a fair hearing set out in Part 1 of this report, that secret evidence was ever permitted to be used in the first place. And, indeed, few could have predicted that – almost four hundred years after Star Chamber was abolished – secret evidence would reappear in British courts. But reappear it has. It is therefore appropriate to set out again the reasons why secret evidence should not be used: (i) it is unreliable, (ii) it is unfair, (iii) it is undemocratic, (iv) it is damaging to the integrity of the courts and the rule of law, (v) it weakens security and (vi) it is unnecessary.

Secret evidence is unreliable

410. First, secret evidence is not reliable. The reliability of evidence matters greatly to the courts because they have an interest, independent of fairness to the parties, to arrive at conclusions that are accurate. Of course, it is often said that courts are not places to discover

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[1025] [1913] AC 417. See also the judgments of Viscount Haldane at 434: 'the administration of justice must so far as the trial of the case is concerned … be conducted in open Court', and at 437: 'the exceptions [to the rule] are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. …… It may often be necessary, in order to attain its primary object, that the Court should exclude the public'; and Earl Loreburn at 445: 'The inveterate rule is that justice shall be administered in open Court'.

[1026] Ibid, 476.

[1027] Hallam, *Constitutional History of England*, vol 1, 7th ed (1854), 230-231, quoted in Scott v Scott, *ibid*, at 477-478.

[1028] *R v A and others*, n750 above, at para 32.

the truth, but merely to determine the facts according to the law.[1029] Nonetheless, as Lord Bingham noted, courts remain places of rational inquiry:[1030]

> It is on the whole undesirable that the process of judicial decision-making on issues of fact should diverge more than it needs to from the process followed by rational, objective and fair-minded people called upon to decide issues of fact in other contexts where reaching the right answer matters.

411. And if it is a principle of rationality that a tribunal must act upon evidence, it is surely rational to conclude that evidence that has been tested by all the parties is more likely to lead to accurate conclusions than a one-sided account. As Justice Frankfurter of the US Supreme Court said in 1951:[1031]

> Secrecy is not congenial to truthseeking, and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give the person in jeopardy of serious loss notice of the case against him and the opportunity to meet it.

Similarly, the 9th Circuit of the Federal Appeals Court held in 1981:[1032]

> The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court.

[1029] See e.g. *Murphy on Evidence,* 10th ed (OUP, 2007), p3: 'Trials are not objective inquiries into past events, but adversarial contests, in which the parties … not only decide what evidence they wish to present and prevent from being presented, but also present the evidence in as persuasive manner as possible …. A judicial trial is not a search to ascertain the ultimate truth of the past events inquired into, but to established that a version of what has occurred has an acceptable probability of being correct. It is in the nature of human experience that it is impossible to ascertain the truth of past events with absolute certainty. Nonetheless, a historian or journalist is entitled to set his own standard of probability which may correspond to the truth as closely as he wishes. A court accepts predetermined standards of probability, which depend not on the facts of the individual case, but on the type of case under consideration'.

[1030] *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26 at para 4.

[1031] *Joint Anti-Facist Refugee Committee v McGrath* 341 US 123 (1951) 171-2, Black J concurring. See also e.g. 5 Wigmore on Evidence (3d ed. 1940) at para 1367: 'For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test has found increasing strength in lengthening experience', cited in *Greene v McElroy* 360 US 474 (US Supreme Court) by Chief Justice Warren.

[1032] *Lynn v Regents of the University of California* 656 F.2d 1337 (9th Circ. 1981) at 1346.

Indeed, Bentham noted that the confrontation of adverse witnesses was such an effective method of testing evidence, that defendants in civil cases 'begged to be treated as a criminal' in order to gain its benefits.[1033] Nor is the court in position to dismiss evidence where there is no adversarial testing on the other side. As Lord Justice Bingham (as he was then) noted in a case in 1989, 'it would be a strong thing to stigmatise as dishonest evidence neither contradicted nor cross-examined'.[1034]

412. In most cases involving secret evidence, this lack of adversarial testing is compounded by a standard of proof ('reasonable suspicion') that even SIAC has conceded is 'not a demanding standard' for the Home Secretary to meet.[1035] Unlike the criminal standard (which requires proof beyond a reasonable doubt) or even the civil standard (which requires that something be more likely than not), the standard of reasonable suspicion that applies in SIAC and control order cases, among others, requires the judge only to conclude that the Home Secretary had *some* grounds for her belief. Suppose, for example, that the intelligence services discover a British telephone number in the mobile phone of a known terrorist captured in Pakistan. The number belongs to a flat in which four students live. In the circumstances, it may be reasonable for the Home Secretary to suspect that *each* student has a connection to the terrorist. It may actually be the case that all of them do. Or it may actually be the case that only one of the flatmates has a connection and the other three are innocent. It may even be the case that the terrorist's connection was with someone previously resident in the flat, or a even visitor to the flat, or that there was some innocent explanation (e.g. the terrorist in Pakistan borrowed someone else's phone, or it was a wrong number). But on a standard of 'reasonable suspicion', the Home Secretary would have evidence against all four flatmates, even though it would likely fail in a civil case, and almost certainly fail in a criminal case. Not only is this damaging to the people who may be innocent, but it relieves the Home Secretary of an obligation to be accurate.

413. This is also compounded by the fact that much of the secret evidence used in closed proceedings is not the product of a criminal investigation involving police detectives interviewing witnesses, gathering forensic material and following leads. It is the product of the security and intelligence services who, despite their expertise in intelligence, have no

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[1033] *Rationale of Judicial Evidence*, Book 3, Ch 29: 'In the cases in which [confrontation] is not afforded, as well as in the cases in which it is afforded, the importance of it has been not altogether a secret to the technicalists by whom it has been refused. To obtain the benefit of it, a defendant that has been proceeded against in the non-criminal (called the *civil*) mode, has begged to be treated as a criminal. Prayers to this effect have not been rejected; but the adverse party is permitted to oppose the grant of the prayer, on the ground that the importance of the cause is not considerable enough to warrant the expense. It seems, upon the whole, that where the defendant is able and willing to pay the expense of being treated as a criminal, the grace has not been refused'.

[1034] *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402 at 420.

[1035] *Ajouaou and others v Secretary of State for the Home Department* (SC/1/2002, 29 October 2003), at para 71 per Collins J.

background in evidence-gathering and for whom the prosecution of suspected terrorists is much less of a priority than the disruption of their activities. Accordingly, intelligence material may contain second- or third-hand hearsay, information from unidentified informants, information received from foreign intelligence liaisons, data-mining and intercepted communications, not to mention the hypotheses, predictions and conjecture of the intelligence services themselves. That much of this material would be inadmissible in a normal court is not a criticism of the intelligence services but it is a criticism of the use of intelligence as evidence. In February 2009, the UN Special Rapporteur on human rights and counter-terrorism criticised the use of intelligence material as evidence, particularly that based on foreign intelligence-gathering:[1036]

> sanctions against a person should not be based on foreign intelligence, unless the affected party can effectively challenge the credibility, accuracy and reliability of the information and there are credible grounds to believe that the information is accurate and reliable.

The same month, the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights found as part of its global study that 'intelligence, sometimes faulty, is being used in an increasing array of administrative procedures' and that 'raw intelligence starts to substitute for evidence, to the detriment of individuals and the criminal justice system'.[1037]

414. Because of the inherent limitations upon special advocates,[1038] secret evidence is not subject to rigorous cross-examination. The inability of special advocates to put the defendant's side of the case means that much apparently compelling evidence goes effectively unchallenged. And some secret evidence may appear, at first glance, to be extremely accurate – for example, a voice recording of a suspect apparently discussing plans to blow up the Houses of Parliament.[1039] Of course, in any other country save the UK, there would be no

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[1036] Report of Martin Scheinin, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/10/3, 4 February 2009), para 74. See also para 29: 'information gathered for 'strategic intelligence' … must not be used in court proceedings when there is no judicial supervision attached to measures directed at named individuals. The Special Rapporteur has noted with concern that in different courts, the line between such strategic intelligence and probative evidence has become blurred to the advantage of different forms of 'national security imperatives'. Judicial approval for a special investigative technique must be given in order to make permissible the use of the fruits of the technique as evidence in court'.

[1037] *Assessing Damage, Urging Action*: *Report of the Eminent Jurists Panel on Terrorism Counter-Terrorism and Human Rights* (February 2009), p161.

[1038] See especially pages 193-205 above.

[1039] According to the 2008 Privy Council Review of Intercept as Evidence, however, intercepted conversations are rarely as straightforward as this example: 'Those with experience in interception have emphasised that the vast majority of communications between serious criminals or terrorists are scrappy, highly allusive, and often deliberately disguised as legitimate conversations. Regardless of language, they make extensive use of dialect and slang. Clear, understandable

need to keep such evidence secret as it would be admissible in open court.[1040] Nonetheless, until the defendant has the opportunity to put his side of the story, it is impossible to assess the evidence in the round: what if it is a case of misidentification? Or, if the suspects are speaking a foreign language, what if there has been a translation error? What if the defendant is able to produce an alibi showing that he could not have made the call in question? In a famous passage from a case in 1970, Mr Justice Megarry discussed the importance of hearing both sides:[1041]

> It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

And, as Lord Justice Sedley noted more recently, quoting Mark Twain, 'the difference between reality and fiction is that fiction has to be credible'.[1042] In the absence of the defendant's side of the story, a court may well arrive at what seems to be a credible conclusion but, as long as it is based upon secret evidence, it will never arrive at the correct one.

415. In his judgment in *AF and others* in June 2009, Lord Hoffman conceded the possibility that a defendant might have an answer to an undisclosed allegation, but nonetheless warned that:[1043]

> There are practical limits to the extent to which one can devise a procedure which carries no risk of a wrong decision. It is sometimes said that it is better for ten guilty men to be acquitted than for one innocent man to be convicted. Sometimes it is a hundred guilty men. The figures matter. A system of justice which allowed a thousand guilty men to go free for fear of convicting one innocent man might not adequately

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exchanges that plainly inculpate those involved are very much the exception. For the rest, much interpretation – as well as translation in many cases – is needed to reveal what the exchange is really about' (para 52).

[1040] See page 154 above.

[1041] *John v Rees* [1970] 1 Ch 345, at 402.

[1042] *AF and others*, n351 above.

[1043] *AF and others v Secretary of State for the Home Department* [2009] UKHL 28 at para 88.

protect the public. Likewise, the fact in theory there is always some chance that the applicant might have been able to contradict closed evidence is not in my opinion a sufficient reason for saying, in effect, that control orders can never be made against dangerous people if the case against them is based 'to a decisive degree' upon material which cannot in the public interest be disclosed.

Lord Hoffman, however, appears to commit a simple error of logic. For at the stage that a control order is made by the Secretary of State, the view that a suspect is dangerous is no more than a suspicion, while the judicial determination that someone is dangerous is a question of fact. To complain that Strasbourg's ruling prevents control orders from being made against dangerous people is therefore to put the cart before the horse. For unless the evidence is disclosed to the defendant, the court cannot be sure whether any of its conclusions about him are correct. It is not, then, a matter of letting a thousand guilty men go free but rather letting a thousand men go free who have not been proven to be guilty.

Secret evidence is unfair

416. Secondly, secret evidence is unfair. It is not only that evidence that has been tested by all the parties will be a more reliable basis for the court to make its judgment, but that it is fundamentally *fairer* to give both parties an equal opportunity to present evidence as well as to comment on the evidence given by the other side. Each of the principles that make up the right to a fair hearing – the right to be heard, the right to confront one's accuser and the right to an adversarial hearing and equality of arms – is denied to the defendant when secret evidence is used against her.

417. In particular, the principle of equality of arms – the idea that both parties must be on an equal footing before the court – illustrates how stark the mismatch is between the parties in cases before SIAC and elsewhere. The government has full disclosure of all the evidence, is free to withhold its evidence from the defendant, has unfettered communication with its own lawyers, and can be present at all stages of the hearing – open and closed. The defendant, by contrast, is not entitled to be present throughout, to know the secret evidence against her, to give instructions to the special advocate on the basis of the secret evidence. Although the defendant has her own lawyer for the open sessions, her lawyer is under the same restrictions that she is in respect of the secret evidence.

418. Of course, the principle of equality of arms – that both parties must be on an equal footing before the court – only requires that both be treated the *same*, so that it is possible to imagine a court in which both sides were under the same disability. Although it is hard to contrive a purpose for such a bizarre arrangement, it might be possible in a civil case involving

disputes between two private parties. But the practical reality is that the cases involving secret evidence have all involved the government on one side and private individuals on the other.

419. The sense of unfairness caused by injustice is a powerful one. As Mr Justice Megarry said in 1970, 'those with any knowledge of human nature who pause to think for a moment' are not likely: [1044]

> to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events

420. Indeed, even the most trivial kinds of unfairness – a person cutting in front of someone else standing in a long queue, for instance – are apt to provoke strong feelings. Consider, then, the sense of unfairness that would result from being denied the opportunity to know the evidence that results in loss of one's liberty for even a short time. The right to a fair hearing is of such basic importance because of the severity of the consequences that may result from an unfair trial or hearing: loss of liberty, loss of one's family or one's home, loss of income or one's job or business, loss of compensation for damage or injury, and so forth.

421. Although imprisonment is the most serious punishment that the criminal law can apply, there are also an increasingly severe range of outcomes that can result from civil proceedings. For many years, it has been recognised that an accusation of fraud in a civil case may have severe consequences. With the growth of administrative law and quasi-criminal proceedings, the stakes have been raised even higher. Breach of an ASBO may result in imprisonment even if the original conduct was not imprisonable even if convicted in criminal court. A control order may result in conditions tantamount to house arrest on an indefinite basis. A flawed deportation or immigration decision may result in an innocent person being sent to a country where they face torture and death. As Justice Arthur Chaskalson, the former Chief Justice of South Africa said:[1045]

> Administrative measures such as deportation, control orders, and financial sanctions can cause considerable harm to those affected by them. The harm goes beyond the immediate impact of such orders on them, and includes the consequences of being tagged as a supporter of terrorism. This could be devastating for individuals and their families. Control orders may be much worse than they sound. They can require the

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[1044] *John v Rees,* n 1041 above, at 402. See also e.g. 'Unfairness and health: evidence from the Whitehall II study', 61 *Journal of Epidemiology and Community Health* (2007) 513-518: A study of 8000 patients by University College London researchers concluded that 'unfairness is an independent predictor of increased coronary events and impaired health functioning'.

[1045] 'The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law', 7th Sir David Williams Lecture, Centre for Public Law, University of Cambridge, published in (2008) 67 *Civil Law Quarterly* 69 at p86.

> victim of the order to remain at his or her home for up to 18 hours a day, with constraints upon receiving visitors, attending gatherings, meeting people or going to particular places during the 6 hours of 'freedom'. We had measures like that in South Africa. We called them house arrest, distinguishing between 12 hours house arrest and 24 hours house arrest. The people affected by such orders found it almost impossible to comply with their terms, resulting in their breaking their orders, which in turn led to their often being prosecuted for doing so.

422. In 2006, the Senior Law Lord described as a 'core principle' that 'a matter should not be finally decided against any party until he has had an adequate opportunity to be heard; that a person potentially subject to any liability or penalty should be adequately informed of what is said against him'.[1046] He described as 'disturbing' the:[1047]

> growing categories of case outside the strictly criminal sphere in which Parliament has provided that the full case against a person, put before the adjudicator as a basis for decision, should not be disclosed to that person or to any legal representative authorised by that person to represent him. Any process which denies knowledge to a person effectively, if not actually, accused of what is relied on against him, and thus denies him a fair opportunity to rebut it, must arouse acute disquiet.

Secret evidence is undemocratic

423. Thirdly, secret evidence is undemocratic. After all, in a democracy, the public are not only bound to obey the law but responsible for making it. They therefore have a right to know not only that the law is being applied, but that it is being applied properly.[1048] As two US law professors wrote:[1049]

> Excessive government secrecy is the enemy of democracy. Secrecy cripples public debate. Citizens cannot understand, monitor, and evaluate public policies if they are kept in the dark about the actions of their elected representatives. Secrecy is the ultimate form of censorship because the People do not even know they are being censored.

[1046] Lord Bingham, 'The Rule of Law', 6th Sir David Williams Lecture, Centre for Public Law, University of Cambridge, 16 November 2006.

[1047] Ibid.

[1048] See more generally page 89 above.

[1049] Geoffrey Stone and William Marshall, 'Secrecy, the enemy of democracy', *The Chicago Tribune*, 17 December 2006.

> Excessive secrecy is also the enemy of competence. We make better decisions when we consider more rather than fewer perspectives. We make better decisions when we openly debate the alternatives. We make better decisions when we know we have to justify our judgments and know we will be held accountable for our mistakes. Secrecy undermines all these values.

The protection of parliamentary democracy was, of course, one of the key aims of the principle of open justice as set down *Scott v Scott*, requiring the courts to conduct their work in public so that the public may satisfy themselves that justice is being done.[1050] It is also one of the main justifications for the right to trial by jury in cases of serious crime, to help ensure the law is correctly applied by those who make it. However, the public's ability to scrutinise court decisions is plainly thwarted where proceedings, evidence, and even judgments are kept secret.

424. Although there are circumstances where it may be appropriate to impose reporting restrictions to protect, for example, a child witness, it is apparent that secrecy has too often been imposed in a broad range of cases. The long-running campaign by *The Times* newspaper to open up proceedings in family courts in England and Wales which led to the recent easing of reporting restrictions in such cases shows how widespread the tendency towards restricting information is.[1051] But one would at least expect that, where the press and public have been excluded for the best of reasons, that there would be an even stronger commitment to ensuring that the parties themselves are able to see and know the evidence. Instead, defendants in SIAC and control order cases and other proceedings are not only denied public scrutiny of the evidence against them, but their own scrutiny as well.

425. Nor is it an answer to say that, in most cases, the use of secret evidence was approved by Parliament itself. For under the Human Rights Act, Parliament has also entrusted the courts with the task of ensuring that its legislation is compatible with Convention rights. And, independently of this, the courts also have a deeper responsibility to prevent their own functions from being used in a way that is damaging to democracy and fundamental rights, even where directed to do so by Parliament.[1052]

[1050] See para 408 above.

[1051] See e.g. Camilla Cavendish, 'When the stakes are so high, parents want to be heard'; *The Times*, 10 April 2009; Sarah Harman, 'Family courts: now we can judge parents stories for ourselves', *The Times*, 23 April 2009; statement of the Justice Secretary Jack Straw MP, Hansard, HC Debates, 16 December 2008, col 980 and the Family Proceedings (Amendment) (No 2) Rules 2009 (SI 2009/857) and the Family Proceedings Courts (Miscellaneous Amendments) Rules 2009 (SI 2009/858).

[1052] See e.g. the speech of Lord Steyn in *Jackson and others v HM Attorney General* [2005] UKHL 56 at para 102: 'the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a

Secret evidence damages the integrity of the courts

426. Fourthly, the use of secret evidence is damaging the integrity of the courts. Not only is it an affront to basic principles of fairness for the courts to determine issues of fact by reference to evidence not disclosed to a party, but – as we have already seen in Parts 2 and 3 of this report – the courts are in addition obliged to give their reasoning in closed judgments kept secret from the public.[1053]

427. The damage caused by the use of secret evidence is not limited to the violation of the rights of the individual defendants affected by it. Lack of fairness also damages the public good of the justice system itself. It is of course inevitable that, in an adversarial system of justice, a court's decision is unlikely to please both parties equally. And from time to time, the courts encounter hard cases that oblige them to deliver a judgment that will please few people anywhere. But the integrity of the courts depends on the perception that the courts have at least adopted a fair process. The maxim that justice must not only be done but seen to be done goes deeper than is first apparent. For, despite the importance of open justice, it remains possible to have a fair hearing behind closed doors, so long as all the parties have had an equal opportunity to make their case. Whatever the outcome, the participants themselves will understand that the procedure adopted was fair. This does not diminish the importance of external scrutiny for the reasons spelt out above. But in a hearing in which secret evidence is used, it is not merely that justice is not being seen to be done, it is actually that justice itself is not being done. It is not simply the *perception* of fairness that matters, but the practice of fairness too.

428. The need to ensure the integrity of the courts was, of course, the basis for the decision of the House of Lords in 2005 to reject the use of evidence obtained by torture under any circumstances.[1054] Torture evidence was not excluded simply because it was likely to be unreliable but because of 'the belief that it degraded all those who lent themselves to the practice'.[1055] In oral argument before the House, one of the central submissions made by the Home Secretary in favour of allowing torture evidence was the inevitable mismatch that would result if the Home Secretary were able to rely upon material received from torture in operational terms, but could not rely upon it to justify her decisions before the court. If, for

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principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'.

[1053] See e.g. page 89 above.

[1054] *A and others (no 2)* [2005] UKHL 71.See pages 57-59 above.

[1055] Ibid, para 11 per Lord Bingham.

example, the police were passed information gained from a torture session in Pakistan revealing 'the whereabouts of a bomb in the Houses of Parliament', it would be lawful to arrest the suspect who planted it, but the information from the foreign interrogation would be inadmissible before SIAC. Lord Bingham noted this possibility but remarked that this was 'not an unusual position':[1056]

> It arises whenever the Secretary of State (or any other public official) relies on information which the rules of public interest immunity prevent him adducing in evidence …. It is a situation which arises where action is based on a warranted interception and there is no dispensation which permits evidence to be given. This may be seen as an anomaly, but … it springs from the tension between practical common sense and the need to protect the individual against unfair incrimination. The common law is not intolerant of anomaly.

Lord Hoffman, too, described the 'mismatch' as 'almost inevitable in any case of judicial supervision of executive action'.[1057] It was not the place of the courts to tell the executive upon which information it could rely for its actions, but neither could the executive expect to defend its actions by reference to a form of evidence that was 'dishonourable'.[1058] Lord Nicholls also did not see the mismatch as problematic:[1059]

> The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do, they are of an essentially short-term interim character. Often there is an urgent need for action. It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture.

[1056] Ibid, para 48.

[1057] Ibid, para 93.

[1058] Ibid, paras 82, 93-94.

[1059] Ibid, para 75. See also e.g. the speech of Lord Scott in *AF and others v Secretary of State for the Home Department* [2009] UKHL 28 at para 91: 'the government has a responsibility for the protection of the lives and wellbeing of those who live in this country and a duty to promote the enactment of such legislation as it considers necessary for that purpose …. The duty of the courts, however, is rather different. It is not, directly at least, a duty to protect the lives of citizens. It is a duty to apply the law'.

429. However, if it is possible for courts to exclude consideration of evidence obtained from torture, however accurate, then it is equally right that the courts should refuse to allow the use of secret evidence. Logically, the positions are no different. Morally, both practices are indefensible. It matters little that torture involves overt physical suffering while secret evidence does not. The unfairness of secret evidence may not be physical but its long-term effects are no less damaging to society as a whole. Indeed, the analogy between torture evidence and secret evidence was one that Lord Brown noted in *MB*:[1060]

> By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute …, so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing.

Lord Brown's error, however, was in not following his analogy through to its logical conclusion, for the rule against torture evidence was not dependent on the outcome of the case, but from the damage to judicial integrity that would come from using it in the first place. As the historian Sir William Holdsworth noted:[1061]

> Once torture has become acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it.

If anything should be apparent from this report, it is that torture is not the only disease known to infect courts. Secrecy, too, saves the labour of investigation and conceals vice. And both are corruptions of the essential values of the courts themselves.

Secret evidence weakens security

430. Fifthly, secret evidence weakens security. This no doubt seems counter-intuitive since protecting national security is by far and away the most common justification for the use of secret evidence, but the point can be simply stated. By relying on evidence that has not been properly tested, procedures that involve secret evidence carry with them a much greater degree of error than those which don't. Consequently, they are more likely to fail in their objective of protecting the public.

431. Inaccurate conclusions endanger security in two ways. First, by punishing the innocent, they breed resentment in those not actually involved in terrorism, as well as their

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1060 [2007] UKHL 46 at para 91.

1061 *A History of English Law,* vol 5, 3rd ed (1945), pp 194-195.

family, friends and members of the broader community. And, as the lessons of Northern Ireland have shown, the communities from which terrorists emerge are typically the best sources of intelligence against them. Secondly, inaccurate conclusions allow the guilty to escape detection. This is because secret evidence, together with a low standard of proof, makes it relatively simple for the government to gain the results sought, whether it is the confirmation of a control order, upholding a deportation order, or the freezing of assets, etc. This ability to gain easy victories against suspects leads to an inevitable confirmation bias: the courts appear to confirm the suspicions of the authorities, which in turn encourages the possibly false belief that their efforts in detecting terrorists are yielding results. Not only does this encourage complacency but it may lead to the real culprits escaping detection. There is, of course, no way of knowing how many suspects have been misidentified in this manner. But by relying upon secret evidence together with a low standard of proof, the door is left open for significant errors to creep in.

Secret evidence is unnecessary

432. Sixthly and lastly, the resort to secret evidence is not necessary. This claim covers two different points. First, the government sometimes claims secrecy in respect of things which, it later emerges, are already in the public domain. Or the government wrongly claims that the disclosure of some item of information would damage some vital public interest when it would not. Secondly, the resort to secret evidence is unnecessary in the larger sense that there are inevitably better means of protecting the relevant public interest in a way that is compatible with the defendant's right to a fair hearing.

433. First, there is the evidence of the special advocates of having found material, which the government has claimed is so secret that it cannot be disclosed to the defendant, to be publicly available on the internet. As one special advocate told the Joint Committee on Human Rights, 'in every case in which I have undertaken internet research as a Special Advocate I have found something on Google'.[1062] One case has already been mentioned of evidence that was kept secret until the security service witness admitted in closed session that it had been published on the internet a year earlier.[1063] In another case, a control order was dismissed because the special advocates had discovered that a considerable amount of the secret evidence was already publicly available in Belgium.[1064] There is also the overall success rate of the special advocates in arguing for increased disclosure to defendants.[1065] While in most

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[1062] Evidence of Judith Farbey to the Joint Committee on Human Rights, 12 March 2007, Q67.

[1063] See para 388 above.

[1064] *E v Secretary of State for the Home Department* [2007] EWHC Admin 233 at para 81: 'The Belgian judgments were obtained and made available as a result of the efforts of E's Special Advocates'.

[1065] See para 318 above.

cases this has made little difference to the outcome, it nonetheless shows that – in almost every case – the government claimed something to be too secret to disclose that was not.

434. Secondly, secret evidence is unnecessary in the sense that there are alternatives to using it that would enable suspects to be prosecuted in open court. Probably the most well-known alternative to using secret evidence would be lifting the statutory bar on intercept evidence to allow it to be used in open court. At present, intercept evidence is only admissible as secret evidence in the UK.[1066] This is in contrast to every other common law jurisdiction where it is used regularly in open court to prosecute both suspected terrorists and ordinary criminals.[1067] Another instance of unnecessary resort to secrecy is the current reliance on anonymous witnesses in criminal cases:[1068] the United States prosecutes terrorists and criminals without relying on anonymity – it should therefore be possible for the UK to do likewise.

435. There is, of course, little reason to doubt that much of the material relied upon by the government in control order cases and elsewhere *would* be contrary to the public interest to disclose, in the sense that it would reveal too much about the identity of undercover agents or informants, methods of interception or other details of ongoing operations. Even if intercept evidence were admissible in open court and the government was much better at identifying what ought to be kept secret, there would still be a rump of material that the government would be reluctant to use in open court – assuming that it would otherwise be admissible there – simply because it would be too damaging to reveal.

436. However, none of this shows that it is therefore necessary to use this information as secret evidence against defendants. In the first place, much of it appears to be material that would be kept out of court not because it is secret but because it amounts only to suspicions on the part of the government rather than proof of any kind. However, even assuming that some of it would be admissible, that does not oblige it to be used under conditions of dramatic unfairness to the defendant. It must be a basic condition of a fair hearing that evidence should be used openly or not at all.

437. As in the case of torture evidence, the requirement that the government must use only open evidence to prove its case is likely to provoke the complaint that this will deprive it of the ability to justify such measures as control orders and the like. As in the case of torture

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1066 See above page 154, *Intercept Evidence: Lifting the ban* (JUSTICE, October 2006) and the 2008 Privy Council Review Committee report on Intercept as Evidence.

1067 See e.g. *Intercept Evidence,* ibid, and From *Arrest to Charge in 48 Hours: Complex terrorism cases in the US since 9/11* (JUSTICE, November 2007).

1068 See pages 144-154 above.

evidence, however, all this is as it should be. Just as there is a mismatch between the information which the government uses for intelligence purposes and the information which the courts will accept as evidence, there is also a gap between the material the government *could* use as evidence if it wished to and the material that it is *willing* to use as evidence without damaging national security. Again, this gap is not unusual and it is not the fault of the courts. It arises, for instance, in criminal cases whenever the courts rule that it is necessary to disclose some piece of sensitive unused material to the defence for the sake of a fair trial. It is, as Lord Hoffman put it, 'almost inevitable in any case of judicial supervision of executive action'. Put more simply, it is the price of basic fairness.

Proposals for change

438. Twelve years of secret evidence is enough. The judgment of the Strasbourg Court in *A and others v United Kingdom* and now the House of Lords in *AF and others* shows that a turning point has been reached. Parliament can allow the current system of secret courts to limp on for the sake of increasingly diminishing returns. Or it can set its face against secret evidence completely and work to make more evidence admissible against suspects in open court. This report proposes the latter. But this section sets out a series of recommendations that should be adopted in either case.

End the use of secret evidence

439. The Grand Chamber in *A and others v United Kingdom* and the House of Lords in *AF and others* have made clear that article 5(4) in cases of immigration detention and now article 6 entitles defendants to disclosure of an irreducible minimum of the case against them.[1069] However, the current rule does not require full disclosure of the evidence against a defendant. Instead it draws a distinction between the allegations (all of which must be known by the defendant) and the evidence supporting them (all of which need not be).[1070] Defendants must be given 'sufficient information about the allegations against him to give effective instructions to the special advocate'.[1071] Closed hearings and special advocates can therefore still be used in (i) helping to determine which of the closed evidence needs to be disclosed to the

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[1069] *A and others v United Kingdom*, (unreported, 19 February 2009), para 220; *AF and others v Secretary of State for the Home Department* [2009] UKHL 28.

[1070] *A v United Kingdom*, ibid, para 220; *AF and others,* ibid at para 81 per Lord Hope: 'the Strasbourg court was careful not to insist on disclosure of the evidence. It is a sufficient statement of the allegations against him, not the underlying material or the sources from which it comes, that the controlled person is entitled to ask for. The judge will be in the best position to strike the balance between what is needed to achieve this and what can properly be kept closed'.

[1071] *AF*, ibid, at para 76 per Lord Hope.

defendant; and (ii) making submissions and cross-examining witnesses in relation to the evidence that remains closed.[1072]

440. While plausible at first glance, it is apparent that any clean distinction between allegations and evidence swiftly breaks down. Specifically, knowledge of the general allegation may be not be enough for the defendant to rebut the case against him via the special advocate in closed session unless sufficient detail of the evidence supporting the allegation is made known. Suppose for example that a key *allegation* against the defendant is that he met with Osama Bin Laden in a cave outside Kandahar on the day before 9/11. Suppose, however, that the secret *evidence* supporting the allegation that the defendant met Osama Bin Laden is the testimony of a single witness who is a valuable undercover source but, unknown to the Security Service, has a long-standing grudge against the defendant. The special advocate can, of course, seek the identity of the witness and try to test if there is any relationship between the witness and the defendant. But unless she is able to disclose not only the general allegation but also the witness's identity to the defendant, it is highly unlikely that she will be able to rebut the witness's testimony. The test set out in *A v UK* and *AF and others* is not confined to the general allegations alone: the defendant is entitled to 'sufficient information about the allegations' to enable him to give 'effective instructions'.[1073] In practical terms, however, much will rest on the ability of the special advocate to identify potential areas of challenge against a closed witness, and the willingness of the court to entertain such challenges.

441. In the case of both secret evidence and anonymous evidence, the Strasbourg case-law invites the parties to consider, among other things, whether or not a particular item of concealed evidence is 'decisive'. If it is, then it must be revealed to the defendant.[1074] While this rule of disclosure is undoubtedly much fairer than the wholesale use of secret or anonymous evidence, it is likely to prove difficult to apply the long-term.[1075] It would instead be

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[1072] Ibid at para 121 per Lord Brown: 'Inevitably there will continue to be closed hearings and special advocates'.

[1073] Ibid at para 76. See also Lord Hope at para 82: 'there are bound to be cases where … the procedure will be rendered nugatory because the details cannot be separated out from the sources or because the judge is satisfied that more needs to be disclosed than the Secretary of State is prepared to agree to. Lord Bingham used the phrase 'effectively to challenge' in *Secretary of State for the Home Department v MB* … It was adopted by the Grand Chamber in *A v United Kingdom* … It sets a relatively high standard. It suggests that where detail matters, as it often will, detail must be met with detail. In *Secretary of State for the Home Department v AF* … Stanley Burton J said that the allegations in the additional disclosure were insufficiently specific to enable AF to give specific instructions beyond a general denial. There may indeed be … a significant number of cases of that kind. If that be so, the fact must simply be faced that the system is unsustainable'.

[1074] Ibid, para 59 per Lord Phillips; para 88 per Lord Hoffman; para 119 per Lord Brown.

[1075] See e.g. ibid, per Lord Hope at para 78: 'The principle is easy to state, but its application in practice is likely to be much more difficult …. there is no room for an exception [to disclosure] where it is thought that the [defendant] has no conceivable case to answer. The judge must insist in every case that the [defendant] is given sufficient information to enable his special advocate effectively to challenge the case that is brought against him. That is the core principle'.

much simpler and fairer for the courts to adopt an absolute exclusionary rule against the use of secret evidence. In those instances where its use has been directed by legislation, especially the 1997 Act establishing SIAC and the 2005 Act establishing control orders, Parliament must repeal the relevant provisions.[1076]

442. It is important to make clear that the prohibition on secret evidence does not require the government to disclose any material whose disclosure would be damaging to the public interest. While the courts must always have the power to direct disclosure of relevant unused material to a defendant for the sake of fairness, it must always be open to the government to withdraw its decision or halt the prosecution if it believes that disclosure would cause serious harm to the public interest.

End the use of anonymous evidence

443. Just as it is unfair to rely on secret evidence, it is unfair to rely on evidence from anonymous witnesses. The current legislation allowing for anonymity orders should be repealed.[1077] In its place, substantial funding for proper witness protection measures should be made available.[1078] The use of anonymous hearsay in ASBO cases should also be prohibited.[1079]

Replace special advocates in PII claims with public interest advocates

444. In cases where one party seeks to withhold relevant material from the other party on the grounds of public interest immunity, special advocates can perform a valuable role by arguing in favour of disclosure where the application is made *ex parte*. Although the courts have suggested that appointment of a special advocate should be a 'last resort' in such cases,[1080] it is difficult to see why this should be so, other than the practical objections. It seems likely that much of the courts' resistance to using special advocates outside of proceedings like SIAC is due to the relative novelty of the procedure and misgivings about their other role in relation to secret evidence. The government's resistance comes from a

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[1076] For a full list of relevant legislation in civil cases, see the beginning of Part 2. In criminal cases, the relevant provisions are Schedule 8 of the Terrorism Act 2000 and section 17 of the Regulation of Investigatory Powers Act 2000.

[1077] See para 290 above. The Criminal Evidence (Witness Anonymity) Act 2008 is due to lapse at the end of 2009. However, Part 3 of the Coroners and Justice Bill currently before Parliament would put the 2008 Act's provisions for anonymity orders on a permanent statutory footing.

[1078] See page 152 above,

[1079] See page 104 above.

[1080] *R v H* [2004] UKHL 3 at para 22: 'a course of last and never first resort' (criminal PII). *Secretary of State for the Home Department v AHK and others* [2009] EWCA Civ 287 at para 99: the power to appoint a special advocate 'should be exercised only in an exceptional case and as a last resort' (civil PII).

different source, as the appointment of a special advocate would almost certainly result in judge directing greater disclosure of material to the other side.[1081]

445. The time has come to distinguish much more clearly between the role that special advocates play in PII claims from the role that they place in closed proceedings such as SIAC. In our view, there is nothing to be gained by confusing an advocate who argues for *disclosure* in a PII claim with an advocate who helps *determine the substantive facts in issue* in a secret trial.[1082] The two functions – disclosure and substantive argument – being fundamentally different, we recommend that different terms be used to describe the advocates performing them:

a. *'public interest advocate'* – appointed by the court to assist with *ex parte* PII claims, the role of the public interest advocate is to represent 'the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done'.[1083] Just as the prosecution or government counsel represents the public interest in non-disclosure in PII applications, the public interest advocate represents the public interest in disclosure (which are in any event indistinguishable from those of the defendant). Although there are plainly cost implications, we do not agree that public interests advocates should only be appointed as 'a last resort'. We do not think it would be appropriate to appoint them as a matter of course in every *ex parte* PII claim, but we would expect them to be appointed regularly in more serious cases where there are large amounts of sensitive material subject to PII. More generally, we also see considerable benefit in public interest advocates being appointed to represent the interests of defendants in other *ex parte* applications, e.g. search warrants, surveillance warrants, injunctions, etc, along the lines of the Queensland Public Interest Monitor.[1084]

b. *'special advocate'* – appointed by the court to act on behalf of a defendant in closed session to cross-examine witnesses and make submissions, etc, in respect of evidence not disclosed to the defendant or her lawyer. Although a special advocate in fact performs both a disclosure role and a substantive role, they are most closely associated in the public mind with the substantive role. For the reasons set out above,

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1081 In addition, the Attorney-General has misgivings about the cost of appointing special advocates: see pages 209-213 above. As the House of Lords noted in *R v H*, ibid: 'the introduction of an additional, high-quality advocate must add significantly to the cost of the case'.

1082 It is, of course, correct that special advocates before SIAC and elsewhere carry out both functions: disclosure and substantive argument. In the event that closed-proceedings continue post-AF, we do not propose that the different functions should be carried out by different advocates.

1083 *Conway* v *Rimmer* [1968] AC 910 per Lord Reid at 940.

1084 See pages 177-179 above.

we favour an outright bar on the use of secret evidence, and hence an end to the appointment of special advocates. If, however, secret evidence continues to be used, we recommend that special advocates continue to carry out the same functions as before, and we do not suggest that public interest advocates operate in the same proceedings as special advocates. We make further proposals concerning the use of special advocates below.

In addition the appointment of public interest advocates in PII claims, we recommend that the Crown Prosecution Service Inspectorate adopt a more intensive oversight role to ensure that the police and CPS properly discharge their disclosure duties in criminal cases.[1085]

Lessen the unfairness of special advocates

446. As this report makes plain, special advocates are inherently incapable of providing a fair hearing.[1086] In light of our view that secret evidence should be prohibited altogether, then, it might seem unnecessary to make recommendations concerning the use of special advocates. However, if as seems likely, the government does not introduce legislation repealing provision for the use of secret evidence before SIAC and elsewhere, there are at least three steps that need to be taken to make special advocates as fair and as effective as possible: (i) relax the ban on communication between special advocates and those they represent; (ii) increase logistical support for special advocates; (iii) remove the Attorney-General's discretion to refuse requests for the appointment of special advocates.

447. First, the current ban on communication between special advocates and those they represent must be relaxed. We note for instance that, in nearly twenty years of operation, there was no equivalent prohibition on SIRC counsel communicating with defendants.[1087] And when it was suggested that special advocates be reintroduced in Canada, both the Canadian Senate Committee on the Anti-Terrorism Bill and a comparative study commissioned by the Canadian Federal Court Service recommended against adopting the blanket UK prohibition on communication.[1088] This approach is also consistent with the recommendations of the House of Commons Constitutional Affairs Committee and the Joint Committee on Human Rights.[1089] In particular, special advocates who have seen the closed evidence must be able to apply *ex parte* to a judge for permission to communicate with a defendant without the Secretary of State being notified.

[1085] See pages 167-168 above.

[1086] See especially pages 193-205 above.

[1087] See pages 173-177 above.

[1088] Ibid.

[1089] See pages 195-200 above,

448. Secondly, logistical support to special advocates must be considerably increased to enable them to search effectively for disclosable material in other languages. But as long as the court continues to accept the government's claims concerning non-disclosure of sensitive material, we do not see how the practical *impasse* concerning lack of expertise can be addressed.[1090] In particular, we find the government's suggestion that former members of the intelligence services would not be able to act as experts to assist special advocates (on the basis that this would breach their 'duties of confidence and loyalty') to be a disturbing one. Former and serving members of the intelligence and security service undoubtedly have a duty of loyalty, and indeed a statutory duty to protect national security. They also, however, have a duty – like any public official – to act consistently with Convention rights and, more generally, the rule of law. There should be no inconsistency between working for the security service and working to protect fundamental rights in the UK, including the right to a fair trial.

449. Thirdly, any discretion that the Attorney-General has to refuse to appoint a special advocate or a public interest advocate where requested to do so by a judge should be removed.[1091] We do not object to the Attorney-General continuing to maintain the current panel of special advocates. Institutionally, she is well-placed to select appropriate counsel. This should not preclude the Attorney indicating potential conflicts to the court, such as in the case of *Rehman* in the Court of Appeal, or even making submissions on the appropriateness of an appointment, so long as the court bears in mind that the Attorney cannot be expected to remain neutral on the issue of disclosure. Exceptionally, Parliament should consider removing the power to appoint special advocates and public interest advocates from the Attorney altogether. Instead, advocates would be appointed directly by the court as they are under the Crown Court Rules 1982 and the Youth Justice and Criminal Evidence Act 1999.[1092]

450. Lastly, despite the inherent unfairness of the special advocate procedure, we do not suggest that those who feel they can better serve individual rights by acting as special advocates are mistaken. The question of whether to act as a special advocate is surely a matter of individual judgment as to whether a person can increase justice by doing their very best to assist the defendant under difficult circumstances, or by refusing altogether to take part in an unfair system. We do however endorse Lord Bingham's suggestion that those who currently serve as special advocates consider under what circumstances they should act in future.[1093] The Bar Council too, which does not appear to ever have taken a position on the

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[1090] See page 205 above.

[1091] See pages 209-213 above.

[1092] See page 213 above.

[1093] 'A fair trial', lecture to the Constitutional and Administrative Law Bar Association, Inner Temple Hall, 4 November 2008.

issue, should become involved in the debate, as should the International Bar Association and the Law Society.

Increase the transparency of court proceedings

451. In exceptional cases, it is right that the courts adopt reporting restrictions to protect vulnerable witnesses. Although it is grave concern that anyone should be convicted on evidence not make public, it is better for terrorism cases to sometimes be prosecuted behind closed doors before a jury on evidence that the defendant knows and is free to challenge, than for the defendant to be subject to a control order or deported on the basis of evidence he never sees.[1094] We are nonetheless concerned there has been excessive resort to closed trials and civil hearings *in camera*. In particular, there is an obvious conflict between SIAC's position that disclosure to a defendant is effectively disclosure to the world at large, and the Court of Appeal's view in *Amin* that is was possible to have a closed trial with disclosure to the defence but with the media excluded.[1095]

452. Consistent with our views concerning secret evidence, the practice of issuing closed judgments must end. For justice to be open and accountable, the public have a right to know the reasons for any court's decisions. More generally, the public has a right to know whenever secret evidence is used or when a special advocate is appointed. It is plainly unsatisfactory that not all cases are reported, or that the only way to gain an accurate picture of the extent of secret evidence in British courts has been to thread together material from a number of different, incomplete sources.[1096] In particular, we see no reason why, if the Attorney was able to give accurate figures for the number of special advocates appointed in 2001/2002, she is apparently unable to do so for any other year, or that her office no longer seems to have a clear idea of how many special advocates have been appointed.[1097]

End reasonable suspicion

453. It is apparent that almost all the secret evidence used in British courts since 1997 has resulted from exceptional measures based on reasonable suspicion: the deportation of suspects on national security grounds; indefinite detention of foreign nationals unable to be

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[1094] See e.g. Viscount Haldane in Scott v Scott [1913] AC 417 at 35: 'There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield'.

[1095] See page 160 above.

[1096] The SIAC website, for instance, has most but not all SIAC judgments since 1997: for reasons unknown, it does not contain any pre-9/11 cases or even the first SIAC case under the Anti-Terrorism Crime and Security Act in mid-2002. There is no corresponding site for control order decisions in the High Court.

[1097] See pages 186-190 above.

deported under the Anti-Terrorism Crime and Security Act 2001; control orders under the Prevention of Terrorism Act 2005; and extended pre-charge detention under the Terrorism Act 2000.

454. In all of these cases, the government's resort to secret evidence has been motivated by its desire to close the gap between suspicion and proof, i.e. the apparent difficulty in prosecuting terrorism offences due to a lack of, or unwillingness on the part of government to provide, admissible evidence. The government cannot use the evidence it has against suspects in open court for fear of damaging national security, so alternative procedures are devised to put forward the necessary evidence under cloak of secrecy. Instead the government's allegations being proved beyond a reasonable doubt, it is enough for the government to produce evidence to show that its suspicions against the suspect are reasonable.

455. It is often assumed that, secrecy aside, the evidence in such cases is no different from that put forward in an ordinary criminal trial or civil hearing. Nothing could be further from the truth. As this report has shown, one of the central problems with the secret evidence besides its obvious unfairness is its dramatically poor quality.[1098] Secret evidence does not close the gap between suspicion and proof. Instead, it allows that suspicion alone is enough to justify deportation, indefinite detention, control orders and pre-charge detention.

456. In our view, the only way to address the evidential difficulties in terrorism prosecutions is to work on making more evidence admissible in open court, rather than resort to quasi-criminal measures based on reasonable suspicion arising from secret material. Lifting the ban on intercept evidence, as we recommended in our 2006 report, would be an important first step and we look forward to the final report of the Chilcot advisory group on the progress towards using intercept as evidence before the end of the current parliamentary session. More generally, however, it is apparent that the gap between suspicion and proof will continue to exist as long as UK counter-terrorism policy is based primarily on the work of agencies whose primary goal is not the prosecution of suspected terrorists. Until the criminal justice system is seen as the primary weapon in the fight against terrorism, the government's desire to resort to secret and unfair methods is unlikely to abate.

CONCLUSION

457. While the reappearance of secret evidence in British courts after nearly four hundred years is indisputably cause for alarm, it is also important not to hearken back to some mythical golden age of governmental transparency or judicial vigilance. As the history of the law

[1098] See e.g.. pages 51 and 69 above.

relating to public interest immunity shows, meritorious claims were for many years dismissed out of hand because of the government's refusal to disclose some sensitive material to the court.[1099] And it was not until after the collapse of the Matrix Churchill trial that Parliament put the requirement to disclose relevant unused material on a statutory footing. Similarly, if the courts have sometimes seemed too timid concerning the government's extensive reliance upon secret evidence over the past decade, it is not simply because they are following what Parliament has directed. Instead, the courts have always been careful to avoid determining issues of national security in a way that would unduly restrict the government's ability to combat potential threats.[1100]

458. Indeed, it is one of the great ironies of the growth in secret evidence over the past ten years that it came about out of a desire to *increase* fairness to defendants in certain kinds of proceedings. In Mr Chahal's case, for example, there was no question of secret evidence being used against him.[1101] The High Court simply could not look at the material that the Home Secretary used as the basis for his deportation order. Through a commendable desire to increase judicial control over executive action based on classified material, Parliament opened the doors to the use of secret evidence in British courts.

459. In deportation cases before SIAC and control orders cases before the High Court, the golden rule of full disclosure has been reduced to dull tin plate. Sir Walter Raleigh once complained that even litigants in a property dispute had the right to confront their accusers, whereas he was on trial for his life. Today's controlees and deportees may not be Raleighs but their position up until now has been the same: a person complaining of a housing decision or a dispute over car insurance has greater rights to see and to challenge the evidence on the other than those accused of involvement in terrorism. It matters not that SIAC's proceedings are presided over by a High Court judge or that control order proceedings have the trappings of a court. The semblance of justice is not justice, however senior the judges involved. After all, the fact that some of the most eminent jurists in English legal history were members did not make the proceedings of Star Chamber any less notorious. This is no dry lesson in constitutional history, however. Secret evidence undermines the tradition of open justice this

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[1099] See pages 127-133 and 163-167 above.

[1100] See e.g. Lord Atkin's famous description of his fellow judges as 'more executive-minded than the executive' in his dissent in *Livisidge v Anderson* [1942] AC 206 at 244. See also e.g. *Chandler v Director of Public Prosecutions* [1964] AC 763 at 798 per Viscount Radcliffe: '[W]e are dealing with a matter of the defence of the realm and with an Act designed to protect state secrets and the instruments of the state's defence. If the methods of arming the defence forces and the disposition of those forces are at the decision of Her Majesty's ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different'.

[1101] See pages 38-40 above.

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