

JUSTICE AND SECURITY GREEN PAPER

RESPONSE TO CONSULTATION FROM SPECIAL ADVOCATES

Introduction

1. This response has been prepared with the aim of providing a collective response to the 'Justice and Security Green Paper' from those appointed to the list of Special Advocates (SAs), to include those currently practising as Special Advocates (SAs) in the civil jurisdiction in England and Wales, or with significant previous experience in that role. Almost every SA with substantial experience has subscribed to this paper. Of the SAs whose names do not appear below, none has expressed active disagreement with its contents. We therefore believe that the views set out here represent an overwhelming consensus from the body of Special Advocates.¹

2. In the response below, we indicate our view that:
 - (1) Closed material procedures (CMPs) represent a departure from the foundational principle of natural justice that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own. They also undermine the principle that public justice should be dispensed in public.
 - (2) Substantially less restrictive regimes than the CMPs currently deployed in the United Kingdom have been successfully adopted to deal with sensitive material; most notably in the United States, to which no consideration has been given in the Green Paper. The 'international comparisons' exercise at Appendix J of the Green Paper makes no mention of the United States and refers to only four

¹ We record our gratitude to the Special Advocates Support Office (SASO) for their substantial and invaluable support in co-ordinating the arrangements for the production of this paper, including the setting up a meeting of SAs on 14 December 2011 for its discussion, as well as the provision of information requested, and logistic support for communications among the body of SAs.

countries² (none of which appears to have a regime as restrictive as the UK model). More thorough research is required, including an explanation as to why a procedure involving security clearance being given to the directly instructed lawyers (akin to that used in *'habeas'* proceedings in the United States) could not be adopted here.

- (3) Contrary to the suggestion in the Green Paper, CMPs are **not** “familiar to practitioners”. The way in which CMPs work in practice is familiar to only a very small group of practitioners. Of the 69 currently appointed to the list of Special Advocate, only about 32 have substantial experience in the role, and almost all of these are signatories to this response³.
- (4) Contrary to the premise underlying the Green Paper, the contexts in which CMPs are already used have **not** proved that they are “capable of delivering procedural fairness”. The use of SAs may attenuate the procedural unfairness entailed by CMPs to a limited extent, but even with the involvement of SAs, CMPs remain fundamentally unfair. That is so even in those contexts where Article 6 of the ECHR requires open disclosure of **some** (but not all) of the closed case and/or evidence.
- (5) It is one thing to argue that, for reasons of national security, the unfairness and lack of transparency inherent in CMPs should be tolerated in specific areas – such as deportation appeals and control order proceedings. It is quite another to suggest that Government Ministers should be endowed with a discretionary power to extend that unfairness and lack of transparency to **any** civil proceedings, including proceedings to which they are themselves party.
- (6) The introduction of such a sweeping power could be justified only by the most compelling of reasons. No such reason has been identified in the Green Paper and, in our view, none exists.
- (7) There is no fundamental difficulty with the existing principles of public interest immunity (PII), which have been developed by the courts over more than half a century and which enable the courts to strike an appropriate balance between the need to protect national security (and other important public interests) and the need to ensure fairness. Nor is there any sufficient evidence that the application

² Netherlands, Australia, Canada, and Denmark.

³ Information supplied by SASO, as at December 2011.

of these principles has caused insuperable logistical difficulties in any particular cases.

(8) The prospect of cases being struck out because of the lack of a CMP is in our view exaggerated. However, even if the possibility exists that a claim which would otherwise be maintainable might be struck out, we doubt that chance is sufficiently great as to constitute an adequate reason to introduce CMPs into civil proceedings.

3. Whether or not the decision is taken, contrary to our view, to proceed with the introduction of a power to extend CMPs to all civil proceedings, we consider that the reforms proposed to the SA system with a view to 'enhancing' the fairness of that system are modest and unambitious. We have identified some further reforms which would serve to reduce to a limited extent (but by no means eliminate) the unfairness inherent in CMPs.
4. The consultation paper identifies fourteen questions, which we have numbered for ease of reference. We have responded to those questions into which SAs may have some particular insight. In so far as individual SAs wish to express views on questions which this paper does not address, they will be submitted by way of a separate personal response.
5. Questions 10 to 14 relate to proposals for the reform of oversight of the intelligence agencies and we do not consider that we have any particular insight or expertise to offer in relation to this area. Of the remaining questions, 1 to 9, we have no particular comment on question 2 (investigations into deaths); question 3 (inquests in Northern Ireland); or question 9 (disclosure, in particular for proceedings overseas).
6. Our views below are primarily directed to the proposed extension of CMPs to civil proceedings. We do not make any comment (either way) as to whether it would be desirable or justifiable to make provision for CMPs in inquests or other inquiries into deaths or other matters, as to which different considerations may apply.

Natural justice and open justice

7. There are two principles which, together, have formed the foundation of the rules of civil procedure in England & Wales and, as we understand it, in Scotland too.
8. The first is what we refer to as “the principle of natural justice” 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”.*⁴
9. The second is the principle that proceedings must be held in public: “the principle of open justice”. That principle may be subject to exceptions, but the importance of public and press scrutiny of the judicial process is such that exceptions should be recognised only in “the most compelling circumstances”.⁵ The reason why this principle is important is that, in a democratic society, the justice system does not exist in a vacuum. The way it works is, and should be, subject to scrutiny

Closed Material Procedures

10. The Green Paper starts by asserting that CMPs are “familiar to practitioners”. We think that this is seriously misleading.
11. Whilst it may be true that a substantial number of practitioners now have experience of having acted in SIAC and control order proceedings where CMPs are used, very few have experience of the closed parts of these proceedings. Only the SAs and Government lawyers involved in those proceedings have that experience. Government lawyers have in general, and for obvious reasons, not felt able to express views as to the fairness of the procedures. Of the barristers appointed by the Law Officers to the list of SAs, the practice of allowing appellants to nominate their preferred SAs has led to a situation in which only a relatively small number have substantial experience of acting in CMPs.⁶

⁴ *Official Solicitor v K* [1963] Ch 381, per Upjohn LJ at 405. See also Lord Devlin’s speech in the same case in the House of Lords at [1965] AC 201, at 237-238 and Lord Mustill’s statement in *D (minors) (Adoption Reports: Confidentiality)* [1996] AC 593, at 603-4.

⁵ See eg *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, per Lord Steyn, cited by Lord Rodger in *In Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, at [25].

⁶ As per the footnote above, SASO estimates that of the 69 currently on the list of SAs, only about 32 have substantial experience in the role, almost all of whom have subscribed to this paper. More than a third of those on the list of 69 have no experience in the role.

12. Those SAs who do have experience of acting in CMPs have consistently and regularly drawn attention, both in articles in print and in evidence to Parliamentary committees, to the considerable shortcomings of those procedures in terms of fairness. Nicholas Blake QC (now Mr Justice Blake, a High Court Judge) described the operation of CMPs in the Special Immigration Appeals Commission in the following way in evidence to the Joint Committee on Human Rights:

*“the public should be left in absolutely no doubt that what is happening... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system”.*⁷

The Committee, having heard evidence from a number of Special Advocates, as well as from appellants whose cases had been considered in CMPs, concluded as follows:

*“After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as ‘Kafkaesque’ or like the Star Chamber... Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against basic notions of fair play as the lay public would understand them.”*⁸

13. The reason why these criticisms have been made is that CMPs represent a departure both from the principle of natural justice and from the principle of open justice. They may leave a litigant having little clear idea of the case deployed against him, and ultimately they may prevent some litigants from knowing why they have won or lost. Furthermore, and crucially, because the SA appointed on his behalf is unable to take instructions in relation to that case, they may leave the SA with little realistic opportunity of responding effectively to that case. They also systematically exclude public, press and Parliamentary scrutiny of parts of our justice system.

The current position

14. As appears from the Green Paper, CMPs were first introduced in 1997 and have escalated in their application since then. The proposals now made for the extension of CMPs to cover “any civil proceedings in which sensitive material is relevant” may be

⁷ Oral evidence, 12 March 2007, Q85, quoted in the 19th Report of the JCHR, 16 July 2007, para. 210.

⁸ Ibid. The views quoted in this paragraph pre-date the recognition that Article 6 may apply to closed proceedings in some contexts, but related to SIAC proceedings where Article 6 has been held not to apply. In our view they remain pertinent because it is apparent that there may be many contexts in which Art 6 does not require disclosure to be given (*Tariq v Home Office* [2011] UKSC 35, [2011] 3 WLR 322) and these may be relevant to the proceedings to which it is proposed CMPs should apply.

seen to be based on the Government's view of the effectiveness and fairness of the existing procedures. At §2.3 of the Green Paper it is stated that CMPs

"are an existing mechanism that has been proven to work effectively ...":

and

"The contexts in which CMPs are already used have proven that they are capable of delivering procedural fairness. The effectiveness of the Special Advocate system is central to this ...".⁹

It appears that these views have led to the conclusion at §2.8 that extension of CMPs would enable cases *"to be tried more effectively and with greater protection for sensitive material"*.

15. Our experience as SAs involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPs are inherently unfair; they do not 'work effectively', nor do they deliver real procedural fairness. The fact that such procedures may be operated so as to meet the minimum standards required by Article 6 of the ECHR, with such modification as has been required by the courts so as to reduce that inherent unfairness, does not and cannot make them objectively fair. Thus, we consider that the assertion quoted above is liable to give a false impression. Neither the provision of Special Advocates, however conscientious, nor (where applicable) the modifications to current CMPs required by the House of Lords decision in *AF (No.3)*, are capable of making CMPs 'fair' by any recognisable common law standards.

16. That conclusion also reflects views expressed elsewhere (a few examples of which we have cited above), including in the higher courts, most recently in *Al Rawi*:

- Lord Kerr stated at §94:

"In the solution offered by the appellants [i.e. a CMP] a state party can supply evidence to the judge with only (at best) the inquiring confrontation of the special advocate. Quite apart from the reasons so clearly stated by Lord Dyson about the necessary, inevitable but ultimately inherent frailties of the special advocate system, the challenge that the special advocate can present is, in the final analysis, of a theoretical, abstract nature only. It is, self evidently and admittedly, a distinctly second best attempt to secure a just outcome to proceedings. It should always be a measure of last resort; one to which recourse is had only when no possible alternative is available. It should never be regarded as an acceptable substitute for the compromise of a fundamental right such as is at stake in this case."

⁹ See also, to similar effect the Executive Summary at §13

- To similar effect are the observations of the Court of Appeal in the same case at §57, and in the Supreme Court Lord Dyson at §36-37 are also notable.

Judicial views such as those expressed in *Al Rawi* have not been recognised or addressed in the Green Paper.

17. Given what we see as the unsound premise on which the proposals in the Green Paper are based, namely the fairness and effectiveness of CMPs in the contexts in which they are currently deployed, it is worth identifying the serious difficulties with the present system (apart from the inherent fundamental unfairness identified above), from our collective experience of operating within the closed procedures. The principal difficulties have previously and repeatedly been rehearsed by special advocates, individually and collectively¹⁰, including in a Note submitted to the House of Lords in *AF (No.3)* which was referred to without disapproval. Reference may be made to these documents for further detail, and so only a summary is provided here:

- (1) The prohibition on any direct communication with open representatives, other than through the Court and relevant Government body, after the SA has received the closed material;
- (2) The inability effectively to challenge non-disclosure;
- (3) The lack of any practical ability to call evidence¹¹;
- (4) The lack of any formal rules of evidence, so allowing second or third hand hearsay to be admitted, or even more remote evidence; frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings;¹²
- (5) A systemic problem with prejudicially late disclosure by the Government¹³;

¹⁰ See e.g. In written and oral evidence submitted to the Constitutional Affairs Committee for its 7th report in 2004-5; Joint Committee on Human Rights, *19th Report*, 2006-2007, July 30, 2007; JCHR, *9th Report*, 2007-2008. These are referred to in Chamberlain, Special Advocates and Procedural Fairness in Closed Proceedings (2009) 28 CQJ 314, Chamberlain, Update on Procedural Fairness in Closed Proceedings (2009) 28 CQJ 448; Since 2009 SAs have given evidence to the JCHR for its 9th Report 2010-11, and to the TPIMs Bill Scrutiny Committee, 2011.

¹¹ We do not regard the suggestion at Appendix F that the provision of further training could alleviate this problem as realistic. As noted further below, the limitations on SAs' ability to challenge closed material effectively are not the result of a shortage of training, but are the inevitable product of the structure of existing CMPs.

¹² No consideration has been given in the Green Paper as to how such closed material would be admissible as truth of what they are relied upon as indicating. This is one of a number of practical problems with the proposal that are briefly considered at paragraph 38 below.

¹³ The allegation of there being a systemic problem with late disclosure of closed evidence is rejected in the Green Paper at Appendix F, but nonetheless reflects the routine experience of all practising SAs.

- (6) Where *AF (No.3)* applies, the Government's approach of refusing to make such disclosure as is recognised would require to be given until being put to its election, and the practice of 'iterative disclosure';
- (7) The increasing practice of serving redacted closed documents on the Special Advocates, and resisting requests by the SAs for production of documents to them (i.e. as closed documents) on the basis of the Government's unilateral view of relevance;
- (8) The lack of a searchable database of closed judgments¹⁴.

18. The first four items on this list are integral to the statutory regimes which currently provide for CMPs.¹⁵ The other items are problems which are encountered in practice, which further compromise the ability of SAs to carry out their role, but which we consider would be potentially remediable within the present regimes.

19. Employment cases probably provide the instance of the existing use of CMPs most closely analogous to the ordinary civil litigation to which it is proposed CMPs should be extended. As well as the endemic problems enumerated above, experience of closed procedures in the employment context has highlighted the following further difficulties encountered by SAs practising in this area:

- (1) The difficulty in identifying a provision, criterion or practice for the purposes of an indirect discrimination case without full access to internal policies or procedures or statistics;
- (2) The apparent willingness on the part of Employment Judges to grant Rule 54 orders, even when unsupported by adequate evidence;
- (3) There is an acute shortage of security-cleared Employment Judges, lay members, and Employment Tribunal staff. Most employment related claims from around the country have been transferred to London Central Employment Tribunal, where there are only three security-cleared Employment Judges dealing with such claims. For several months decisions were not being sent out because London Central ET did not have a security-cleared typist;

¹⁴ We note and welcome the proposal at §3 of Appendix F to the Green Paper.

¹⁵ An apparent exception, in relation to the bar on communication from the SA to the open representatives, is the regime applicable in Employment Tribunals, which is considered further below. The Green Paper [at §2.38], however, proposes to remove this exception; which course the SAs consider would be a retrograde step.

- (4) The delays caused by these staffing shortages are compounded by the public/private/open/closed nature of the proceedings, which requires many more Case Management Discussions and hearings than would otherwise be necessary.

The scope of the present proposals

20. We understand the justification for the proposals set out in the Green Paper to be based on the imperative of national security¹⁶. However, the impact of the proposals, as currently formulated would appear to extend to all civil proceedings, even where the asserted sensitivity of material is entirely unrelated to national security. The proposed mechanism at paragraph 2.7 envisages the Secretary of State forming a judgment that open disclosure of sensitive material would cause “damage to the public interest” (which judgment could only be challenged on judicial review principles) and thereby trigger the use of a CMP.

21. We note that the ‘public interest’ is incompletely, but apparently broadly, identified in the glossary to the Green Paper:

“There are different aspects of the public interest, such as the public interest that justice should be done and should be seen to be done in: defence; national security; international relations; the detection and prevention of crime; and the maintenance of the confidentiality of police informers’ identities, for example.” [p.71]

... and ‘sensitive material / information’ is also given a broad and open-ended definition, which refers back to the ‘public interest’ as identified above:

“Any material/information which if publicly disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily ‘sensitive’, but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive. Diplomatic correspondence and National Security Council papers are examples of other categories of material that may also be sensitive.”

22. Although not expressly articulated or recognised in the Green Paper, it would appear that the effect of the proposals would be largely or entirely to eliminate the doctrine of public interest immunity for the purposes of material regarded by central Government as sensitive for any reason, not just for reasons of national security. We currently do not understand how the stated view that “CMPs should only be available in exceptional

¹⁶ See e.g. paragraphs 1 to 3 of the Executive Summary

circumstances” [§2.4] is reconciled with the apparent breadth of application of the proposals in §2.7.

23. It is difficult to see how the proposal that the decision whether to use a CMP should be made not by the Court, but by the Secretary of State, who is likely himself to be a party to the action, is compatible with any notion of equality of arms and natural justice.

The deployment of all relevant material

24. At §2.3, the following is claimed as an advantage that extending CMPs would have over continuing use of Public Interest Immunity:

“In contrast to the existing PII system, CMPs allow the court to consider all the relevant material, regardless of security classification. A judgment based on the full facts is more likely to secure justice than a judgment based only on a proportion of relevant material.”

25. We note that this argument was made by the Government in *Al Rawi*, and found to be fallacious. Lord Kerr’s reasoning (at paragraph 93, quoted below) as to why a CMP create an ‘obvious and undeniable’ risk of unfairness is not identified, let alone answered, in the Green Paper. Nevertheless, that reasoning reflects our experience as SAs operating in existing CMPs where (in many instances) no effective challenge to closed material can be made in the absence of both instructions on it and any practical ability to call evidence to rebut it:

“The [Government’s] second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive – for what, the [Government] imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.”

Question 1: How can we best ensure that closed material procedures support and enhance fairness for all parties?

26. We consider that this question requires to be addressed by reference to existing CMPs, and the problems that are encountered in their operation. We have identified those problems at paragraph 17 above and, as also noted above, the principal constraints upon the special advocate system delivering effective justice are integral to the statutory regimes currently in place. Those problems lead us to believe that it would be most undesirable to extend CMPs any further; and indeed should lead to a review of the extent to which the current range of their application can be justified (as has previously been recommended by the Joint Committee on Human Rights). Of the principal four problems identified above, only the first (communication) is even considered in the Green Paper.

Communication

27. The absolute bar on direct communication between SAs and open representatives after the SA has received the closed material is the most significant restriction on the ability of SAs to operate effectively.

28. The Green Paper notes that *“in practice, Special Advocates have only rarely sought permission from the court to communicate with the individuals whose interests they are representing after service of the closed material ...”* [§2.29]. That is correct, at least in relation to matters relating to the substance of the closed material (although procedural matters are much more frequently communicated by the SAs by this means, albeit with delay and inconvenience). One reason for that is identified in the Green Paper; namely the disadvantage and unfairness of revealing such communication to the opposing party and the court [§2.29]. At least equally significant in explaining the rareness of such communications is that in practice most matters that could form the subject matter of such a communication could generally already be the subject of a gist to be disclosed, rendering the requirement to communicate through the Court redundant.¹⁷

¹⁷ For example, if it were significant for an individual to give an explanation of his overseas travel in, say, 2006 and that could be indicated openly, rather than formulating a communication to be made through the Court

29. We recognise that communication in relation to the substance of any closed material is likely to create difficulties, and may often be impossible. Nevertheless we question whether the absolute bar on all direct communication that characterises current CMPs is in fact necessary, by reference to procedures adopted abroad, as well as domestically:

- (i) The approach abroad An absolute prohibition on direct communication is not a feature of procedures used to deal with closed evidence anywhere else in the world, as far as we are aware (or is apparent from Appendix J to the Green Paper).
- In Canada, the SAs are permitted to communicate with open representatives, save in relation to the substance of closed material. Communications involving the substance of closed material may be made if sanctioned by the Court, without necessarily requiring the approval of the Government.¹⁸
 - In the United States¹⁹, there are no SAs. Rather, open representatives themselves are security-cleared and trusted not to reveal any information of any sensitivity to their clients. We find it striking that in the US, where the threat from terrorism is at least as great as that in the UK, and relevant material must be at least as sensitive, lawyers acting for terrorist suspects are afforded a substantially greater measure of trust and confidence than is given to SAs in existing CMPs.

("Please give an account of your overseas travel in 2006."), it would be routine to address this in the disclosure process by way of a gist ("The Appellant's overseas travel in 2006 is of relevance to the case against him." – or something to that effect). If such a gist could not be given because of the asserted sensitivity of information, even at that level of generality (which is routinely encountered) then there would be no possibility of framing an equivalent question to be communicated through the Court and Government body.

¹⁸ Reference to the system in Canada appears at Appendix J to the Green Paper, although without making clear (beyond an allusion to "the practical approach to case management") that communication on matters not relating to the substance of the closed material is permitted there. More useful detail may be found e.g. in the JCHR Report: Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010 (Ninth Report of Session 2009-10) at paragraphs 74 to 77.

¹⁹ No reference to the United States appears in the 'international comparisons' at Appendix J to the Green Paper. Indeed, the scope of the comparison exercise which appears there may have been very limited, as only 4 countries are expressly referred to in Appendix J (Netherlands, Australia, Canada, and Denmark). Whilst we recognise that the US system has its own difficulties and limitations, as a matter of principle it would seem preferable to have a system which maximises the information known to the lawyers directly instructed by a party, as has (to a considerable degree) been achieved in *habeas corpus* proceedings in the US for men detained in Guantanamo.

- (ii) The Employment Tribunal precedent Even within our jurisdiction, there is an existing precedent for a more relaxed communication regime: namely that applicable in Employment Tribunals²⁰. That regime appears to permit communication between the SAs and open representatives (after the former have received the closed evidence), save in relation to the substance of the closed material. We find it significant that in a forum where there may be closed material that is at least as sensitive as that deployed in other statutory CMPs, it had not been thought necessary to impose the absolute bar on direct communication that characterise every other statutory CMP in this jurisdiction.

The proposal in the Green Paper is to abolish this benevolent exception “*in order to harmonise the Special Advocate system across contexts*” [§2.38]. We find the rationale that this “*will enable Special Advocates to operate more readily in different courts and tribunals and bring a greater degree of consistency to proceedings in which Special Advocates are appointed*” wholly unpersuasive. We do not consider that the existing exception creates any difficulty in practice for SAs operating in different forums. Although consistency and harmonisation may be inherently desirable, it seems to us that it would be much more constructive for the communication permitted by the Employment Tribunal rules to be applied in other CMPs, rather than seeking to abolish that feature of the more liberal regime.

The Government’s proposals for improvement

30. The limited proposals for amendment of existing and future CMPs in the Green Paper are incapable of addressing the fundamental defects that we regard as inherent in any CMP of the type presently in place. The proposals discussed are as follows:

- (i) *Further training* At §2.24 of the Green Paper it is suggested that there should be “*additional training on intelligence analysis and assessment methods in order to enable more rigorous challenge of closed material.*” We are strongly of the view that our inability to challenge closed material more rigorously is not the result of a lack of training. Rather, it is the inevitable result of our inability to take instructions, together with the practical inability to call any evidence, expert or otherwise, and

²⁰ The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861), Rule 8(4) of Schedule 2 and its interpretation in *Rahman v Metropolitan Police* ET Case Nos: 220288/07 & 3200438/07

the nature of that evidence (which may be second or third hand, and whose primary source may be unidentifiable). That said, the proposal for further training for Special Advocates is not unwelcome (although has previously been proposed, without being forthcoming), but it would be quite wrong to suggest that such training would enable us to challenge closed material more rigorously: what it could possibly do is to reduce the time that it would take to analyse such material and reduce the number of queries that need to be raised of the security services.²¹

- (ii) *Junior legal support* [§2.27]: In most cases the model of two SAs per case works well. There may be cases where a third SA would reasonably be required. Only rarely – such as in the PII exercise that would have been necessary in the *Al Rawi* litigation – do we think that further resources in terms of junior legal support would be required. Thus, although again welcome, we do not see this proposal as a significant enhancement to existing or new CMPs.
- (iii) *Chinese Walls*: The suggestion that it may be possible to have an independent official to approve communications from the SA to the open representatives may be worth pursuing, although we suspect that the practical difficulties alluded to in the Green Paper [§2.33 and 2.34] are likely to make this unworkable.
- (iv) *Categorisation of communications as purely procedural*: The argument that some proposed communications by SAs “will relate only to purely procedural or administrative matters that relate solely to directions in the case, as opposed to substantive factual or legal issues” is identified at §2.35. In fact legal issues in a case rarely fall within the remit of the SAs, or are of any sensitivity. We consider that any objection to communication between SA and open representatives on matters not relating to the substance of the closed material is unsustainable. The potential objection raised in the Green Paper is that “*the Special Advocate is not in a position to fully determine harm to the public interest and thus it does not seem possible to create ‘categories’ of communication which would require different clearance procedures*” seems to lack logic. Even accepting that the SA is not in a position ‘to fully determine harm to the public interest’, it does not follow that any SA would be unable reliably to distinguish a communication that related to the substance of

²¹ Separately, we would also welcome funding for training to be provided by experienced SAs to newly appointed SAs. SASO has identified a need for such training, and consider that it would enable new SAs to be able to operate more effectively more quickly, rather than relying on ‘on the job’ training in the role of an SA. We support and endorse that proposal.

the closed evidence from one that was purely procedural. The system relies upon the good faith of SAs and the existence of this has never, as far as we aware, been doubted.

We note that the Government is undertaking 'further analysis' in relation to the potential for categorisation of communications, and urge the conclusion that unobstructed communication on purely procedural matters should be permitted.

Question 4: What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?

31. We have considered the issues relating to the current prohibition upon any direct communication from the SA to the open representatives above. In summary, our proposals are as follows:

- (i) At a minimum, communication on matters which do not relate to the substance of the closed procedure should be permitted in all CMPs (reflecting the closed material procedure which currently appears to obtain in the Employment Tribunal).
- (ii) There should be an opportunity for the SA to communicate about the substance of the closed material through the Court (possibly a designated Judge), without automatically revealing the substance of the proposed communication to the Secretary of State. Where no question of any sensitive disclosure arises, the Court should have the power to authorise the communication without reference to the Secretary of State. Where there is any doubt, the SA should have the option of pursuing the application on notice to the Secretary of State, or abandoning it.

32. As noted above, these proposals are relatively modest by comparison with the more relaxed treatment of closed evidence in procedures in other jurisdictions. More fundamentally, we consider that there should be a thorough review of the treatment of sensitive material in other jurisdictions, the scope of the application of such procedures, and their essential features.²² In particular a reasoned justification as to why a model

²² As noted above, the very limited exercise that appears at Appendix J is inadequate, not least through giving no consideration to procedures in the US.

with features of that used in the United States (involving directly instructed representatives being provided with sensitive material, subject to 'Protective Orders') could not be adopted to replace currently used CMPs in the United Kingdom, is required.

Question 5: If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the 'AF (No. 3)' 'gisting' requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out in AF (No.3) does not apply?

33. We make the following comments in relation to *AF (No.3)* disclosure:

- (i) As to the substance of the proposal, we doubt that there would be any advantage in seeking to legislate to identify proceedings in which *AF (No. 3)* did not apply. It seems to us to be unrealistic to consider that this would obviate or reduce the need for the Courts to rule upon the question in relation to any particular category of proceedings where a dispute as to the applicability of *AF (No.3)* arose.
- (ii) In any proceedings in which *AF (No. 3)* disclosure requirements are recognised to apply, we consider that it is important that the primary legislation, and rules, should acknowledge this. Thus, although not directly under consideration in the present consultation, we regard it as unfortunate that the Terrorism Prevention and Preventative Measures Bill (now passed) provides for procedural rules for disclosure to be made which are framed only by reference to a requirement that material should not be disclosed contrary to the public interest, and which take no account of *AF (No.3)* requirements²³. In this way, legislation is being proposed which cannot be interpreted by the Courts as meaning what it says.
- (iii) Furthermore, in relation to proceedings in which it is recognised that *AF (No.3)* disclosure requirements apply, we consider that the procedural rules should provide for the Government to consider the disclosure required at a much earlier stage in the proceedings. It should be recognised that the relevant Minister's duty to act compatibly with Article 6 in bringing relevant proceedings under a CMP requires the

²³ The only apparent recognition of *AF (No.3)* appears in Sch.4, paragraph 5, which states that the preceding provisions should not be read as requiring a court to act inconsistently with Article 6 of the ECHR. However, it would appear inevitable that the requirements of Article 6 will prevent paragraphs 2 to 4 being read literally in many circumstances, which may be thought to be unsatisfactory and confusing.

disclosure that fairness requires to be provided at the outset, and is not fulfilled merely relying upon the Court and the Special Advocates to achieve compliance at a later stage.

- (iv) The Special Advocates have previously set out our concerns about the way in which *AF (No.3)* has been operated in practice by the Courts on occasion, by means of ‘iterative disclosure’. Those concerns have been set out in a submission made to the review of counter-terrorism powers announced by the Home Secretary on 13 July 2010 and undertaken under the oversight of Lord Macdonald QC.
- (v) Finally, we would make a point that may appear semantic, but we believe is important: the disclosure that may require to be given pursuant to ‘*AF (No. 3)*’ may go well beyond ‘gisting’. As Lord Hope said in that case [§87]: “*detail must be met with detail*”, which the term ‘gisting’ does not effectively encapsulate. In the body of the Green Paper, ‘gisting’ is used as a shorthand for the disclosure required pursuant to *AF (No.3)*, which we suggest would be best avoided²⁴.

Question 6: At this stage, the Government does not see benefit in introducing a new system of greater active case management or a specialist court. However, are there benefits of a specialist court or active case management that we have not identified?

34. In so far as our experience gives us a particular insight into this question, we doubt that there is any benefit in setting up a (further) specialist court.

35. Nevertheless, to the extent that active case management involves some enforceable (and enforced) requirement on the Government to comply with court-imposed deadlines for the production of evidence, that would be welcomed. As noted above, we consider that there is a systemic problem with large volumes of material being served on SAs very shortly before, or during, proceedings. Such material requires review both for the purposes of the SAs’ disclosure function (i.e. to seek to identify material which should be made open and supplied to the open representatives) as well as our substantive function (i.e. in representing the interests of the person affected in relation to the material that

²⁴ We note that the glossary to the Green Paper correctly recognises that *AF (No.3)* imposes a requirement that goes further than ‘gisting’, but this does not reflect the way in which the term has been used in the body of the Green Paper.

remains closed). Both functions are liable to be compromised by late disclosure, yet – unlike in ordinary civil litigation – there is no effective sanction available, whether in costs (all parties being publicly funded), exclusion of the late served material (which is unlikely to be contemplated in the context of cases involving national security), or adjournment (that is likely to prejudice the person affected by the measure in issue). To this end, we would welcome some more active case management powers in any CMPs, whether current or proposed, if it assists in addressing the problem of very late disclosure by the Government to the SAs of voluminous closed material.

Question 7: The Government does not see benefit in making any change to the remit of the Investigatory Powers Tribunal. Are there any possible changes to its operation, either discussed here or not, that should be considered?

36. We doubt that Special Advocates as a class bring any particular expertise to answering this question, but see no basis on which extending the remit of the Investigatory Powers Tribunal would serve the interests of delivering effective justice.

Question 8: In civil cases where sensitive material is relevant and where closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?

37. Our experience as SAs and as practitioners conducting civil litigation in a variety of fields, including such as involves sensitive evidence, leads us to the view that existing public interest immunity (PII) procedures are generally workable. In complex cases, there may be an argument for the involvement of a SA in the course of operating the PII procedure. However, we doubt that, on analysis, the cases which are said to exemplify the problem that has led to the proposals in the Green Paper in fact justify the extension of CMPs to a broader category of proceedings:

- In the *Al Rawi* litigation, the PII procedures were never put to the test before the Government settled the cases. Such problems as were encountered in that case (and – irrespective of the merits of its case – the Government’s decision to

settle rather than contest the claims) may be attributed to the scale of the litigation, rather than any shortcoming in PII procedures. In any event, it may be thought (and hoped) that such litigation is likely to be wholly exceptional. We do not think that the experience from *Al Rawi* establishes either that the operation of PII procedures would have led to harmful disclosures of significantly sensitive material, or that a CMP would have been any less of a procedural challenge and burden to all parties (including the SAs that would have been involved in either event).

- *Carnduff v. Rock*. Others have questioned whether this case was correctly decided. It was not a case involving national security, and in any event it is highly exceptional. We doubt that it assists in identifying a problem that requires to be dealt with by the radical step of extending the availability of CMPs to civil proceedings.
- *Binyam Mohammed*. Given that this was a *Norwich Pharmacal* application, which applications are dealt with separately in the proposals in the Green Paper, again this case does not appear to be of relevance to the question of CMPs in civil claims (in so far as it is suggested to be so).

38. The Green Paper nowhere considers the practical implications of taking a statutory procedure designed for appeals against coercive state action (e.g. deportation, the imposition of a control order or asset freezing order) and seeking to apply it to the trial of a civil claim. Aside from the principled objections that may be made to the extension of CMPs, it seems to us that there are likely to be practical difficulties associated with any attempt to transpose such procedures into civil litigation. These are likely to include the following, by no means exhaustive, profound problems:

- (a) Funding and access to justice: It is not apparent how a litigant deprived of relevant material could achieve access to the courts, unless in the improbable position of being able to fund a claim privately. Legal aid for a civil claim (if available), a conditional fee agreement, after the event insurance, and union funding are all funding mechanisms which require a reliable assessment of the prospects of a claim. That assessment could not be given if a party's legal advisers were unaware of relevant material.
- (b) Evidential admissibility: Our knowledge of the nature of closed material makes us doubt that most of it could be admissible as truth of its contents in civil

proceedings, on an application of established rules of admissibility. Such documentary evidence routinely contains information which may be second or third hand, and of which the primary source will usually be unidentified (and may be unknown). Intercept evidence would remain excluded by RIPA. It scarcely seems worth applying CMPs to civil proceedings if the evidence concerned will be largely inadmissible as evidence of the truth of its contents (or to which no weight can be attached).

- (c) Costs protection mechanisms: We do not understand how applicable procedures, in particular the regime of Part 36 offers could be operated where a CMP was applied.
- (d) Advice on prospects: Based on our experience of CMPs we cannot envisage SAs being permitted to give an indication of the impact of the closed evidence on the merits of a claim (or indeed, where it may be applicable, quantum issues). Quite how the open representatives could then advise their clients as to the conduct of the litigation, including making and responding to offers of settlement, is not apparent.
- (e) Corruption of the common law: The common law develops on a case by case basis, through judgments based on the application of legal principles to a variety of facts. How is the process to be reconciled with the accumulation of a body of secret case law, accessible only to the government and a small group of special advocates?
- (f) Funding of SAs and closed proceedings: We assume that the Government would underwrite the substantial costs of a CMP, including the deployment of the SAs, in a civil claim, rather than seek to impose this on one or more of the non-governmental parties to the proceedings. This, however, has not been stated and should be clarified. If the parties are, or may be, required to fund the closed proceedings that would appear to create an independent set of difficulties, including exacerbation of some of those identified above.

Conclusion

39. Our experience as SAs operating existing CMPs leads us to the clear view that:

- (1) The proposal to extend CMPs to become available in civil litigation is insupportable.**

(2) The outcome of the present consultation represents an opportunity to review the operation and scope of existing CMPs. We have made suggestions for improvement to existing CMPs in this paper. More fundamentally, however, we urge that consideration be given to adopting an alternative system to deal with sensitive material, using directly instructed security-cleared lawyers receiving information subject to 'protective orders' (i.e. with features that characterise the system operated in the United States in *habeas* proceedings), which would provide a substantially greater measure of fairness, and has been shown to be workable without compromising material quite legitimately regarded as sensitive by the Government.

16 December 2011

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