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Constitutional Affairs Committee

The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates

Seventh Report of Session 2004–05

Volume II

Oral and written evidence

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Witnesses

Tuesday 22 February 2005

Tuesday 1 March 2005

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List of written evidence

Oral evidence

Taken before the Constitutional Affairs Committee

on Tuesday 22 February 2005

Members present:

Mr A J Beith, in the Chair

Peter Bottomley
Ross Cranston
Mr Clive Soley
Keith Vaz
Dr Alan Whitehead

Witnesses: **Neil Garnham QC** and **Martin Chamberlain,** Special Advocates; **Gareth Peirce,** Civil Rights Solicitor; and **Ian MacDonald QC,** examined.

Q1 Chairman: Gareth Peirce, Ian MacDonald, Neil Garnham and Martin Chamberlain, thank you for coming this morning. We look forward very much to the evidence we are going to hear from you. It is obviously extremely timely with the Home Secretary making an announcement later today, but I think it would be helpful if I could first clarify something which would remain significant even if today's announcement gives us a whole new line of questions to ask, and it is particularly directed towards those who have served as Special Advocates. This process was introduced as a means of challenging the arbitrary decision to deport somebody from this country, so if that was all it was still doing and it had not become a process for locking people up in Belmarsh, would it be a process you would be happy to continue to take part in?
Ian MacDonald: Well, I think that question sounds as if it is directed principally towards me because I have resigned. When SIAC was first introduced following recommendations by the European Court in the case of *Chahal*, the improvement on what we had before was very big and on deportation, I do not think you could describe them as "arbitrary", but deportation proceedings and exclusions from the country both operated. I initially took the view that that was a big improvement on what had happened before because it introduced an element of fairness which had previously been lacking. My objection was when you tacked on the jurisdiction under the Anti-Terrorism Act to SIAC which was purely an immigration court, and at first I stayed on because I thought that I might be able to make a difference, but eventually one had to balance that against really being some kind of fig-leaf of respectability and legitimacy to a process which I found odious.

Q2 Chairman: Does anybody else want to comment on SIAC as an immigration tribunal, which it originally was?
Gareth Peirce: As a non-immigration lawyer, when the legislation came in, I found that colleagues who were immigration lawyers were used to a very raw deal and were not as astonished as I was and shocked at what was a removal of all the rights of a criminal trial. It was indeed deceitful to suggest that this was somehow relevant to immigration when it was an arbitrary choice of a number of foreign nationals, but what was being said was, "You are guilty of criminal offences. We know you are. We cannot go near a court and we do not want to go near a court, so we are going to have this shoddy process where you are not told the evidence, where it is heard in secret, where your lawyers cannot investigate, where you will never know what is happening, you will never know the length of sentence and you will never know how you can progress". All of this, all in one, was deceitfully suggested as being an immigration situation, but now it is being broadened to everybody potentially.

Q3 Chairman: Let's start to look at some of the issues which arise in trying to conduct a process of this kind either for immigration or, very significantly, for the deprivation of liberty, the detention. Are there sufficient procedures in place to ensure that closed material is reviewed against current developments, such as disclosures in foreign proceedings and can that process work?
Gareth Peirce: Can I make one other intervention because it is a part of the deceit that was brought upon Parliament in the first place. Parliament was reassured that this would be a last resort and that every consideration would have been given to prosecuting people under the normal rules. None of the detainees was ever arrested, was ever questioned and now, three years later, none of them has ever even been spoken to, so if one is now on the cusp of considering new procedures for everybody, the basic question remains: why, if we have so much legislation in place to deal with investigation into terrorism, was it all jettisoned and people simply arrested first of all rather than last of all?

Q4 Chairman: There are some wider questions there which are not what this Committee is currently trying to do, although numerous other bodies, on one of which I served, have done so. What we are actually trying to look at is whether this process works as a court and whether it can

work as a court either for a less unacceptable jurisdiction, namely the civil decision about whether to deport someone or the depravation of liberty and the imputation of a criminal offence or indeed, if it goes on to control orders, an actual criminal offence in breach of those orders. It is in that context I just want to establish what happens. I think many of us, as Members of Parliament, and perhaps the public need to know a bit more about what actually happens under SIAC procedures and that is why I wanted to find out how you deal with the disclosure of material, so perhaps I can go back to my earlier question, which is: are there sufficient procedures to ensure that there is a continued review of closed material, particularly when elsewhere information may be coming to light which challenges that material?

Ian MacDonald: It is quite difficult for, I think, any of the Special Advocates or ex-Special Advocates to answer that without disclosing things that we are not allowed to disclose and that is one of the problems about assisting your Committee. I suspect that there is a tendency, since on the whole the evidence given to SIAC is given by one section of the Intelligence Services, that there is a little bit of a hermetic seal around the kind of co-operation that they may have with other bodies and, in particular, the police.

Neil Garnham: If I may answer two questions, the first is whether I was content and remain content to act as a Special Advocate in respect of the old proceedings, and the answer is yes. It seems to me that that was a significant improvement on what predated it. In answer to the practicalities of the operation of the system under Part 4 of the newer Act, speaking for myself, I remain content to serve as a Special Advocate in relation to that for the simple reason that I take the view, as some but not all others do, that I am more likely to do good by being in there and being involved than by not being involved, although I respect the view of others who take a contrary view. In terms of the practicalities, it seems to me that there are ways in which the system could be improved and we sought to address those in the paper that we put in to the Committee. The one, Mr Chairman, that you alight on, which is the manner in which Special Advocates are able to review material as it becomes available, is one that gives us particular concern because 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. Therefore, my observation would be that whatever view this Committee and Parliament take of the merits of the system as a whole, about which I say nothing, there are ways in which it could be made to work more effectively.

Martin Chamberlain: Specifically on the question of disclosure, the problem that we face is that we have a vast body of material and we suspect, on occasion, that some of that material is not in fact secret because it is likely to have been disclosed in the course of criminal proceedings abroad. The problem that we have is that there is a vast number of jurisdictions in which those criminal proceedings may be taking place and we simply do not know whether the material has or has not been disclosed. We do know, because we have pressed on a number of occasions, that some of the material has been disclosed in foreign criminal proceedings. We simply do not have any systematic means of discovering which material has and which material has not because we do not have the resources that enable us to perform those sorts of exhaustive checks, and that is one of the matters that we have identified as seriously limiting the extent to which we can perform a useful function for the appellants in our cases.

Q5 Chairman: What about exculpatory material, material which would assist the defence or might assist the defence? What about the procedures for refusing to disclose exculpatory material? Can you throw any light on that?

Ian MacDonald: One of the problems you have with exculpatory material is that you may not know that it is exculpatory. Can I just give you the example that comes to mind which is the kind of evidence which would have been given against, I think they are called, the "Tipton Three" about having met Bin Laden at a certain time in a certain place. Now, that would almost certainly be information which would not be put in the public domain in a SIAC hearing and of course once we have got the closed material, we are not allowed to speak to Gareth or her barristers or indeed the appellant, so you would not have any idea that there might be an explanation for that, that it was one of the people working at the checkout at Curry's, and you would not have a clue how to proceed. I think that dislocation between the role of someone who, at the point when you get the important information, can have no contact with the appellant and, therefore, you cannot take any kind of instructions in any of the information you get, as Neil has described it, you are a two-person band without any available resources and it is very difficult even to recognise what might be very, very important exculpatory information because you never get the chance to marry the two bits of information up.

Q6 Chairman: You are flying with very little fuel and no instruments really.

Ian MacDonald: Well, that would be one way of putting it, yes. It is a serious drawback about the whole Special Advocate procedure and I think it has certainly come up. We could probably all give examples, but the trouble is that we cannot.

Q7 Chairman: Ought there to be an obligation on the Secretary of State to disclose exculpatory material?
Ian MacDonald: I think the same problem arises there, that the Secretary of State would not know what is exculpatory or not, even with the best will in the world, and I do not know how you can get over that problem ever with this kind of procedure.

Q8 Chairman: Then intercepted material—how should SIAC itself, the court, exercise its role in considering whether intercept evidence should be disclosed?
Neil Garnham: Disclosed to the appellant?

Q9 Chairman: To the parties, to the appellant.
Neil Garnham: That has been the subject of some consideration by SIAC and the circumstances in which it will be disclosed are pretty slim, frankly, and there are sound reasons, at least arguably, why that is so. It, nevertheless, creates the problem that has been recognised as fundamental to this system, that there is material which SIAC consider and which the Special Advocate and the Secretary of State have access to, but which the appellant does not and cannot.
Chairman: I want to turn to what I think is the other central issue about the nature of the process which is the ban on taking instructions, the limitations on contact.

Q10 Keith Vaz: Can I declare my interests, that I am a non-practising barrister and my wife holds a part-time judicial appointment. Mr Garnham, you described the system as being like one man and his dog and Gareth Peirce described it as shoddy and deceitful. Why are you still there then?
Neil Garnham: Because I think I can do more of use being involved than not being involved and it is not without its benefits and I disagree to some extent with what Gareth and Ian have said about that and there is room for a difference of views. While the system exists and while I am instructed, I take the view that I am able to do some good through the process and I say nothing about the merits or demerits of the system as a whole.

Q11 Keith Vaz: It sounds as if you can easily join the Boy Scouts if you want to do good!
Neil Garnham: I think I am too old!

Q12 Keith Vaz: Can you tell me how many cases you have done involving immigration work? You are a recorder and you serve as a barrister, but have you ever been involved in the immigration field?
Neil Garnham: Yes.

Q13 Keith Vaz: You have?
Neil Garnham: Yes.

Q14 Keith Vaz: And, in your experience, looking at the procedures that have been set up here, the ban on communication between yourselves and the defendant, have you ever come across that before in any of the work that you have ever done?
Neil Garnham: No, of course not because this is a very different situation from the one that normally obtains. The ban on communication is something we address in our paper and it is obviously fundamental to the review this Committee is undertaking. It is inherent in the system and it does not seem to me possible to operate this sort of system, dealing with this sort of evidence, without there being some sort of restriction on contact. It operates in different ways in practice. For example, in one case I have done under the 1997 Act I had extensive contact with the appellant before I saw the closed material, so I had consultation with him at Belmarsh and I had a number of consultations with his solicitors and his barristers before I saw the closed material, and I was able to advise and they were able to inform me as to what the nature of the defence was.

Q15 Keith Vaz: But in this system you have no contact.
Neil Garnham: Exactly the same could happen. It can only happen if the Special Advocate has not in that case, and probably in any other case, seen the closed material, but provided they have not, they can have contact with the appellant and his solicitors and barristers before the closed material is delivered to the Special Advocate.

Q16 Keith Vaz: But not after?
Neil Garnham: Not after, that is right.

Q17 Keith Vaz: So after you receive the material, there is no way you can contact that person who is supposed to be your client?
Neil Garnham: Not quite. You are almost right. It is possible, and I have done it recently, to put questions to the appellant's solicitors through SIAC, but you are right in essence, that in substance there cannot be any iterative process between the two sides.

Q18 Keith Vaz: But do you not think, in your experience, and you are a silk, you are a recorder, that it would be better if you did have that contact and if you were able to discuss strategic issues with the appellant or his solicitors?
Neil Garnham: Of course it would and if that were possible, consistent with maintaining the national security concerns that arise in these cases, then I, for one, would welcome it, but I do not think the answer to the problem this Committee is addressing is simply to recognise that that is the norm or that that is preferable because that does not address how you deal with the closed material.

Q19 Keith Vaz: It is a pretty difficult different set of circumstances for those of us who are lawyers to deal with, is it not?
Neil Garnham: It is quite extraordinary.

Q20 Keith Vaz: Have you raised those concerns with anybody?

Neil Garnham: I and a junior I was instructed with in one case raised our concerns about some of the operations direct to SIAC and to the Secretary of State. I cannot recall whether this was one of the matters that we raised, but it is a circumstance that is obvious to all those who take part in it and it is implicit and explicit in the system.

Q21 Keith Vaz: You do not think there is any way in which some kind of neutral supervision not involving the Secretary of State could be built into the procedures?
Neil Garnham: Yes, I do. I think that might be possible.

Q22 Keith Vaz: Have you raised examples of the ways in which this could be done with whoever has instructed you?
Neil Garnham: That it could be done under the current structure?

Q23 Keith Vaz: Yes, have you said this to somebody?
Neil Garnham: No, I do not think I have.
Keith Vaz: Do you think you should if you think it would improve the system?
Chairman: He did actually say he should, so I think we can draw on this suggestion in our own view.

Q24 Keith Vaz: But you have not raised it with anyone else apart from this Committee?
Neil Garnham: The need to have a third party?

Q25 Keith Vaz: Yes.
Neil Garnham: No, I do not think I have.

Q26 Keith Vaz: Mr MacDonald, you resigned, I think, to the *Mail on Sunday*, did you not?
Ian MacDonald: No. All right, I wrote to the Attorney General and my letter was delayed so that he did not in fact receive it before the article in the *Mail on Sunday* appeared. For that, I blame the Post Office.

Q27 Keith Vaz: Why did you stay so long, bearing in mind you had all these concerns about the way in which the system operated? You are a very experienced, probably the leading, immigration law practitioner in the country, so why on earth did you stay so long?
Ian MacDonald: I think I made it clear that one of the reasons why I stayed in was that, like all the other Special Advocates, I thought I might make a difference. There came a point when I was balancing that against, as I have explained, giving legitimacy to a system of indefinite detention without trial to which I objected. It was a balancing exercise, but I think I felt that it was important to see what the House of Lords were going to do in the derogation hearing and in fact it was after they gave their ruling and then I heard the reaction of the Secretary of State that he was going effectively to continue to keep people in prison when the House of Lords had said that, according to Strasbourg law, it was unlawful and had quashed the derogation which the Government knew perfectly well they required in order lawfully to detain.

Q28 Keith Vaz: You said on your resignation, "The current legal system is certainly having a very adverse effect on the Muslim community in Britain and the whole Asian community. I think it is giving Britain a bad name internationally". Why did you draw that conclusion based on your experience?
Ian MacDonald: There are two separate questions there. The first one, I think, is that once you give wide publicity to the fact that the people whom you are going to lock up are conducting a worldwide jihad, the impression that is given is that they are representative of the whole of Islam which is patently untrue, but it then allows people in the streets to start attacking any Asian-looking person. In fact if you look at figures that the Director of Public Prosecutions has put out or that the CPS, I think, have put out, there has been a very large increase in the last year in racially aggravated crimes against Asians in which the attackers shouted at their victim either "Saddam Hussein" or "Bin Laden".

Q29 Keith Vaz: Are all the defendants that you have dealt with, Mr Garnham and yourself, people of Asian origin and of the Muslim faith?
Ian MacDonald: I have dealt with them, but not under the anti-terrorism legislation. In the anti-terrorism legislation I have not dealt with anyone who does not come from north Africa.

Q30 Keith Vaz: But of the Muslim faith because you mentioned the word "Muslim"?
Ian MacDonald: The Muslim faith, yes.

Q31 Keith Vaz: Are Special Advocates bound to withdraw should their client decide to withdraw from the open appeal or should they merely pursue a request to withdraw?
Neil Garnham: Neither. My view is they exercise an independent judgment as to what, in their view, is in the best interests of the appellant and they will be much influenced by the decision of the appellant whether or not to take part in the open hearing, but, in my view, they are not, and should not be, bound by that. There have been cases, as the Committee will be aware, where Special Advocates have decided, on the particular circumstances of the case, that they ought to withdraw, and I have done that, but there will also be cases where an appellant decides not to take part in the open proceedings and where the Special Advocate takes the view that they should stay in the closed hearings and can advance the appellant's case in those proceedings.

Q32 Keith Vaz: Mr MacDonald, do you agree with that?

Ian MacDonald: Yes.

Q33 Keith Vaz: Should they withdraw?
Ian MacDonald: Part of the task that you have to perform as a Special Advocate is that once you get closed material, you are on your own and, therefore, you have to make a judgment about how you are going to play the case in the closed session, which is not particularly satisfactory because it is done without any reference to the case which the appellant may be putting.

Q34 Keith Vaz: Mr Garnham believes it should be left to the judgment of the Special Advocate.
Ian MacDonald: Well, it has got to be left to the judgment of the Special Advocate. There is no other way to do it when you are in there.
Martin Chamberlain: I was involved in two cases in both of which the appellant chose to play no part in the open proceedings. In the first case my leader and I decided to withdraw and in the second case we decided to take part, and that is an illustration of what I believe to be the correct position on this matter which is that Special Advocates have to take an independent view as to what is in the interests of the appellant in the particular case.

Q35 Mr Soley: Can I clarify something with Mr MacDonald. You indicated that Britain gets a bad reputation and Muslims are troubled by the present situation. I understand that and I am not unsympathetic, although I also know that an awful lot of Muslims understand what the nature of the problem is, in fact the vast majority do. What I am puzzled by is the implication of the question that there are better systems in other parts of Europe, North America and so on, whereas my understanding is that in most of those countries Muslims are also being locked up often for many years and without any procedures at all, so what is the better system that you seem to have in mind?
Ian MacDonald: If people have, as they will undoubtedly have if they are involved in terrorist activities, somewhere along the line committed one or more crimes, they ought to be charged, if that is the case, and tried in the normal way. Since the start of the anti-terrorism legislation in 2001 after 9/11, British nationals who are suspected of terrorist activities have been dealt with under the ordinary law.

Q36 Peter Bottomley: Can I just follow on from Keith Vaz's questions. Lord Carlile, in his review, expressed a view that Special Advocates should not be able to decide not to go on. What is your comment on that?
Neil Garnham: I think he is wrong.
Martin Chamberlain: So do I and, furthermore, I think it is very difficult to see how the proposal which he made, namely changing the legislation so as to make it impossible for a Special Advocate to take the path of withdrawing, could be implemented in practice. Presumably the legislation would have to say something like, "It shall be the duty of a Special Advocate to represent the interests of the appellant by making submissions even when he considers that those submissions will not assist the appellant", and that is, to my mind, a very difficult course to take with legislation.

Q37 Peter Bottomley: Is there any parallel or precedent for that kind of proposed requirement?
Ian MacDonald: I do not think there is. I agree with the other two on this, that I do not think there is because I do not think there is any other animal like a Special Advocate because you do not have a client. We are representing in there the interests of a particular appellant without that person being our client and, therefore, you are not acting on instructions and, therefore, you have to make your own judgment and you cannot be told that you must stay or you must make submissions if you do not think it is right to do so.

Q38 Peter Bottomley: Just for clarity, who appoints a Special Advocate?
Ian MacDonald: Well, I was appointed by the Attorney General and I gather that there may be some doubts about that. That is another point, that because the Attorney General may be involved and has been on the other side, for example, in the derogation hearing and we are appointed by him, we also have at the Treasury Solicitors the Attorney General's part of the Treasury Solicitors and in fact the person who instructs all of us is not someone who is vetted and, therefore, he cannot see the closed material, so there is no one in fact that you can discuss these things with. You cannot go to the Attorney and discuss it with him unless there is a question of etiquette, which has arisen in certainly one case I was involved in concerning my junior, but there is no one, other than talking to other Special Advocates, that you can consult with.
Peter Bottomley: Charles Dodgson might have made something of this!

Q39 Dr Whitehead: Bearing all of this in mind, do you think that Special Advocates require any form of training to familiarise themselves with this interesting state of affairs? If that is so, how might that be done and indeed who might supply it?
Neil Garnham: I think there would be some benefit in it. 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, so I do think there would be a benefit in training. I would have thought the most obvious providers of such training would be those who have already done the job. Quite how it works out it is not easy to envisage, but I do not suppose it would be beyond the wit of man.

Q40 Dr Whitehead: Could those who have already done the job tell the people who are about to do the job sufficient information in order to allow them to do the job?
Neil Garnham: Yes, I think they probably could. One of the most important needs is for new Special Advocates to have access to the collected body of decisions relating to the operation of SIAC and its decision on matters of principle. Now, at the moment that is done very informally by the passing around of a closed bundle of closed judgments with the approval of SIAC and so on and that could be made much more efficient and systematic. If that were available and recognised to be acceptable, then Special Advocates who have already done the job could provide really quite useful guidance to those who are taking it on.

Q41 Dr Whitehead: I think you mentioned the two men and their dogs, but I would be interested in observations generally on this. Is there any need for some sort of body to co-ordinate and maximise the efficiency of the Special Advocates in general and in what way might that, or could that, be conceived as sort of matching the expertise and facilities available to the Secretary of State's team? Would you see that as in any way sort of bringing reality to the force of arms argument in this as far as advocacy is concerned?
Neil Garnham: We deal with this in the paper and, in short, I agree with the suggestion implicit in your question. I think the position would be improved if Special Advocates had access to both the solicitors who were able to see closed material, but also to assistance on a more technical level. If I can give you one example, one of the most useful functions Special Advocates perform is persuading the Secretary of State and, failing that, SIAC that more material in the closed statement should be made open. One way in which they do that is by pointing out that the material is already in the public domain that the Secretary of State purports to keep closed. One way in which that is done most easily is by use of the Internet, but Special Advocates cannot, without breaching their duties of confidence, put into a Google search-engine the name of an individual taken from the closed material because to do that would risk breaching security. Therefore, we are in a position, if we want to pursue a question of whether X and Y, whether their names are in the public domain, of having to ask the Security Services to do that Google-type search for us because we cannot do it on an open computer. Now, it seems to me that that could readily be addressed by providing Special Advocates with some form of technical assistance whereby that assistance could be called on in those sorts of cases.

Q42 Dr Whitehead: But how would that special assistance avail itself of a wider amount of information than you would be able to, for example?
Neil Garnham: It depends how it was set up, but they, in the example I gave, could at least do the sort of closed searches that currently we would not be permitted to do on our laptops in chambers.
Martin Chamberlain: It may be also that the people who provided that technical assistance would have better knowledge of ways of getting hold of publicly available sources than we do because we are not by any means experts in where to look for publicly available information. It may be that other people would know that much better than we do.

Q43 Chairman: And let's get this clear, that you, Mrs Peirce, would be excluded from that process entirely because by this stage the instructing solicitor has lost any role?
Gareth Peirce: Yes. What our fundamental job is as defence solicitors is to investigate and to know the person we are representing and his back teeth, to know everything about what makes him tick and to look for evidence that can establish his case. In this situation, we do not even know what he is accused of. We do not know the basis, we cannot respond and we cannot investigate. I appreciate that this Committee is focusing on the role of the Special Advocate and how it could improved, but it is extremely difficult to contribute to that debate when we are saying that all of this conversation and discussion is a further extension of the Kafkaesque nightmare for our clients. I think it is imposing upon the Special Advocates a duty of constant soul-searching and indeed morality which should not be being placed upon them any more than it should on the judges in SIAC. We have had this debate with the judges in SIAC to say, "It is not you who are the subject of our attack; it is the system that you are operating", and the judges themselves have said, "As long as this system is here, we are obliged to operate it. It does not mean that we are approving it". Therefore, I do urge the Committee at all times to keep coming back to what we are saying, that it is not a personal attack, it is not anything to do with the people who are operating in it, but it is to say that if you are at the receiving end of this kind of accusation, it is wrong in law, it is wrong in fact, and it is ridiculous that that person should never be able to tackle it himself, and that is not just literally a recipe for madness, but it is the destruction of very tried and tested methodology in the criminal process which we all criticise. We all criticise in any criminal prosecution that there are constraints upon us, what we perceive as injustices, but, nevertheless, we can proceed towards an end which has fairness attached to it and safeguards. Here it is simply free fall three years on. All we have when we are dealing now with the situation for bail for the people we represent is a two-line assertion saying, "The Secretary of State assesses that you are still wedded to your extremist views", and that is all the person is told, yet nobody has come near him in three years, he has had no visit at all except from his wife and the only phone call he has made is to his wife or his solicitor. How is this assessment made and on a bail application, even where there is still closed

material, where there is still a role for the Special Advocate who has not seen this person, if he ever saw him in the first place three years ago? If he has not seen him for three years, how can he participate effectively in that assessment? There must be myriad and mountains of enigmas in the process and that is not what we have in this country. We do not depend upon enigmas; we depend upon transparency and the ability to react intelligently.
Chairman: Let me assure you that we have made no presumptions as a committee about whether this is a desirable process. What we are actually trying to do is to throw some light on it, how it works, what are its internal inconsistencies or problems and that, I think, should help the wider political community to form its judgment about whether the process is an acceptable one or not.

Q44 Ross Cranston: I am a barrister and recorder. Can I just say that, in my view, Mr Garnham and Mr Chamberlain are acting in the best traditions of the Bar in acting as Special Advocates just as Mr MacDonald acted in the best traditions of the Bar in resigning, and I think it is distasteful that that issue was raised earlier. I want to raise the issue of the appointment of Special Advocates. Mr MacDonald raised this issue of whether the appointment should be made by someone other than the Attorney. The law officers do act of course both for the Government, but also in a neutral way and I suspect that when the appointment of Special Advocate is made, that is being done in that neutral way. Who else would do it because I think it would be very difficult for the court to do it, would it not, because again you get the same sort of conflict of interest?
Ian MacDonald: I have never had a problem about who appointed me and whether it should be someone other than the Attorney. That has never really been, for me, an issue. The fact that once you are appointed you have no one that you can go to is a different question and, in particular, over some of the issues that you face once you are on your own, particularly the kind of issues that my two ex-colleagues have discussed over this nonsense about not being able to do Google searches and so forth.

Q45 Ross Cranston: Just on the appointment, if I could just limit it to that, there has been some criticism, has there not?
Ian MacDonald: There has.

Q46 Ross Cranston: I just wondered, is it a serious problem?
Ian MacDonald: I have never found it a serious problem

Q47 Ross Cranston: Mr Garnham is shaking his head, for the record, and saying it is not and Mr MacDonald is saying the same thing.
Neil Garnham: In fact we were instructed by the Solicitor General to avoid this sort of technical conflict, but it does not seem to me an issue in practice at all.
Martin Chamberlain: There is an issue though as to whether it is necessary that a Special Advocate should be foisted on appellants. Clearly it is necessary that there should be some limitation in choice because obviously Special Advocates have to be security-cleared, but we, in our evidence, question whether it is necessary that there should be no choice at all. Could there be a pool, for example, of security-cleared advocates?

Q48 Ross Cranston: So you have a pool, the names would be presented and the person would choose?
Martin Chamberlain: That would be at least an improvement on the current system so far as the appellant is concerned, one would have thought.

Q49 Ross Cranston: What about the practicalities of that? They are not likely to know or would they be acting on advice, say, of Gareth Peirce in terms of their choice? Is that how it would happen?
Martin Chamberlain: Well, I suppose that they would have the same information available to them as any client has who wants to select a barrister for a case. Naturally, they would have a smaller pool of barristers available to them because they would have to choose from security-cleared counsel, but there is no reason in principle why they should not have that choice.

Q50 Ross Cranston: I think you also, in your collective evidence, raised this issue of expertise and because it came out of immigration, SIAC, I think the criticism has been made that there are not enough, for example, criminal practitioners there. Has that now been overcome or do we need other expertise as well, such as administrative law? What sort of expertise do we need there and is it being provided amongst the pool?
Neil Garnham: The pool at the moment, I think, is largely confined to those with administrative law experience and that made good sense in the early stages of SIAC because many of the issues were of an administrative law character. Our collective view, as set out in this paper, and certainly mine is that the pool could usefully be widened to include those with experience of criminal cases and those with experience of civil cases dealing with witness actions.

Q51 Ross Cranston: Can I just ask for an explanation of this issue of how the pool becomes exhausted, which was something raised in the Newton Report, because you cannot choose the person again, as it were? What is the problem and what is the solution?
Ian MacDonald: In one of the cases that I did, I think I represented the interests of five of the people who had been detained and in the last of them, the only reason why I was able to represent his interests was because Mrs Peirce was quite happy that the Special Advocate did not go and see the person beforehand, but the reason why you cannot reappear is because once you have seen the closed material in what are a general group of cases, there is generic evidence and then there is specific

evidence that deals with the particular appellant. The generic evidence affects all the people who may be part of the so-called "link network", or whatever you want to call it, and once you have seen that, then you cannot start the process which Neil Garnham has talked about where you start off by going and seeing the appellant with the appellant's solicitors, you may have discussions with the appellant's solicitors and counsel, but once you get the closed material, the Chinese wall is up and you cannot do that anymore, so once you have been instructed on one of these general cases, you cannot have a second bite. In fact I think I was instructed on four cases initially and then got this fifth one afterwards, so they had run out of Special Advocates and it again highlights some of the, and I had better be careful of what I say, absurdities and difficulties of the system.

Neil Garnham: Yes, what Ian says is right.

Ross Cranston: Can I just ask about the expertise. You mentioned this before and I was surprised, frankly. I did not appreciate that the solicitor instructing you is not security-cleared and, frankly, is not much help because of that, not because of the lack of qualities of the person, but just because they do not have the sort of expertise in terms of being able to see the material.

Q52 Peter Bottomley: Is this the Treasury Solicitor?

Neil Garnham: The man at the Treasury Solicitors who instructs us all in fact has done his job admirably and is very helpful in the way he conducts himself; it has been invaluable. However, because he is not security-cleared, and I think it is a matter of deliberate policy that he should not be security-cleared, he does not get to see the closed material, so we cannot discuss with him the closed evidence.

Q53 Ross Cranston: Is there a rationale to that or is that just how it has happened?

Neil Garnham: I am not confident that I can give an accurate answer to that. I suspect it is because the view was taken that you could not have two solicitors inside the Treasury Solicitors who are both security-cleared, seeing the same material on different sides, but I do not know.

Q54 Ross Cranston: It is not unusual to have Chinese walls in legal organisations, even though there is some scepticism by the courts as to whether they actually work. Ideally, you would say that that person should be security-cleared, should see the closed information and should be able to do these sort of Google searches that you mentioned. What else should they be able to do?

Neil Garnham: I am not sure the solicitor necessarily should be able to do the Google-type searches. Our suggestion would be that the Special Advocates were provided with some more technical assistance than a solicitor, so somebody with Security Service experience perhaps.

Q55 Dr Whitehead: Would that person need to be security-cleared?

Neil Garnham: Absolutely.

Martin Chamberlain: It seems to have been an assumption that has been made throughout that the solicitor who instructs us must be an employee of the Government and we, in our evidence, question whether that assumption is a sound one. There does not seem to us to be any reason in principle why there could not be an independent security-cleared solicitor. I know, for example, that in other contexts where national security concerns arise in legal proceedings, for example, in employment cases, there are independent solicitors in private firms who are security-cleared and who are able to act for employees who want to bring, for example, employment proceedings against employers where there is a national security element.

Q56 Ross Cranston: Or perhaps creating some sort of special unit which is quite isolated in government.

Martin Chamberlain: Which is another suggestion that we have also put forward in our evidence, an independent office of the Special Advocates, something of that nature.

Q57 Peter Bottomley: I have not got an interest to declare, but I have had experience of breaking the banning order . . . on The Reverend Beyers Naude in South Africa some years ago. I was involved in the case of a young man accused of blowing up London where clearly he was in jail, but he clearly had not done it, and I was involved in the case of a senior police officer where warrants were obtained for interception and surveillance on grounds of a grave threat to national security which were not true, or turned out not to be true, and I thought they were not true to begin with, so I have a slight suspicion over some of the things which happen, although I am willing to accept that the Intelligence Services get most things right most of the time and they are acting in a straightforward way. Can I ask whether you have had the chance of seeing Sir Brian Barder's evidence to us and whether you agree that it ought to be possible to deal with criminal charges and you do not actually need SIAC or, therefore, the Special Advocate system in the way it is being used at the moment?

Ian MacDonald: So far as using the Special Advocate system in any criminal trial is concerned, I would be very opposed to that. That would seem to me to be doing even worse than the anti-terrorism legislation of locking people up indefinitely once you start having a criminal trial and you take away what I would regard as the fundamental elements to a fair trial and, in particular, that the person who is being tried does not have access to all the evidence which is being called against him or her. From my experience of the kind of dislocation that you get between trying to protect someone's interests when you do not really know what their interests really are, to do that in a criminal trial would, in my opinion, be a

travesty and I would be very much opposed to it and I certainly would not want to take part in it as a Special Advocate.

Neil Garnham: I think there are difficulties, although I am not sure that I am any expert to give an opinion on this, but I think there are difficulties in suggesting that inevitably all these cases could have been dealt with as criminal trials because the nature of the evidence upon which the Secretary of State is bound to rely is often going to mean that that is simply not sensible.

Q58 Peter Bottomley: How should unproven factual allegations be handled by SIAC?

Neil Garnham: We have attempted to address that in our paper and there are, it seems to us, questions that need to be raised about the burden of proof and about SIAC's approach to the degree of deference that is due to Security Services' evidence on the subject. I do not think I would feel confident to give a complete answer to your question as to how it should best be done. All I think I could do is to point to our paper and to the difficulties we think there are with the current arrangements.

Q59 Peter Bottomley: And how far do you go along with the SIAC view that what it ought to be looking at got widened by the Court of Appeal and the House of Lords and, in particular, that the Government should be able to define national security in a way which is difficult to explain sensibly and openly?

Neil Garnham: I am not sure any of us are going to volunteer to say why it is that the House of Lords have got it wrong on that or any other topic. I certainly would be slow to do so.

Ian MacDonald: In the *Raymond* case I was the *amicus* in the Court of Appeal and put forward a suggestion to the Court of Appeal as to how national security might be defined and that was rejected; as indeed were what seemed to me to be the eminently sensible views of SIAC in its first determination. Basically we have a decision of the House of Lords and it is a binding decision on us.

Gareth Peirce: However, *Raymond* was dealing with a clearly immigration/deportation context. From the moment of being set up, the 2001 Act is saying these are criminal accusations (with which I disagree) but we cannot bring them to a criminal court for trial. There is, therefore, a real difference in the level at which there should be clarity and safety limits between one and the other. We would come back to the absolutely fundamental necessity in criminal law for society's benefit generally for any person to know where he stands so that he can conform to the laws of society, so that he can adapt or adopt behaviour that is in accordance with that—knowing if he does not there are penalties. The enormous overarching problem here is that on December 18 2001 there was brought in legislation which used these extremely broad terms as "a threat to the nation", "threatening the fabric of the nation"; but what was said against the defendants was so vague and, indeed, retrospective that even now they are saying, and many, many others are saying, "How do we know if we are breaking the law: how do we know if we are going to be subjected to this kind of situation?", particularly on the cusp of discussion of new law involving British nationals as well. People will go to their lawyers, as did many of these accused detainees under this Act, as say, "We raised money for Chechnya; we thought it an absolute moral necessity; we thought it was legal to be helping Chechen defence, only to find in SIAC it said "When you did that, before the law came in, before you knew you might be looked at, when you did that we assessed that you were helping Chechen resistance of a particular type that in the past had had links to people who may have had links to al-Qaeda"". It is that remote. I agree with Sir Brian Barder that the definition is so amorphous and so vague that no citizen or no non-citizen can know: is he likely to be locked up; is he likely to be the subject of the Control Order? The answer is, nobody could tell you because it is entirely in the assessment of the Intelligence Services. Just as you do not know what it is they are saying against you, neither do you know what they could say against you; you cannot make that assessment. I think it is necessary for Parliament to be questioning that, as well as those who are acting for the accused persons.

Martin Chamberlain: I just want to return to the question you asked a moment ago, Mr Bottomley. The evidence that nine of the current Special Advocates put in did address at the end three issues as to the way in which SIAC looks at and deals with evidence. The purpose of that evidence (the evidence we submitted) was not to make any particular submission or suggestion as to what the appropriate role was; it was simply to draw attention to three important features of the way that SIAC works. I think the importance of those features is emphasised by the discussion there has been very recently about judicial control in relation to the new proposed Control Orders, because one suggestion which has been made is that the Control Orders will be fine as long as they are subject to judicial review. That is a rather broad term that has been used. Part of the purpose of this evidence is to simply focus discussion on what exactly judicial review means in this particular context. We have looked at three particular aspects: standard of proof—

Q60 Peter Bottomley: This is page 20?

Martin Chamberlain: Indeed. We have simply noted that SIAC itself has described the standard of proof, which is laid down in the 2001 Act, as "not a demanding one". We have simply asked the question, which is a question for Parliament and not for us, as to whether it is appropriate that the standard for the new Control Orders should continue to be undemanding. The second matter is unproven allegations. We have simply noted as a matter of fact that SIAC has looked at the question, should it take into account allegations which are not proven even on the balance of probabilities, even on the civil standard, and it has taken the view (and the Court of Appeal has

endorsed that view), yes, it should take into account allegations of past conduct potentially amounting to criminal acts, which are not proven even on the civil standard. There are arguments for and against that. Some people say that intelligence material is simply not susceptible to proof on the civil standard; and others would disagree. The fact of the matter is that is how those allegations are dealt with. The third matter is deference. At the moment SIAC defers to a very great degree—

Q61 Peter Bottomley: "Deference" is a technical term?

Martin Chamberlain: "Deference" is a technical term. It defers to the views of the Executive as put forward by the Security Service witnesses that it has before it. The trouble is of course, that in relation to the closed material the Security Service witnesses are treated as experts and there is no expert on the other side. One has an expert assessment which is treated just as a judge would treat a doctor, surveyor, engineer or an expert witness, yet there is not an expert witness on the other side to give a countervailing view. That is simply a feature of the way SIAC works: whether it is an appropriate feature is not a matter that we have commented on in our evidence but a matter for Parliament.

Ian MacDonald: That raises another question, and it is really one of the fundamental flaws of this dislocated system that you have. Apart from this disclosure issue, which is being dealt with, it has always seemed to me that one of the tasks that police forces have is that they have to turn information into evidence. One of the problems about dealing with the way SIAC has been working on the current system is that you have a whole lot of mass of information and assessments without there ever being any need to make an effort to turn any of that into evidence. I think that has within it an inherent risk that you end up with quite shoddy intelligence and misleading intelligence. One of the criticisms of the police in the Lawrence Inquiry was that they were unable to turn a mass of information which they had within two or three days of the murder of Stephen Lawrence into evidence which they could use to prosecute the people whose names had been given to them as part of that intelligence. I think the same kind of problem is inherent on a much bigger scale in these proceedings. If you can find all the action you are going to take in relation to alleged suspected terrorists to assessments of information without going further and trying to turn that into evidence then there is no way for the reasons that have been given, that they are treated as experts, you can ever be sure that is accurate information on which you are acting. I think that is an inherent problem in the whole system.

Q62 Chairman: Is it not inherent in the fact that intelligence is gathered and you almost know what the intentions are, or what the dangers are, and the process of gathering it is not easily made to conform to that gathering of evidence?

Ian MacDonald: Absolutely, I agree.

Q63 Peter Bottomley: Curiously (as Stephen Lawrence's MP) the police when asked, "When was the last unprovoked attack on someone black or white?" would probably have been at the suspects' home before the suspects had got home. Can there be a distinction between the procedures used for the purposes of deporting a terrorist suspect and those used to facilitate the detention (or to control the behaviour) of such a person?

Ian MacDonald: I think the same inherent problems will arise in either procedure. One has to make a judgment at which point it is acceptable that you are going to, if you like, make the best of a bad world; that there is information which in the public interests should not be disclosed and you have to proceed. We tend to approach that on a step-by-step basis: that we had the Three Wise Men in the Strand, or whatever it was that they sat, before we had SIAC and that was a thoroughly unsatisfactory procedure; then following the European Court of Human Rights decision in *Chahal* in 1997 we moved to SIAC. It was a very, very big improvement and I think everyone who participated in that felt an element of fairness was introduced into the procedure. The problem about extending the SIAC system to detention, or to the detention which may reach complete house arrest under Control Orders, I think the system has the same objections within it; but it is a matter of judgment on the degree to which you can go with this and still not feel you are overstepping what I consider to be quite fundamental notions of liberty which are deeply ingrained in our legal and social culture in Britain.

In the absence of the Chairman, Mr Soley was called to the Chair

Q64 Mr Soley: Can I widen this out slightly—although hopefully not too much and ask you to bear that in mind when you answer—I particularly want to know whether you accept the need for special powers and procedures to deal with terrorist suspects outside the normal criminal law; and, if you do think there is such a need, is SIAC an amendable body, if you like, or do we really need to go back to scratch and start again? Perhaps, Mr MacDonald, I could throw the ball in your court first because you have been on both sides of the Special Advocate argument and, I think, with some honour, because I do not think any of us find this an issue easy to deal with. I think what we are looking for are some ideas here.

Ian MacDonald: One talks about having a balance between the need to protect people and maintaining the kind of fair procedures and the right to a trial, and all the rest of it, which are inherent in what I have called our legal culture and in our law, going right back the Magna Carta. I have certainly taken the view, obviously except in a situation of immediate emergency, that you have to deal with this through the processes of criminal law; and you will have to deal, obviously, with the question of

whether you use intercept evidence and those kinds of things, and whether you need to create more amendments, although I understand there have been 600 new criminal offences created since 1997. I am very firmly of the view that if you are going to deal with this on a longer term basis that you have to do it by the traditional methods of the criminal law, with all the inbuilt fairness that involves.

Q65 Mr Soley: Would you accept that other countries have had to bend the guidelines on what we would all regard as acceptable legal practice in many of these cases?
Ian MacDonald: No other country in Europe has derogated and introduced indefinite detention without trial.

Q66 Mr Soley: That is a cop-out, is it not? The reality is that in a number of European countries you can hold indefinitely, and they do?
Ian MacDonald: I know in certain European countries in the ordinary criminal law that is probably also the case, and that is regrettable and quite wrong. I would prefer it to have the kind of traditions we have in this country. Having said that, it does not seem to me—because delay is an inbuilt category of some of the criminal judicial systems in certain countries—that that gives this country any excuse at all for backing away from the traditional ways with which we have dealt with people who commit crimes.

Q67 Mr Soley: I am looking for structures which might help us through this. You are basically saying that SIAC is non-workable, are you not, that is your position?
Ian MacDonald: I have not said SIAC is unworkable on dealing with deportations and exclusions where there is a national security interest involved. The problems that have been highlighted in the court of our discussion do arise in those cases as well, but not with the same kind of sharpness and not with the same issues of liberty involved. When you move to the issues of liberty SIAC should be scrapped as being the vehicle for doing it.
Gareth Peirce: If you accept that there is expertise in the Anti-Terrorist Squad, in the Crown Prosecution Service, the Director of Public Prosecution, the Treasury Counsel experienced in prosecuting, all of that has been deliberately abandoned for those who are detained under the 2001 Act. I wrote to the Director of Public Prosecutions asking when he was consulted as Parliament was told before each of these individuals was locked up; and he wrote back and said he was never consulted about anyone. It was an intelligence-based decision implemented immediately by executive order. What I would wish to emphasise, over a long period of experience of defending individuals charged with terrorist offences, I am aware it is difficult to defend those individuals—it is not an easy process—but it has been completely scrapped here. Mr Bottomley referred to the case a long time ago of a young Irishman who was accused. He would still be locked up under this law. In his situation it was possible to establish an alibi and independent evidence. Were he to have been detained under this kind of legislation he would still be there and would never have had the opportunity.

Q68 Mr Soley: Your view is that SIAC should not exist, in a way, is that right?
Gareth Peirce: I am baffled as to why it was ever considered necessary. I repeat that there was a jettisoning of a plethora of anti-terrorist legislation, ability to investigate and all of the expert bodies that could have done that; a deliberate decision to do something differently. I would say it has been an experiment that has been a disaster—not just from the point of view of those detained and their families, but for our whole system of criminal justice. The fact that we are considering taking it one step further at the very moment of the dying days of the Act when it is going to be abandoned anyway, I think it is a moment to reflect and not to, once again, rush in anti-terrorist legislation that is gong to be yet another disaster.
Neil Garnham: I think this is a political question and I am not sure that my views on it are any more valuable than those of any member of the public, frankly. With that caveat, I would say that I suspect there will continue to be a need for some special procedure that deals with cases of suspected terrorism. For what it is worth (and, frankly, it is not much), I suspect that the criminal procedure alone will not adequately accommodate those special requirements.

Q69 Mr Soley: Have you looked at overseas systems?
Neil Garnham: No.

Q70 Peter Bottomley: In very simple terms, are there needs for special powers and procedures with terrorist suspects, as distinct from the general criminal process; and, if so, what could those sensibly be?
Neil Garnham: With the same caveat, I think it is a political question on which my opinion is of precious little value as opposed to those who know more about it, I suspect. There do need to be special procedures, yes, and SIAC appropriately adapted or amended may well provide the best vehicle.

Q71 Mr Soley: Is the threshold of reasonable belief that a person's presence in the country is a risk for national security, coupled with reasonable grounds for suspecting that they are involved in international terrorism a sufficiently high standard to safeguard the interest of appellants?
Neil Garnham: That is for Parliament and not for us, I would say. The questions that arise as a result of the way in which the test is currently phrased—the issues are addressed in our paper and I think it is a matter for Parliament and not for Special Advocates or lawyers to say how it should be answered.

Ian MacDonald: I disagree with that. I think the answer is, no, it is not an adequate safeguard and I think that as lawyers we have as much a public duty to speak out on the areas in which we earn our living and spend most of our lives, because fundamental to the way in which we operate is a fundamental respect for the rule of law and its proper application. Where I see that that is being threatened, I am always going to be prepared to speak out as a lawyer.

Gareth Peirce: In itself it is far too low a standard combined with all the other aspects; the fact that the evidence is not known about to the accused person; and, in these cases, the accused person was never even spoken to and still has not been. I would say the standard is wrong but the belief could never have been reasonable in the first place. The reasonableness would have come from going to a person arresting him, investigating, asking him basic questions and then making an assessment. Here you have abandoned the criminal justice process and you have abandoned the person as well.

Q72 Peter Bottomley: We need to hold a balance of the national interest and the interests of an appellant in mind. I think I am right in saying that the Court of Appeal rejected SIAC's definition of national security which related to the security of the UK and British citizens. The Court of Appeal rejected it as unduly narrow and put in a wide range of definitions—any act that might prejudice the UK's relations with another country which might retaliate against British interests, including in ways that might damage its collaboration of security matters and so on. Would you recommend that Parliament try to get a rather more narrow definition than the one the Court of Appeal has left us with?

Ian MacDonald: You want to have something that you can get your hands on. You do not want something that, as soon as you think you have got your hands on it, has suddenly escaped and become something much bigger. That is the problem about leaving definitions to the discretion of the Home Secretary, that none of us know where we are. It is not an easy thing to define—that I totally accept. If you have to deal with that question then I feel rather sorry for you as a Committee. I think it is necessary that there should be a little bit better definition and clearer definition.

Gareth Peirce: This is the same Court of Appeal judgment that said it was acceptable to use evidence obtained from torture, and that it is on appeal to the House of Lords, we have been given leave to appeal.

Mr Soley: On that point, can I thank you all very much indeed.

The Chairman resumed the Chair

Witnesses: **Dr Eric Metcalfe,** Director of Human Rights Policy, JUSTICE, **Gareth Crossman,** Director of Public Policy, Liberty and **Livio Zilli,** Amnesty International, examined.

Chairman: Good morning. We are very glad to have your views and insights into these matters. I will ask Mr Soley to begin the questioning.

Q73 Mr Soley: Continuing really from where we left off with the last group. Do you accept the need for any special powers and procedures to deal with terrorist suspects outside the normal criminal law?

Livio Zilli: As far as Amnesty International is concerned, we have already had in the United Kingdom very extensive anti-terrorist legislation enacted quite recently in 2000. That in fact consolidated what was in so-called temporary form in both the Prevention of Terrorism Act and the ATA. The law was then in temporary form and it was then consolidated on a permanent statutory basis. We do not accept that there should be a special criminal process. If people are reasonably suspected of having committed a criminal offence they should be charged with a recognisably criminal offence and tried in proceedings that fully meet international fair trial standards.

Q74 Mr Soley: You would accept, would you, that this is a common problem across many countries now or have you got one ideal country which we should all follow?

Livio Zilli: I am afraid I do not share the premise that it is a problem. I think it is a duty of the State to take measures to protect people in their jurisdictions. In doing so, they must uphold the rule of law in human rights. Some people refer to the question of balance, and by that I do not accept there is a problem as such.

Gareth Crossman: One of the main criticisms, one of many criticisms, arising from the Newton Committee was that they believed the Government had simply not put sufficient effort into looking into ways in which the domestic criminal courts could be used as an alternative to the use of Part 4 powers.

Q75 Chairman: I was the Deputy Chairman of the Newton Committee!

Gareth Crossman: I am aware of that, Chairman. It is always difficult when you are asked to put forward alternatives because you can end up finding yourself moving towards suggesting we should have some sort of domestic Diplock court. Having said that, given the range of offences under the Terrorism Act 2000—the existing common law in relation to conspiracy attempt, the possibility of looking at acts preparatory to terrorism, ways of introducing security within the court process that do not affect fundamental fair trial rights, the admissibility of intercept, the use of public interest amenity—there is

a range of material that can be looked at. I think part of the problem is that a lot of this has to be led by the Government. If there is a feeling that we are looking more towards the use of domestic courts and moving away from either the use of SIAC for Part 4, or Control Orders, organisations such as Liberty, Amnesty and JUSTICE we can say these things, but there needs to be some sort of incentive coming from Government that they are actually listening.

Dr Metcalfe: Our view, since the 2001 legislation was first introduced, has always been that the need for any exceptional powers to fight terrorism outside of the normal criminal process has always been a matter for the Government to show the justification by reference to a threat of terrorism. We have always been agnostic as to the need for those powers, simply because the Government has justified those measures by reference to evidence that is not publicly available. It is difficult to second-guess the Government on the point that you cannot say any particular measure may be proportionate or disproportionate if we do not know the evidence upon which they are relying. However, I think it is true to say that we have always been sceptical, and we have become increasingly sceptical since 2001. Following the judgment of the House of Lords in the Belmarsh case last December, I would say that there is now a very clear consensus that whatever special measures may be necessary (and it is possible you might adopt minor procedures in reference to civil cases) you cannot compromise the basic guarantees of due process.

Q76 Mr Soley: Would all three of you rule out the use of secret courts and investigating judges, those sorts of approaches, or not? Do you rule them all out as options?

Eric Metcalfe: With reference to secret courts and special judges, there was one proposal which was raised by the Newton Committee; again, we were sceptical that this was a useful way forward. There was some suggestion of adapting the use of judges sitting alone from the Canadian system and screening evidence that would act as a way forward for further criminal proceedings. However, it was not clear to us what exactly you did with the summary of evidence that you then gained from the judge sitting alone; how that would be adjudicated upon by the subsequent judge and jury, presumably sitting in criminal proceedings. It was not obvious. We are not prepared to rule it out completely if there was a detailed proposal put forward, but I would say that the UK system is very much an adversarial system and the checks and balances which we have in place are very much tied to that system. It would be a dangerous departure to introduce a more inquisitorial system without a great deal of careful thought.

Gareth Crossman: I would very much agree with Eric. One of the suggestions put forward in a Home Office discussion paper last year was some adoption of a French *Juge d'Instruction* system, which again was trying to put the elements of an inquisitorial system on to what is effectively an adversarial system in the United Kingdom, excluding Scotland. We felt that this was extremely problematic. We felt that many of the problems that arose from the *Juge d'Instruction* system would not be remedied by adopting it in any of the courts in England and Wales.

Q77 Mr Soley: Can you tell me what you think the Government ought to do about evidence that is obtained from secret phone taps, or whatever, but also from overseas and other agencies; how should that be presented in court?

Livio Zilli: In relation to evidence I think here are two fundamental questions: first is the role of the court, and what the inquiry that the court must conduct should look like; second is the imposition on the authority (and by that I mean both the executive and the judiciary) to uphold the rule of law and human rights. If it is with reference to evidence obtained through torture or by other unlawful means, clearly there should be an exclusion ban on the use of such evidence. In respect of any other legal evidence or any evidence where there is a presumption that it might have been unlawfully obtained, it is for the authorities to rebut that presumption, that it has in fact not been unlawfully obtained.

Eric Metcalfe: In relation to the use of intercept evidence it is clear, since the UK and Ireland are the only two jurisdictions in the world which refuse to use it, there is a very large number of different procedural models for the use of such material. We were particularly surprised by the suggestion of Charles Clarke appearing before the Home Affairs Committee very recently in which he declared that the UK's legal system was somehow unlike other legal systems. I think that will come as some surprise to lawyers in Canada, Australia and New Zealand, and even the United States, which are based on common law principles. We would therefore suggest that if the UK is considering (and we certainly do propose) that the ban on intercept evidence should be lifted, we should be looking towards those common law jurisdictions first and foremost to see how they handle such evidence. I do not believe it is beyond the wit of lawyers here to be able to handle such material if criminal proceedings in Australia and the United States are able to do so. I do accept there are some practical problems with the technical way in which evidence is adduced. However, we already have a great deal of regulation, the Regulation of Investigatory Powers Act 2000, which relates to the regulation of evidence gained from non-intercept but, nonetheless, other kinds of surveillance evidence, such as bugging someone's house. It is not obvious what the difficulties are, if you already have that framework in place in relation to a bug, why you cannot extend the same procedures in reference to intercept evidence from a telephone tap.

Q78 Chairman: Do you think there is a distinction to be drawn between procedures that are used when someone is being detained, and those which were devised for immigration purpose—namely, to

exclude someone from this country or, indeed, to refuse entry to this country on security grounds? Is that a legitimate distinction?
Gareth Crossman: I think it was pointed out in the last session that the introduction of SIAC arose from *Chahal*. The use of Special Advocates in *Chahal* was essentially to determine whether or not Mr Chahal's presence was conducive to the public good of the nation. In immigration proceedings, rightly or wrongly, there is no right for a non-British national to remain in the country. The determination by SIAC and the use of Special Advocates was not determination of rights as we would understand it under Articles 5 and 6 of the Human Rights Act. We would say there is a very strong distinction between the use of Special Advocates and the use of SIAC for what are effectively administrative decisions, and the use of Special Advocates when individual liberty and the right to a fair trial and the presumption of innocence are at the forefront.

Q79 Dr Whitehead: Could you shed some light on the exact status or the exact nature of the proceedings under the Anti-Terrorism, Crime and Security Act? Would you say that they are essentially criminal or civil in nature, and what would be the consequences of that distinction?
Eric Metcalfe: It is an interesting question, at least from the perspective of the European Convention of Human Rights, because there is an argument in relation to the right to fair proceedings, Article 6, which suggests that you do not look at how the proceedings are classified in the jurisdiction in the United Kingdom but you look at the essence of the proceedings. We would say, at least in relation to SIAC proceedings under Part 4 of the 2001 Act, the essence of the charge is essentially criminal. Although you are talking about the reasonable suspicions of the Home Secretary in relation to people under immigration control, in fact what you are saying or suggesting is that these people are involved in terrorism and as a consequence of that determination you are depriving them of liberty. In our view, within Article 6, that would constitute a criminal charge. Even though it is within civil proceedings, you are essentially talking about the determination of a criminal offence by other means.

Q80 Chairman: Are you saying that that would apply to house arrests as well?
Eric Metcalfe: In essence, yes. It is a deprivation of liberty based on the suspicion of the Government, of the Home Secretary. It is ironic that terrorism is perhaps one of the most terrible crimes with which one can be accused but, nonetheless, as the law currently stands, and as it would appear to have been proposed, someone who is accused of shoplifting has more right to answer their accuser than someone who is detained under the Part 4 legislation.

Q81 Dr Whitehead: Your consequences of that presumably would flow onto the nature of access to defence and presumptions within the proceedings and so on?
Eric Metcalfe: In our evidence we said there is a distinction between the use of Special Advocates in other proceedings and civil proceedings. I agree completely with what Gareth said about SIAC in its original capacity as a purely immigration tribunal. Its proceedings didn't relate to someone's right to liberty. If you are talking about depriving someone of their liberty in any kind of proceedings, though, whether civil or criminal, then our position is that it is inappropriate to use Special Advocates to at least determine the substantive issues in those kinds of proceedings.

Q82 Dr Whitehead: How might that change if the Control Orders were to be introduced?
Eric Metcalfe: Again, if you are talking about a Control Order that would seek to impose restrictions that amounted to house arrest, then that would be a deprivation of someone's liberty in our view and, therefore, it would not be appropriate to be using Special Advocates in relation to those kinds of procedures. If you are talking about Control Orders amounting to, say, less than that kind of interference—say restrictions on someone's movement or limitations on someone's communication, electronic tagging, potentially less than deprivation of liberty—then there is perhaps more latitude, more opportunity to use the different kinds of procedures. I think if you are talking about the essential component of a Control Order which is detaining someone in their house then you have ended up with essentially a criminal charge.
Gareth Crossman: I would differ slightly from Eric on the interpretation of how different types of Control Orders will operate. Control Orders are effectively punitive, even though they are civil. Whether or not you are locked up in your home, whether or not you are tagged, whether or not you are subject to a curfew, these are effectively punitive measures. In terms of deprivation of liberty, my interpretation of whether or not these are going to result in a breach of the European Convention on Human Rights is that basically, in order to avoid the breaching of Article 5, any deprivation of liberty must be made in anticipation of some sort of criminal disposal. Inbuilt within the European Convention is a certain leeway, so that a deprivation involving a minor restriction is not likely to breach insofar as a major breach. However, eventually unless there is some form of criminal determination, there must eventually be a breach.

Q83 Chairman: Are you saying an Anti-Social Behaviour Order is a breach?
Gareth Crossman: An Anti-Social Behaviour Order has been made by a civil court. If you go back to SIAC and the breach of Article 5, the right to liberty, the use of SIAC was not considered to be sufficient remedy to remedy that breach. I do not see anything within what are being proposed in Control Orders which will not mean that a future House of Lords will not come to exactly the same conclusion, that what has been proposed is not sufficient to remedy the breach.

Q84 Ross Cranston: Is it an issue of whether it becomes disproportionate? I accept the point that if you detain at home that could be detention, but there can be something less than that. People under ASBOs are restricted in terms of where they can go; they cannot go into town centres and so on; that would not be in breach and the courts have said that.

Gareth Crossman: The deprivation of liberty is not a disposal in itself in the way that an Anti-Social Behaviour Order is a disposal of the court. It is not being made in anticipation of a criminal disposal. Obviously, the Government has reached a totally different conclusion which is why later today we are expecting the publication of a Bill introducing Control Orders. Certainly on my interpretation of the application of Article 5, I do not see that there will be any distinction between what the House of Lords decided in December and what a future decision will be.

Q85 Ross Cranston: I take it you do not accept the notion of Control Orders but say that they are introduced. I was especially interested in whether it would be appropriate to have a system of Special Advocates. I guess that would also operate in the context of a solely criminal provision. Do you see any role for Special Advocates in terms of modifying the ordinary criminal proceedings; or are you saying we will just have ordinary criminal proceedings in the ordinary way; the judge might have an application before he or she starts the trial about particular evidence; the judge says, "Well, I'm going to admit that", and the prosecution has to be abandoned. Is that what you are after? I think JUSTICE has accepted there might be Special Advocates?

Eric Metcalfe: Not in relation to criminal proceedings; not in relation to the determination of someone's liberty; nor determination of a serious criminal charge at least. I did suggest that Special Advocates might be used where you were talking about the imposition of low level restriction orders based on security-cleared evidence. If you are talking about an ASBO-type situation where someone is prevented from going to Birmingham, for argument's sake, but that was it and you were not talking about house arrest, and the evidence upon which you sought that order was evidence that could not be disclosed to the appellant, then conceivably the Special Advocate could be used in that type of procedure. I am saying that hypothetically, because we do not support the introduction of Control Orders at this time. We do not believe that the Government has taken all necessary steps to make possible criminal prosecutions—by which I mean lifting the ban on intercept evidence. To address the particular point, Special Advocates are currently used in criminal proceedings and currently used in relation to public interest immunity applications made *ex parte*. The House of Lords considered their use in those kinds of circumstances, and found they were of benefit to the defendant and approved them; but they said that applied in that very limited set of circumstances, where you are talking about the determination of an issue that was preliminary to the criminal trial itself, they said it was a course of last and never first resort. I think the fact they found it to be so exceptional, even in the kinds of circumstances where they were a benefit to the defendant and it was only a preliminary issue, shows that it would be almost impossible to introduce this Special Advocate kind of procedure where you are talking about the determination of the substantive criminal charge against someone because that would be such a departure from fundamental due process.

Q86 Ross Cranston: How do you protect the evidence, the security evidence?

Eric Metcalfe: There are other ways, and other countries find other means of maintaining the national security of their countries without depriving people of the right to answer the full case against them.

Q87 Mr Soley: Other countries do do that?

Eric Metcalfe: I am not aware that any other common law jurisdiction deprives people of the right to answer the case against them. If I could address particulars, there are other methods available. I think one point might be useful to consider is that the Joint Committee on Human Rights in its report on counter-terrorism powers last year indicated that there were different methods that might be available. It is interesting to note, even in relation to the United States and their military tribunal procedures in Guantanamo Bay, which is no-one's idea of a model judicial process, they in fact allow for ordinary solicitors (or attorneys in the American system) to apply for security clearance, so they might be able to represent those whom they appear for in the military tribunal system. Conceivably Mrs Peirce could apply to the Home Secretary for security clearance so she should could participate in the proceedings in relation to the closed evidence on behalf of her client. It is ironic that Guantanamo Bay, such a black hole of legalism in other respects, offers a suggestion in this regard. Other jurisdictions also take different measures in respect of, say, witness protection—that is another way of protecting evidence. I could go on, but there is more than one way to address this problem.

Q88 Ross Cranston: From what you said earlier, you can see some role for Special Advocates, even though that might mean that there is no communication between the client and the Special Advocate. You can see limited circumstances in which the Special Advocate might be there?

Eric Metcalfe: Again, I have to be very clear. The idea that Special Advocates could be used would only be in relation to civil proceedings in which someone's right to liberty was not engaged. I do not see that Special Advocate procedure could be used to determine the substantive issue in criminal proceedings.

Q89 Ross Cranston: I think Amnesty said you do not have Special Advocates at all?

Livio Zilli: To the question of: can we make it work—and the answer, as far as we are concerned, is that is the end result is someone's deprivation of liberty—then the answer must be, no. Our concern is, with the enormity of what has been happening even in the last three years since the enactment of the 2001 Act, we seem to be concerning ourselves with some tinkering of the system, or even contemplating new proposals that will lead to deprivation of liberty without charge or trial. Even before considering what alternatives there might be, the first question should be: how can we uphold the rule of law and restate the commitment to measures that do not undermine the rule of law and human rights. Where the question was: are the proceedings criminal or civil, the fundamental way of answering that is one that looks at substance and not at formalism. The point is that people have been deprived of their liberty without charge or trail. Calling a pear an apple does not make it one—clearly. The measures were bolted on to immigration legislation and so they were called civil. They are clearly not civil because they can lead to deprivation of liberty. Clearly, all the safeguards of the criminal process should be engaged and have not been engaged. The whole SIAC/Special Advocate system is clearly a jettisoning of all the safeguards that should be afforded in the normal criminal justice system. In a sense we urge that the discussion be one that looks at the enormity of what has happened. The commitment we would like to see from the authorities is upholding the rule of law on human rights. Then perhaps we can look at discussing the proposals, but certainly it is not a tinkering of the system which we are advocating; it is a scrapping of the system. Special Advocates and SIAC clearly do not work and cannot uphold human rights and the rule of law.

Q90 Dr Whitehead: Do you think there is a calculus of the civil liberties and the principles you have set forward as far as civil liberties are concerned, and the risk to the public? Is there a point at which you think the two begin to have traction against each other?

Gareth Crossman: The Human Rights Act and the European Convention on Human Rights allow for derogation in time of national emergency. I think the problem is that derogation is now being used as rather a convenient tool to allow the Government to introduce Control Orders. In his statement to the House the Home Secretary said, "We will make these provisions compliant with human rights standards by taking out a further derogation if necessary". That is not really the way to look at taking a derogation. The question is: is there a risk to the whole of the nation that requires derogation? The reason why we have the derogation power is so that there is not a conflict when there is a national emergency that threatens the life of the nation. I unfortunately feel that derogation is now being used as another tool in the armoury, or potentially so, in relation to Control Orders.

Q91 Chairman: I think it rather undermines the civil liberties case if you argue against on the basis that there is not a national emergency. It is clearly a matter of judgment as to whether the threat terrorists pose to us is very large, is continuous and is likely to go on for some period of time. If you challenge that presumption, rather than looking for ways of dealing with the terrorist threat compliant with human rights, are you not actually underselling the human rights case?

Eric Metcalfe: I think the human rights case is relatively secure in respect of the balancing act you are talking about. Our position may be different from those of other organisations appearing before you, but whether or not there is a public emergency threatening the life of the nation, looking at the specific language of the European Convention, is less important than the question of whether the particular measures you adopt are justified by the threat. I think we have now arrived at a point following the Belmarsh judgment in House of Lords that, no matter how serious, a terrorist threat of this current type could not justify indefinite detention. You can imagine an extreme situation where bombs are dropping on London from airplanes overhead as was the case 60 years ago that short-term detention without trial may be countenanced in the middle of a war, but that is not the kind of situation—

Q92 Chairman: You have some prospect of knowing that the war is over.

Eric Metcalfe: You can identify victory conditions. You know when you have taken their capital, waved the flag and so forth, but this is not that kind of conflict, this is a terrorist threat of a kind perhaps greater in magnitude than the UK has faced before, but certainly the UK has faced terrorism before over the past 30 years. The point I think is important to bear in mind is that under no circumstances can you deprive people indefinitely of their liberty simply by reference to the potential threat of terrorism. In many ways, and I do not mean to downplay the horror of terrorism and the damage it can inflict, but we balance our liberty and our security daily by reference to our road transport laws. We could save perhaps hundreds of lives a year if we cut the speed limit in half, but that would mean depriving ourselves of the liberty to drive at the speed we do at the moment. In a way it is similar with terrorism. We could put cameras on every street and in everyone's houses. You could massively increase the amount of surveillance being done on private citizens in this country; you could put electronic tags on everyone. You would perhaps end up with a much safer society but one which is much less free. The calculus is very much the same when you approach the terrorist threat. I think the House of Lords has indicated quite clearly that, no matter how serious this kind of threat, this kind of generalised threat of terrorism, you cannot justify indefinite detention.

Q93 Ross Cranston: Of course, the House of Lords, by majority, deferred to the Executive's view of the public emergency, did they not?

Eric Metcalfe: They deferred to the Executive's view that there was a public emergency, but they disagreed with the specific question of whether—

Q94 Ross Cranston: On the grounds of disproportion and discrimination.

Eric Metcalfe: And I think that stands as a more general judgment that indefinite detention cannot be proportionate.

Chairman: Since bells are about to ring which would disturb our proceedings, I think that is a very good note on which to end. Thank you very much for contributing to our consideration.

Tuesday 1 March 2005

Members present

Mr A J Beith, in the Chair

Peter Bottomley	Mr Clive Soley
Mr James Clappison	Keith Vaz
Mr Ross Cranston	Dr Alan Whitehead

Witnesses: **Lord Falconer of Thoroton QC,** a Member of the House of Lords, Lord Chancellor and Secretary of State for Constitutional Affairs, and **Alex Allan,** Permanent Secretary, Department for Constitutional Affairs, examined.

Q95 Chairman: Lord Chancellor, Mr Allan, good morning and welcome. This is a very timely sitting and it is rather complicated by the pace of events. Let me put it this way. The Special Immigration Appeals Commission was set up to provide relief against the exercise of arbitrary power by the Home Secretary following a significant pace and then subsequently came to be used to lock people up in Belmarsh, for which it will no longer be used. We now face legislation currently proceeding through our House to yours which may impose the same procedures that SIAC uses on the High Court and on the Court of Session and on the High Court in Northern Ireland. In order to keep this in some kind of orderly way as a means of exploring these issues, I wonder if we could start by looking at SIAC and its procedures, bearing in mind that it will continue to operate and will continue to carry out the function for which it was originally created; and that will give us an opportunity, I think, to look at some of the problems of these procedures and move seamlessly from there into looking at how these procedures might be transplanted into the High Court and possibly at some wider issues at the end of that. Are you happy if we proceed in that way?
Lord Falconer of Thoroton: I am absolutely happy with that.

Q96 Chairman: The procedures which SIAC uses have been criticised in some detail, or at least let us say concerns about the procedures have been expressed in some detail by no less than nine special advocates who have submitted written evidence to us and those who gave oral evidence to us. Is SIAC fit for its original purpose of allowing a decision to deport or to lock up someone in this country to be properly examined in order that that person does not see either the evidence or even the basic charge, if you can call it that, on which it is based?
Lord Falconer of Thoroton: I think the basic premise, or the great issue in relation to SIAC is obviously the fact that the subject of the proceedings does not him or herself see all of the allegations against him or her, which causes difficulty when measured against any normal, fair process, but, as Lord Carlile has said, there are cases, both in the deportation area and in the terrorist area, where you need to strike a balance between on the one hand having a fair process, or as fair as possible, and on the other making sure that the suspect does not see material that might damage national security. That is the fundamental problem in relation to the procedure. I think it is the best that can be done. I think there are improvements that can be introduced, particularly in relation to the role of, and the support for, special advocates that will improve the procedure, but addressing that fundamental problem, I think it is the best that can be done. Is it fit for its purpose? Yes, I think it is.

Q97 Chairman: Did it become rather unfit for purpose when it started being used as a procedure to lock people up?
Lord Falconer of Thoroton: I do not think the problem in relation to what happened was SIAC not being fit for purpose. The problem ultimately was, as the Law Lord said, the course adopted was discriminatory and disproportionate. That was not because of the SAIC procedures.

Q98 Keith Vaz: Lord Chancellor, Gareth Pearce when she gave evidence to this Committee described the process and procedure as "deceitful"; others have described as a "shambles". Even Neil Garman, who is still a special advocate, said he described it as being a process for one man and a dog. What is being done to help special advocates being trained?
Lord Falconer of Thoroton: I think the points that the special advocates have made have huge force. I think there are a number of areas where you can make improvements. First of all, we need to increase the size of the pool of special advocates so that there are special advocates, for example, who have wide experience of cross-examination, whether civil or criminal. Secondly, we need to give the special advocates proper support. I think the point that Neil is making is, "I am handed the material. I do not know what to do with it and nobody helps me." A critical aspect of that is that, unlike any other case, they do not have an instructing solicitor who is engaged with them on the process. We need to set up, I think probably within the Treasury Solicitor's Department, a number of treasury solicitors who are development vetted, who are able to see the closed material, who are able to provide the advocates with assistance in relation to it.

Q99 Keith Vaz: And that includes training?
Lord Falconer of Thoroton: The third point was training. I think the special advocates need training; I think the instructing solicitor needs training. The fourth point is they need to have some feel for what happens in SIAC. They need to know what decisions

SIAC has made in the past. They need to have access to a database of decisions that have been made by SIAC. Fifthly, they have to be able to say, "We need help of an expert nature in this area or that area", so that they can consider whether or not evidence should be put before SIAC about a particular issue. They have got to be better supported, there has got to be a greater choice, they have got to have access to help that allows them to operate like an advocate in a conventional sense, subject, of course, to the necessary limitation that once they have seen the closed material they cannot speak to the suspect.

Q100 Keith Vaz: They are, of course, appointed by the Attorney General?
Lord Falconer of Thoroton: Yes.

Q101 Keith Vaz: Have you heard only complaints until this inquiry began its deliberations from special advocates about the problems? We even had the problem of who should they resign to? One of them decided to resign to the *Mail on Sunday*, Mr McDonald. Who do they turn to if they want to seek advice in government? Is it to yourself? Is it to the Attorney General?
Lord Falconer of Thoroton: They are appointed by the Attorney General. I think there is a significant issue about who, as it were, chooses them in relation to an individual case. I can see a problem about the subject, him or herself, not being able to choose the special advocate from the list that they want. I appreciate there are great difficulties about knowing who to choose, but I think there is a significant point about the person whose case it is being able to make the choice from a list as to who the special advocate is, and although there might be conflicts of interest points that arise right across the law, ultimately the choice from the list, subject to conflict of interest, should be made by the person who is the subject of the proceedings.

Q102 Keith Vaz: What does the Government plan to do to ensure that special advocates are able to properly communicate with defence solicitors to ensure that a coherent strategy can be followed?
Lord Falconer of Thoroton: The difficulty at the moment is that the instructing solicitor for the person in the Treasury Solicitor who was, as it were, instructing the special advocate was not allowed to see the closed material. He or she could talk to the instructing solicitor, or the suspect, or the defendant, or the person who is the subject of investigation but could not really make much progress in relation to how it worked. We need to think of ways by which the Treasury Solicitor, who is properly instructing the advocate, can talk better to the main solicitor for the suspect. I do not know how that can be done because the balance you have to strike is making sure that the subject of the proceedings does not get into the detail of the closed material, but we need to work out ways that that can be done. We are looking at that at the moment.

Q103 Chairman: Can I put a suggestion to you? At the moment once the special advocate has gone into the closed proceedings he can have no further communication at all with the defendant or the defendant's solicitor?
Lord Falconer of Thoroton: Correct. Once he has seen the closed material. It is not just whether he goes into the hearing room; it is once he has seen the closed material.

Q104 Chairman: Yet the moment he sees the closed material he may discover something which is impossible to check unless he communicates with the defendant or the defendant's solicitor. The defendant may have a cast iron alibi against every aspect of the case that is being made again him, but there is no process, not even an interrogatory process, not even a list of questions agreed with the judge, which can be transmitted back to the defendant and a solicitor which would allow the special advocate to establish whether any of these things were true?
Lord Falconer of Thoroton: Yes, but the balance you are striking throughout all of this is that in principle you cannot allow the subject of the proceedings to know about the closed material; so there is a fundamental difficulty that is at the heart of all of this.

Q105 Chairman: I am suggesting one way in which you could sometimes get over that difficulty which is, without showing the closed material, you actually give the special advocate the opportunity to raise some questions with the defendant through his solicitor, those questions having perhaps been agreed with the judge following discussion with both sides?
Alex Allan: I believe the arrangements at the moment are that the special advocate can communicate with the appellant or his legal representative with the permission of SIAC and subject to any representations made by the Home Office, and that has been done on a number of occasions.

Q106 Keith Vaz: Lord Chancellor, you are the guardian of the rule of law in the Cabinet. Do you think that it is right that a British citizen's liberty can be restricted without them knowing what they are accused of and their advocate being unable to discuss the details of the allegations with them?
Lord Falconer of Thoroton: In the special circumstances that currently exist and subject to the safeguards in the Prevention of Terrorism Bill, I think it is appropriate. For the first time in considering those very, very important rule of law questions we are assisted by the fact that we have got the European Convention on Human Rights that the judges can tell us whether or not our proposals comply or not with that particular template. So it is not a question just of judgment, we are also assisted by an objective assessment of the position by the judges in relation to that. It is an incredibly

important question. I think, subject to appropriate safeguards and if the facts justify it in a particular case, then the answer is, "Yes".

Q107 Mr Cranston: I think what you have already said anticipates a lot of what I was going to ask about improving the system of special advocates. Did you mention the point about the Treasury Solicitor who instructs them not being security cleared?
Lord Falconer of Thoroton: I did, and that is a huge problem, because the relevant Treasury Solicitor cannot see the closed material and that is why Mr Garman was saying it was him alone.

Q108 Mr Cranston: You mentioned widening the pool?
Lord Falconer of Thoroton: Yes.

Q109 Mr Cranston: The point made to us was that people have historically come from immigration, administrative law backgrounds; they should also come from criminal backgrounds?
Lord Falconer of Thoroton: Again, I agree with that proposition. Both in the civil field and in the criminal field people experienced in cross-examination may well be suited to many of these cases.

Q110 Mr Cranston: I guess the question then would be when would you expect the new system for special advocates to be in force?
Lord Falconer of Thoroton: As soon as possible. The Attorney General is responsible for the precise terms on which the special advocates are instructed and engaged. The areas that I have gone through we need to discuss in full with the special advocates, because they may well have ways of improving what we are saying, but we need to introduce these as soon as possible.

Q111 Mr Cranston: A couple of months, a month?
Lord Falconer of Thoroton: Months, yes, a couple of months.

Q112 Mr Cranston: Thank you very much. In the debate there has been some suggestion that an alternative model should have been used. For example, one suggestion is that we could have had a judge to do all this assessment of the evidence and then present it to an ordinary judge. Were those alternative models explored and then eliminated?
Lord Falconer of Thoroton: It was certainly considered. Lord Carlile, I think, suggested that. I cannot remember whether or not Lord Newton proposed it as well. I am strongly against it, because what you are asking a judge to do is to become within our system, which is not inquisitorial, a prosecutor. You are saying in effect, assemble the case by pushing out that which you think might be dangerous, bringing in that which you think might be appropriate. You make the judge a player in the prosecution. That is antithetical to the way that judges normally operate in this country.

Q113 Mr Cranston: It was a possibility I raised in a debate in the House of Commons as well, but I can see where you are coming from. You are saying it is contrary to the way we operate?
Lord Falconer of Thoroton: Yes. I do not think it would work and I think the judges have got to be kept to what is plainly a judicial role?
Chairman: I want to return to the alternative model a little bit later in the proceedings, but there are a number of things we still have to get clear about how the present model works or might work.
Mr Cranston: I think that is fine for the time being.

Q114 Chairman: Can I explore "material that would be helpful to the applicant or the defendant"—exculpatory material? Are you satisfied that the present system provides any guarantee that that material will become available to the defendant or, indeed, the case dropped if it cannot be made available, and is that going to be formalised in any way, either for SIAC itself or if this process is transplanted into the High Court?
Lord Falconer of Thoroton: There is guidance that has been issued which applies to those presenting the cases in SAIC which says that any exculpatory material has got to be made available to the judge and, where possible, to the subject of the proceedings as well. The judges in SIAC have approved that approach. All areas which depend upon, as it were, one side producing material that is only known to them because it is exculpatory bring with it, as you know, the risk that it might be not be produced. The more forceful the arrangements made on the other side, the stronger the pressure to ensure that that exculpatory material is made available, but the principle, as the guidance makes clear and as the judges in SIAC have endorsed, is that it should be made available. There is an obligation on the part of those presenting those cases to produce that exculpatory material.
Chairman: We will come on later to precisely how the rules of the High Court or the Court of Sessions might or might not embody this. I bank that for the moment and perhaps come back to it later.

Q115 Mr Clappison: Can I ask you a bit more on special advocates. Do you have any plans to guarantee their accountability as far as looking after the interests of the person they are representing is concerned?
Lord Falconer of Thoroton: They plainly owe a duty to the person who is the subject matter of the proceedings. They are not in the position of an ordinary advocate because of the limited contact they can have with the person on whose behalf they are making submissions. We need to think about how we make them accountable, but it is very, very difficult.

Q116 Mr Clappison: On that point, can I take you back to the point you were making earlier on when you were being asked about the question of having an inquisitorial style judge acting as a preliminary for the judge taking decisions. The reasons which you have given are extremely understandable for the

reluctance of wanting to see that, and also it is very understandable as well your reluctance to allow the defendant to know about the material concerning him, obviously, the special material, but you predicated your answer to the question of inquisitorial judge of the *juge d'instruction* of the court in France on the basis that we have an inquisitorial system.
Lord Falconer of Thoroton: We do.
Mr Clappison: The system is different to this, is it not? There is not the chance for the defendant to challenge the material as fully as would be the case otherwise.

Q117 Chairman: A different system from what we are talking about?
Lord Falconer of Thoroton: The question is do you engage the judge, or a judge, as a player in preparing a case against a subject matter of proceedings in the way that Lord Carlile and Lord Newton and Mr Cranston propose? I am saying personally, and I think this is the view of the Government, it would not be a good idea because of the way it would change the role of a judge.

Q118 Mr Clappison: Can I ask you a little further on the special advocates, in the light of what we heard yesterday with both the derogation orders and the non derogation orders, what is going to be the role of the special advocates as you understand it now in what the Government is now planning?
Lord Falconer of Thoroton: In terms of every case where there is a control order, whether derogating or non derogating, made and there is material that cannot be shown to the subject of that order, then a special advocate will be engaged to deal with that material.

Q119 Mr Clappison: In the case of the non derogating orders the special advocate will be involved in those cases as well?
Lord Falconer of Thoroton: If there is material which cannot be shown to be to the suspect or the person who is the subject of the order, yes.

Q120 Mr Clappison: At what stage will the special advocate come in on those cases?
Lord Falconer of Thoroton: The special advocate will come in after the order is made almost invariably, because in relation to the non derogating order provision is made for the Home Secretary to make the order, then to go to court. In relation to the derogating order, the position is that, as the Home Secretary said in the course of the proceedings yesterday, the judge's first involvement would be an *ex parte* application would be made, so that means that the first application would be one with only the state making the application and not engaging people on behalf of the suspect—so it would be in both cases derogating and non-derogating, including the changes that the Home Secretary premised yesterday—after the order is made.

Q121 Mr Clappison: In the non derogating orders, as you have said, it is the Home Secretary who will take the decision in the first instance?
Lord Falconer of Thoroton: Yes.

Q122 Mr Clappison: It will then go up to the judges for formal judicial review?
Lord Falconer of Thoroton: Yes.

Q123 Mr Clappison: Will the special advocate have any contact with the defendant in those cases to find out what the defendant's case is?
Lord Falconer of Thoroton: The position is, and it will be the same in the future, the special advocate can have contact with the subject matter of the proceedings before he, the special advocate, sees the closed material. After he or she, the special advocate, has seen the closed material he cannot have direct contact with the subject matter of the proceedings, though, as Alex has pointed out, the subject matter of the proceedings can provide written material to the special advocate.

Q124 Mr Clappison: When the review takes place will this be in the form of a hearing or will it be a review which is done on the papers?
Lord Falconer of Thoroton: It is a matter for the judge to decide. If he thinks an oral hearing is necessary, then he can have an oral hearing.

Q125 Chairman: In clause five of the schedule, which is one of the many things which was discussed in the House of Commons last night, there is provision which enables you to appoint one or more advisors whom the court may call in aid. Who are they and what are they for?
Lord Falconer of Thoroton: SIAC at the moment, as you know, has lay members that sit on SIAC. The aim of clause five is for the High Court, if they think it would provide them with assistance in looking at the material, to call in aid one or other of the lay advisers. They might be people experienced in the workings of government, the workings of intelligence, or whatever, so that the judges who would make this decision can assist themselves through people such as that, in the way that the lay members of SIAC have been there to assist the High Court judges presiding over the proceedings in each individual case.

Q126 Chairman: So they do not fill the gap which was identified by the special advocates of being people who are security cleared and could assist a special advocate who wanted to explore further some information which had come forward and had no mechanism to do so?
Lord Falconer of Thoroton: No, they are intended to be of assistance to the judge making the decision. Plainly, if the judge, on the basis of what a lay adviser said to him in an individual case, said, "This line of inquiry should be followed up", then the judge could make that point to either the solicitor, the subject matter of the proceedings or the special advocate, whichever was appropriate.

Q127 Dr Whitehead: When the Newton Committee looked at the SIAC process, among other things, they observed it was subject to lengthy delays. Indeed, if you look at the difference between the dates of certification, the date of appeal and the date of determination, in a number of cases that SIAC has dealt with on the Home Office website those delays are quite apparent. For example, one case date of certification is 17/12/01, date of appeal 16/7/03, date of determination 29/10/03. Under the Prevention of Terrorism Bill, however, the Home Secretary makes an Order under clause 2 with determination after seven days, which is a remarkable acceleration in productivity.
Lord Falconer of Thoroton: I think one has to distinguish between two things. First of all, we are extraordinarily keen that both in relation to derogating and non-derogating Control Orders a judge looks at these as quickly as possible. In relation to derogated Control Orders it will mean in effect before the Order is made, in the light of what Charles Clarke said in the House yesterday, once a judge has looked at it, the judge has got to decide in practice how quickly can there be a full hearing on the merits of the particular Order that has been made; and that will vary from case to case. In some cases it can be done quickly; in other cases both sides will have legitimate reasons for wanting there to be a longer period. For example, and it is only an example, one of the reasons for the time it took to get the SIAC hearings on was the fact that the subject matters of the proceedings, the people involved, had wanted to instruct the same solicitor and same counsel quite legitimately, but that meant there had to be consecutive hearings rather than a series of hearings going on at the same time. If you bring a judge in as quickly as possible, he or she can determine how you get a fair process. The seven day period you referred to was on the basis, in the original draft of the Bill, that the Order was made by the Home Secretary. We were absolutely determined it got before a judge as quickly as possible so that he or she should then determine how quickly could that be looked at on the merits; and also to check there was a proper basis for the Order to be made. I do not retreat for one moment from saying that remains the principle. I fully accept the judge might have to conclude or take a bit of time for a full hearing but a judge getting a grip of it very early on we believe is vital.

Q128 Dr Whitehead: Given that is the case, could that line of reasoning not have always been applied to the SIAC process? The lengthy delays that we observe, could those not have been condensed in the way you describe?
Lord Falconer of Thoroton: SIAC was not across these cases. SIAC was regularly having directions hearings in all of these cases and, in effect, agreeing with the parties to these proceedings when the case should come on. I think the critical thing is that it is not that the State, in the form of the executive, should not be determining how quickly a case is heard—it should be the judge, so that he can set out a fair timetable as far as both the State and the appellant or the subject matter of the proceedings is concerned. It is very difficult to identify how long an individual case would take; some cases take longer than others; and in very many cases people want the advocate of their choice; they want properly to prepare the case they are going to make and a judge has got to determine how long that takes. The critical thing is the court gets a handle on the thing as quickly as possible.

Q129 Ross Cranston: So really the seven days is a preliminary hearing?
Lord Falconer of Thoroton: Exactly.

Q130 Ross Cranston: Are the Special Advocates going to have a role in that first hearing?
Lord Falconer of Thoroton: They could be engaged before the seven days but there is absolutely no prospect that, within the seven days, a court, a Special Advocate or, indeed, an instructing solicitor could have got together.

Q131 Ross Cranston: Exactly.
Lord Falconer of Thoroton: Our concern is that the judge immediately gets into the story. Remember, those seven days in practice have been replaced by the *ex parte* hearing; because the judge now, in a derogated Control Order, has got to make the decision before it comes into effect; and the judge is in the derogating cases, before a Control Order is made.

Q132 Chairman: We have to take it on the basis of the letter, I am afraid, because we have not seen any words which bring that into effect.
Lord Falconer of Thoroton: That is right. I am proceeding because the Home Secretary made it absolutely clear, both in the letter he wrote (which I hope everybody has seen) and in what he said in the House of Commons yesterday, that there was going to be an *ex parte* process which would involve the judge making a decision—and the judge, in effect, prescribing a short period of time within which the matter has got to come back before the court. That is the normal way that the courts would operate in civil order proceedings. They make an Order *ex parte* if it is urgent, but they bring the parties back before them as quickly as possible to determine, "Now, what's a fair process to determine whether or not this Order should continue?"

Q133 Ross Cranston: Could I take you to the rule-making provisions in the Schedule. If I could just go through them to help me—and other members—to clarify my thoughts on this. You are going to make the rules. I take your point on procedure, because as lawyers we know that procedure is quite important—the old quip by Maitland—that the forms of action rule us from the grave. First of all, clause 3(2), you are going to exercise the powers, if not the person by whom they are otherwise exercisable. Who is that? Is that the CPR?

Lord Falconer of Thoroton: Exactly.

Q134 Ross Cranston: I do not think it is in the Bill, is it?
Lord Falconer of Thoroton: No. In England and Wales that is right. In Northern Ireland it is clearly the Lord Chief Justice who makes the rules.[1] These provisions only apply in Northern Ireland and England and Wales—not the Bill, but these rule-making provisions. In Scotland it is the Lord President who will make the rules.

Q135 Chairman: Could I clarify the Scottish position, because the Bill is very opaque on that point. Does it require a Sewel motion for the Court of Session to be instructed to carry out SIAC-type procedures?
Lord Falconer of Thoroton: I am told that it does not, no.

Q136 Chairman: The Government at Westminster can impose upon the Court of Session the rules—it can write the rules?
Lord Falconer of Thoroton: No, the position is as follows: terrorism is reserved therefore this Bill applies throughout the United Kingdom. In the light of this Bill it is for the Court of Session to determine what rules it makes.

Q137 Chairman: Unlike England and Northern Ireland the Court of Session can decide for itself whether to operate SIAC-type rules, and it might decline to do so?
Lord Falconer of Thoroton: It is a matter for the Scottish courts to determine what procedural rules they adopt, yes.

Q138 Ross Cranston: You then have to consult the Lord Chief Justice?
Lord Falconer of Thoroton: Yes.

Q139 Ross Cranston: And the Chief Justice of Northern Ireland?
Lord Falconer of Thoroton: Yes.

Q140 Ross Cranston: You do not have to lay the rules before Parliament. I am just wondering—given this is a very sensitive area and, by contrast, with the SIAC rules—if that ought not to be the case. Just to supplement that, subclause 5 says that in the case of the Northern Ireland rules they do have to be laid before Parliament?
Lord Falconer of Thoroton: Yes.

Q141 Ross Cranston: So it is a bit of a muddle?
Lord Falconer of Thoroton: It reflects the current rule-making powers, which mean the Northern Ireland ones do and the English ones do not. If you regard that as a muddle then you are right—there is a muddle in relation to it. These rules are incredibly important, for obvious reasons. One would expect there to be as wide-ranging a look at these rules as possible; but by the nature of what we are doing, at least on the first occasion, the rules are required quite quickly.

Q142 Ross Cranston: Why not lay them before Parliament?
Lord Falconer of Thoroton: We are simply reflecting the way that the rules are currently made. We have placed in the Bill an obligation to consult with the relevant Lord Chief Justices. There needs to be a proper debate about these rules, and I hope we do achieve that.[2]

Q143 Chairman: The Bill expressly says that you do not have to consult the Lord Chief Justice any more once the Bill is passed? Looking at subsection 4: "The requirements of subparagraph 3 may be satisfied by consultation that took place wholly or partly before the passing of this Act".
Lord Falconer of Thoroton: All that that is saying is I must consult the Lord Chief Justices, but I can satisfy my obligation under this Bill by starting to consult them before the Bill becomes an Act. All that is saying is that it would not be unlawful for me, to comply with this obligation, if I started consulting with the Lord Chief Justices now. It is not saying I can rely on some consultation about something else.

Q144 Chairman: Does it not also protect you if you now say, "I"ve spoken to the Lord Chief Justice, that's enough, and I"m going ahead now"?
Lord Falconer of Thoroton: It would certainly do that.

Q145 Chairman: Are you going to do that?
Lord Falconer of Thoroton: No, I want to make sure that there is a proper debate about this. What I want to try and avoid in these particular bits of the rules is that nobody should say, "We can strike these rules down because you didn"t consult this person or that person", that is all. I am not at all at odds with the proposition that these are very important rules; they need a proper debate.

Q146 Ross Cranston: Could I take you to the burden of proof in clause 4(1)(a). I think it would be a retrograde step if the rules could somehow subtract from the position that is already there in the earlier part of the Bill—clauses 1 and 7 about the burden of proof. That would not be the intention, would it, to undermine?
Lord Falconer of Thoroton: A) it would not; and b) I do not think it could. You have got provisions in a statute, for example, saying that we have to be satisfied on the bounds of probability of a particular

[1] *Note by witness:* Rules of court for the High Court of Northern Ireland are made by the Northern Ireland Supreme Court Rules Committee, which is chaired by the Lord Chief Justice of Northern Ireland

[2] *Note by witness:* When making the first set of rules, the Lord Chancellor will be exercising the powers of the Rule Committees in England and Wales and Northern Ireland, as extended by paragraph 4 of the Schedule to the Bill. Rules made by the Lord Chancellor will therefore be required to be laid before Parliament and will be subject to the making of Civil Procedure Rules. Paragraph 3(5) of the Schedule allows the same procedure to apply to the making of the first rules of court for Northern Ireland (instead of the Northern Ireland statutory rules procedure)

thing, which is 2(1)(a). It is absolutely plain, as a matter of drafting, that the rule-making power is not intended to supplant that. You say clause 7 in relation to a burden of proof Order—

Q147 Ross Cranston: I cannot find it either.
Lord Falconer of Thoroton: There is a burden of proof issue in relation to clause 1.

Q148 Ross Cranston: The principle is that this is not going to undermine/weaken the burden of proof?
Lord Falconer of Thoroton: No.

Q149 Ross Cranston: There is already criticism that the burden is not high enough.
Lord Falconer of Thoroton: Absolutely right.

Q150 Ross Cranston: If I could just take you to (b): (b) would not enable you to completely do away with a hearing. You really mean there an open hearing, do you?
Lord Falconer of Thoroton: I mean an oral hearing. No, it would not.

Q151 Ross Cranston: You earlier raised the issue about disclosure, and this is 4(3)(c). Again, I think the concern might be that, as you quite rightly said, there are already established practices approved by SIAC as to disclosure. I think the concern would be that the rules might somehow again weaken the existing provisions about disclosure; because even though there are no provisions at present, a practice has grown up approved by SIAC as to disclosure. Again, a *Pepper v Hart*-type statement. You can give that assurance?
Lord Falconer of Thoroton: I can give that assurance. Just to be clear what the assurance I am giving is: I can give you an assurance that the rules will be able to prescribe that the State has got no exculpatory material that it is withholding—that is really what you are on about there.

Q152 Ross Cranston: Yes, and would disclose in accordance with the current practice?
Lord Falconer of Thoroton: Exactly.

Q153 Ross Cranston: Are you happy that the existing practice (which you have just said is going to be continued) is sufficient to meet human rights standards?
Lord Falconer of Thoroton: All the indications I have got from the questions I have asked and the research that I have done is that it is working; but I take that on trust. I am not aware of anybody proposing a whole new method of doing it. I think the critical aspect of it is that it is clear that the State, when presenting these cases, has got an obligation to present any relevant exculpatory material. If it is not prepared to do so then it cannot proceed with the case.

Q154 Chairman: Special Advocates will only appear through the normal courts, if I can call them that, in circumstances in which their role is exclusively to assist the defendant, I am not sure if they are ever involved in civil cases—but in very, very limited circumstances. You are about to make some rules which you will require the High Court to carry out. In the High Court of England somebody will be subject to rules under which the person representing him cannot communicate with him or with his solicitor. Do you think the judge is going to buy that?
Lord Falconer of Thoroton: I think they recognise the difficulties in relation to it. I think the High Court judges who have conducted the SIAC proceedings have done it impeccably. I think they recognise the great difficulties in it. Lord Carlile and Lord Newton have recognised the great dilemma is that national security requires you should not disclose everything to the subject of the proceedings, but national security also requires that Orders be made. It is trying to balance that very difficult balance. If Parliament determines that this should happen, as indeed in relation to the setting up of SIAC, then I think the High Court judges will loyally do that which Parliament prescribes for them.

Q155 Chairman: As Mr Cranston has pointed out, Parliament will not (in the case of England) have any jurisdiction over whether the rules you devise are satisfactory or strike as good a balance as possible between those conflicting interests?
Lord Falconer of Thoroton: That is why the judges are so important in relation to this, because the judges do have to be consulted in relation to it. One of the reasons for making it the High Court and not SIAC is to make it absolutely clear that it is not some special tribunal—this is a tribunal right in the heart of the High Court, as it were the main court in England and Wales, and Northern Ireland and the Court of Session in Scotland—and it has got to be, as much as possible, in accordance with the procedures of the High Court.

Q156 Chairman: The Court of Session has got discretion, we have established. The Court of Session can decide this for itself, quite unlike the situation in England. In England how much power do the judges get to say to you, "We"re not going to run our High Court in the way you"re currently suggesting unless you change your proposals"?
Lord Falconer of Thoroton: If they said that then a) that would be a matter of huge importance; and b) of course I would take it hugely into account. I do not believe that they will do that. Indeed, if you look at SIAC, they took the view that the right course was to help in making that court work.

Q157 Ross Cranston: As I understand it, once these are launched they are then amendable in the ordinary way?
Lord Falconer of Thoroton: Exactly.

Q158 Ross Cranston: That of course, in terms of the CPR, is by the judges and so on?

Lord Falconer of Thoroton: Exactly.

Q159 Ross Cranston: That was not exactly my question. I just wanted to say in terms of this human rights aspect, should there be a specific provision, for example, to allow cross-examination to meet your Article 6 obligations? Should that be specifically there so that counsel can cross-examine either in open or closed session?
Lord Falconer of Thoroton: Whether or not you need a specific rule to say that I am not sure. I envisage the position being that like in practically all High Court procedures (and you will know this as well as anybody) the courts have got great discretion to determine how the case is actually conducted. I cannot envisage it arising, if the judge in a particular Control Order case thought somebody needed to be cross-examined, that that would not happen. Indeed, that is how I envisage the rules working.

Q160 Ross Cranston: I think that is very helpful because a lot of these are very factual inquiries, are they not, where cross-examination is very important?
Lord Falconer of Thoroton: Absolutely.
Ross Cranston: I find that very reassuring.

Q161 Chairman: Once somebody is the subject of a non-derogated Order it is pretty much the equivalent of a criminal conviction, is it not? If they fail to satisfy the terms of the Order in any detail then they are subject to a criminal conviction?
Lord Falconer of Thoroton: No, I would not accept that. Indeed, I would most certainly say it is not the equivalent. Is it not much more like an Injunction or Restriction Order that the courts very frequently make which they have to make for preventative reasons? If you break a Court Order or an Injunction then you are guilty of contempt and can be subject to fine, imprisonment etc Similarly, if you break the Control Order you are guilty of a criminal offence which has similar penalties to contempt. I would not think that the right way to look at this is to say it is the equivalent of a criminal conviction.

Q162 Mr Clappison: There is one important difference because all those forms of legal restraint you referred to, and Anti-Social Behaviour Orders as well, they are made in the first instance by a Tribunal, are they not, and this is being made by a Home Secretary in relation to the non-derogation?
Lord Falconer of Thoroton: In relation to a derogating Control Order it would be made by an *ex parte* order of a judge in the light of the statement Charles Clarke made yesterday. In relation to a non-derogating Control Order it would be made in the first instance by the Home Secretary but then it would be subject to judicial review.

Q163 Mr Clappison: I understand that, but the question which was being asked yesterday in the House—and I do not know if you can assist us any further today—it has not conceded that the derogation Orders are going to be made as the result of a judicial proceeding in the first instance—and they are the more serious types of case, with the more serious infringements of liberty. Why cannot the non-derogation Orders be made in the same way?
Lord Falconer of Thoroton: The distinction between the two is based upon the level of intrusion with the subject matter of the Order, so a derogated Control Order inevitably involves deprivation of liberty; and we think, on the basis of representations made, that should only be made where a judge has made the Order in the first instance.

Q164 Mr Clappison: Quite so, but those are going to be the more serious cases where the more serious information is at stake—all the reasons which you gave earlier about the need for people not to see the information because of the evidence concerning them. Why could that not be extended to the less serious type—the non-derogation Order? What is the problem with having a judge or some tribunal make the Order for the non-derogation Orders?
Lord Falconer of Thoroton: In the first instance the decision is made by the Home Secretary—that is the non-derogating one. That is not by its nature as intrusive and, therefore, the balance of procedural protections is different in the non-derogating ones than it is for the derogating ones. The crucial difference that we rely on is the level of intrusion with the subject matter of the proceedings.

Q165 Mr Clappison: None of that is a reason or a problem as to why there could not be a tribunal deciding it in the first place. You are just saying that the other one is more serious?
Lord Falconer of Thoroton: That is right. That is why there are different procedural safeguards.

Q166 Mr Clappison: You are giving us the reason, but there is no problem, no obstacle, to there being a tribunal to deal with the non-derogation Order case, is there?
Lord Falconer of Thoroton: If you are saying, could you procedurally arrange for an *ex parte* application to be made to the judge in relation to the non-derogating ones, I am sure that is right, yes. As I say, the reason for the distinction is the extent to which we believe a distinction should be drawn between depriving somebody of his or her liberty, as opposed to something which, while it restricts them, does not constitute deprivation of liberty.

Q167 Mr Clappison: Are you in fact making a difficulty for yourself with this? Everybody has sympathy with the problems which you are facing; nobody wants evidence to be released to people who are under suspicion; and everybody understands the nature of the threat which we are facing; but you are actually doing something here which is discrediting the whole process and raising a question mark against it. It could be easily remedied, could it not?
Lord Falconer of Thoroton: The sorts of Order that could be made under the non-derogating power are things like requiring reporting to a police station; or, going further, restricting somebody from seeing particular people; it could include having a curfew overnight. The risk that you have got is that you

make an Order like that; there is then a period of time before the applicant can get to court to get the Order discharged. Is it a sufficient safeguard that a period of time, some days, elapses before the person can get to court and get that Order discharged? We think, in striking the balance, the risks of injustice justify doing it on that particular basis. Remember, you assume for these purposes that in many cases such an Order will be required to protect the State. I understand entirely the point you are making, but a judgment has to be made about the precise extent of judicial involvement. I think there is also a point about the extent to which you have got to mark clearly the difference between the two.

Q168 Mr Clappison: I understand that. I am specifically putting this with some sympathy for the position you are in. I understand the nature of the problem. I think we all have to be very responsible in the face of a problem like this, but it does seem to be the case that you are making things difficult for yourselves

Lord Falconer of Thoroton: We are certainly causing a great controversy about it!

Q169 Chairman: Could I just take you back to the review process in court of a non-derogating Order which is covered in subsection 5, clause 7. The threshold for that review is really rather a difficult one to meet. The Secretary of State's decision has to be flawed, either in respect of necessity for terrorism or that the obligations are necessarily in relation to that person. That is a very high threshold to review, is it not?

Lord Falconer of Thoroton: It is judicial review basically. It is not like a derogated Control Order where we are saying the judge decided in effect on the basis of all the material whether he would make the Order or not. In relation to the non-derogating Order what the court is deciding is was there a proper legal basis on which the Home Secretary could have made this Order?

Q170 Chairman: Bearing in mind that these Orders are such, if a number of them were taken together, that the Home Secretary has himself conceded that that might put them right up into derogated category, some of them are pretty serious and, if taken together, might constitute a derogated Order. Not just dealing with, "You might have to report to the police station once a week", you might be dealing with a combination of curfew, restricted visits, no telephones—the whole lot or a combination. It is in that context I am merely asking whether the threshold is too high?

Lord Falconer of Thoroton: Wherever you draw a line, the bottom end of the next category and the top end of the previous category might be quite close. In reality probably most of the non-derogated Control Orders would be somewhere in the middle, rather than right close to a derogating Control Order. Question: is it sensible to have a different test in relation to a non-derogated Control Order? The test being that the judge looks at what the Home Secretary has done and says, "Could a reasonable Home Secretary have come to that conclusion?" which is ultimately what it amounts to. That looks to me a moderately sensible way of doing it. The courts will be very acute to ensure that if a Home Secretary has made such an Order it should only be made when the circumstances plainly justify it. I am confident that the courts will provide adequate protection. If we are talking about deprivation of liberty—which is a derogated Control Order—then I think we need to go even further, because that is such a significant step. Question: do we have confidence that the judges, when confronted with the Home Secretary's non-derogated Control Order, will be able to say to themselves, "Was it reasonable to make that Order?" because that is ultimately the test. I have complete faith that they will be able to.

Q171 Chairman: The test is expressed in the form, "Was the decision flawed?"

Lord Falconer of Thoroton: If the decision was one that no reasonable Home Secretary could make then it was flawed. That is the test.

Q172 Mr Soley: Can I take you to the alternatives to the current approach, which actually goes back not so much to the Bill but to SIAC itself and, indeed, the situation prior to that with the old Prevention of Terrorism Act. There cannot be too many people who think we have got a clear policy on this at the moment in the wider sense and I understand why it is a profound threat that we face—far worse than anything else—and it does not sit comfortably with the British style of justice. Bearing in mind the long history of the Prevention of Terrorism Act in this country where, contrary to popular opinion, we have got people up on the basis of executive power with internment and, indeed, Exclusive Orders, why do we not look again at, at least, two possibilities: one is, for this very narrow area of terrorism, the inquisitorial system; and, secondly, the alternative to that, the special court system used in a number of places, including Ireland, very successfully. Why do we go down a road of trying to make the British system of justice fit an impossible position where you cannot let the person see the evidence, cross-examine and so on as you point out? Why not go down, in the narrow area of terrorism, the inquisitorial approach or special court approach?

Lord Falconer of Thoroton: On the inquisitorial approach I am strongly against the idea of a judge becoming a player?

Q173 Mr Soley: Why?

Lord Falconer of Thoroton: Because the judge has got to stand outside the process, in my view.

Q174 Chairman: There could be two judges.

Lord Falconer of Thoroton: You have got a prosecutor and you have got somebody putting the evidence together, but for a judge to become—

Q175 Mr Clappison: It works in France.

Lord Falconer of Thoroton: They have got a totally different system from us. I do not know if you saw (and I say this with grave reservation because the

facts need to be checked) but the process of the judge investigating can take a number of years before a conclusion is reached. I would not regard it as adding lustre to our system that three or four years went by whilst investigation was going on. I think it would also draw the judges into a process that would politicise them much too much. They would become not responsible for adjudicating on material presented by two sides; they would become responsible for decisions being made of a semi-executive nature as to what should happen in relation to terrorists. I am strongly against it. I believe a much better approach is to try to preserve as much as possible of the current arrangements, making only those amendments necessary to deal with the particular circumstances of the problem; and that is the *Chahal* approach which Canada thought up which the Human Rights Court approved, which we then adopted in the 1997 Act. That is a minimum change but keeping the full scepticism of that approach but recognising you do need to make some changes. All of my instincts say, "Don"t throw out the existing system—amend it to the minimum necessary".

Q176 Mr Soley: First of all, I think we need to put aside the example of France. There are other examples in Europe of the inquisitorial system which do not have the failings of the French system. Secondly, when you try and say just the British system, you are acknowledging (as you have acknowledged this morning) that you create a situation where the defendant does not have anybody to speak for him and cannot ask questions?
Lord Falconer of Thoroton: Has got someone to speak for him but not on particular parts of the case.

Q177 Mr Soley: Cannot ask questions; cannot see the evidence against them. These are very serious erosions of the British system—very serious. If you are saying that on the very narrow issue of terrorism (and everybody accepts terrorism is a very special case because it is designed to undermine and destroy the State), and coming up with an inquisitorial system where you had set judges for that, why would that be such a terrible thing to do? It need not impact on the rest of British law at all?
Lord Falconer of Thoroton: A) this Bill is making a change in the very narrow area of terrorism. B) you are, in effect, subcontracting to a judge what is, in effect, an executive decision, which I think is dangerous and wrong, and loses you the benefit of the instincts of the current system. What we are doing in particular, for example, by saying it is the High Court and not SIAC any more, is saying that everything has got to be as it is in looking at these issues, except we have that special rule. I cannot do anything about the particular problem because I think everybody around the table is accepting you somehow have got to deal with that. I am quite sure that the right way to do it is to say to the current justice system, "Deal with it in accordance with your just traditions", rather than trying to invent a wholly new system.

Q178 Mr Soley: Whether we talk about the present Bill or whatever might emerge out of it—or whatever was happening under the old Prevention of Terrorism Act which got this country into a lot of trouble in international bodies of one type or another—surely we are not making a great success of doing the Bill in the way you are describing it?
Lord Falconer of Thoroton: We can talk about the detail—the detail really, really matters—but I am quite sure the approach we are taking (which is, let our traditional courts decide as much as possible in the ordinary way) is the way to ensure this is not the thin end of the wedge. People refer to the internment example, and I think everybody agrees that internment in the North of Ireland in the 1970s was a disaster, that was the executive in effect. The debate we are having here is: should it be as long as seven days before the court gets to look at the issue? It is a totally different situation. We have learned from that.

Q179 Mr Soley: I agree, but that is my point—it was an executive decision and that is what I am trying to avoid. Let us leave the inquisitorial system although I suspect we will have to revisit it. What about the inquisitorial alternative? What about the special courts alternative?
Lord Falconer of Thoroton: When you say "special courts" what do you mean?

Q180 Mr Soley: The Irish version is the simplest version around, where they have a special court which has special powers to not reveal evidence but to consider evidence put before them and to keep it from the defendant.
Lord Falconer of Thoroton: Is that different from the three wise men who were hearing the pre-SIAC cases?

Q181 Mr Soley: There is an element of similarity.
Lord Falconer of Thoroton: *Chahal* in effect said, "You can"t go on doing that".

Q182 Mr Soley: There are more legal safeguards in the Irish system. The Irish system does not derogate from the European Convention, nor has it been in any trouble with Europe so far.
Lord Falconer of Thoroton: We are not derogating from the European Convention in relation to the process. The derogation, if it ever comes, is based upon the fact that you are depriving people of their liberty without full criminal justice.

Q183 Mr Soley: The Irish do that. They are not in trouble with Human Rights legislation—why? They have special courts, why are they not in trouble with the European Human Rights Convention?
Lord Falconer of Thoroton: I wonder if there is a significant difference between what you describe as the Irish special courts and what the High Court would be doing here. The Irish court system (and I say this with a great degree of diffidence) is very, very much based on a common law English court system. The balance that needs to be struck is between the three wise men type approach, which has been

rejected by the European Convention on Human Rights and a traditional court process which I think is what the Irish have done; but I need to check my facts.

Q184 Mr Soley: Could you look at that. I accept that it is in fact an extension of the three wise men, and it may be because they have not had quite the same terrorist problem we have recently, it may be it has not been faced with the problems we have had. I suspect there are options there for us.
Lord Falconer of Thoroton: I will do that.[3]
Mr Soley: Then perhaps let the Committee know. Can I look at one other option, which I recognise does not meet the whole case; but it was suggested by Lord Newton, amongst others, that we look at a new Act dealing with acts preparatory to an act of terrorism.

Q185 Chairman: Could I declare an interest as the Deputy Chairman of the Newton Committee.
Lord Falconer of Thoroton: The Home Secretary has made it clear that we should look at that. I think that might provide a criminal proceedings basis for some people currently not caught within the criminal net. Charles Clarke has made clear that prosecution is the favoured option. I do not think anybody, who has looked at the detail of the possible cases, believes that that would involve solving the problem to the extent that you would not need anything other than criminal proceedings. Charles has made clear that he will look at that, and he is right to look at that and we should do that.

Q186 Mr Soley: Should not our approach on this be to recognise that what we have been trying to do for many years, including yesterday, is actually not working very well. You cannot be pleased with a system where we are trying to surround our own system with all these strange rules about special advocates and so on; you cannot be pleased with that; you cannot be satisfied with it; nobody can be satisfied with it. We do it because we can see no other way forward.
Lord Falconer of Thoroton: Yes.

Q187 Mr Soley: Yet it seems to me that there is a battery of alternative options: one of them is the act preparatory to terrorism, and another may be the special courts; so that you eat away at the numbers involved, you have to reduce them even further. The very last thing we want is an Act of Parliament like the one yesterday which is there, frankly, for years to come and which is dealing with what could be a very significant number of people.
Lord Falconer of Thoroton: I could not agree more with your approach. You need to reduce, reduce and reduce as much as possible the number of cases that you need to deal with in the particular way outlined in principle in the Bill; but currently I think most people take the view there will be some that need to be dealt with in that particular way. If they have to be dealt with in that particular way it does require something that is abnormal. We have got to make it as far as possible and subject, as much as possible, to proper safeguards that ensure there is no injustice and there is only the minimum intrusion.

Q188 Mr Soley: One very final question which you might not be aware of, but the United Nations High Level Panel, which reported in January, has made recommendations which are likely to be accepted that there is an agreed definition of terrorism; they have given that definition and I think most countries will sign up to it. They also raise the possibility of defining terrorism either as something for international criminal courts or as a crime against humanity. Could you see that as a way forward for the special groups like al Qaeda?
Lord Falconer of Thoroton: It is certainly something to be looked at. I am not quite sure how it fits into individual atrocities. For example, if you think about Beslan, Atocha Railway Station, Bali nightclubs, where do they fit into that?
Mr Soley: They would be defined as crimes against humanity and that then produces a possible legal focus. What the panel is struggling for is a way of dealing with terrorism worldwide, and that is what we are struggling to deal with. The interesting thing is that each country is coming up with a range of different options, some good, some bad and some indifferent. It is not something for now.

Q189 Chairman: The Lord Chancellor can go away and think about it.
Lord Falconer of Thoroton: There is a legal definition point there, is there not.

Q190 Keith Vaz: Lord Chancellor, prevention of terrorism is part of the responsibilities of the Home Secretary?
Lord Falconer of Thoroton: Correct.

Q191 Keith Vaz: As with the previous session on immigration and asylum, do you not feel there is a feeling in the country that we are going too far and your Department is being pushed too far as a result of what the Home Office is doing? Do you think there is enough consultation at the earliest possible stages with your Department about the interests of justice, the rule of law and all these other considerations that are quite proper?
Lord Falconer of Thoroton: Yes, I do. These are incredibly difficult issues. This Home Secretary and previous home secretaries have always consulted widely within government about these issues. Difficult problems arise and we have got to act jointly as a government in reaching conclusions about how you deal with them. There is detailed discussion both at official and political level. In relation to this particular Bill I have felt that it has been a very, very cooperative operation. There has been no Bill since I have been Lord Chancellor which has not raised more difficult issues than this particular Bill.

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Q192 Keith Vaz: As far as the judiciary is concerned there will be a time when you will turn round and say, "Enough and no further", because the judges are coming to you to say, "We"re getting involved in politics". Have there been any representations from the judiciary, either formally to you or informally to Mr Allan, in which they say they are concerned about the direction of the policy and they are being brought into politics far more than they expected?
Lord Falconer of Thoroton: In relation to this particular Bill it is a matter for Parliament, on the proposals put by the Government, to decide what to do. Of course, I have kept the judiciary fully informed as to what we are proposing. I do not want to say what has passed between me and the judiciary in relation to this particular Bill.

Q193 Chairman: We can but speculate! Can I thank you very much for the careful way in which you have dealt with the questions this morning. Last night's proceedings—and here I state a personal view—allowed for no discussion of any of the details of the Bill beyond the very first group of amendments and the principle of bringing a judge in at the initial stage of derogating Orders. The Bill has a mass of very, very important detail which I think we have begun to explore today. What I contend is that the transcript of today's proceedings should be available by tomorrow and, therefore, available to their Lordships for their discussions tomorrow and Thursday; that will not be a fully corrected transcript, but I am sure you will be very keen to see these exchanges available at an early stage. We have explored some important issues in a Bill which, as you rightly pointed out, is perhaps the most fundamental one you have dealt with in the whole of your time as Lord Chancellor.
Lord Falconer of Thoroton: We had a series of exchanges about Special Advocates and I have prepared a page and a half document which does not say anything beyond what I have said but might be a useful point to help the Committee in relation to seeing where we are going in relation to Special Advocates, because I knew that was one of the particular concerns of this Committee. Could I distribute that to the Committee?

Q194 Chairman: If you let us have it we will distribute it to the Committee and that will be helpful. What will happen, of course, is that at some time we will produce a report on Special Advocates and their role and SIAC procedures and will continue to operate for its original and proper purposes. Then events will move rather more quickly in relation to the Prevention of Terrorism Bill, which is why the transcript at this stage is what can be of most use to both Houses of Parliament, insofar as the Commons gets an opportunity to look at these things properly and, during the process, the Lords doing so.
Lord Falconer of Thoroton: It goes without saying that if you want to hear from me again whilst the Prevention of Terrorism Bill is going through I am obviously at your disposal.
Chairman: That is very helpful.

Q195 Peter Bottomley: If the paper on Special Advocates is made available to Special Advocates I am sure they will benefit. Could I ask whether you or your colleagues would be prepared to meet with the Special Advocates, or whether you have, to discuss their concerns?
Lord Falconer of Thoroton: Of course, and I hope it was made clear when I was answering a question, from Mr Cranston I think—when is this going to come into force—the Attorney General would envisage speaking to the Special Advocates directly to see what their views were before one finalised whatever proposals one would make but, of course, that goes without saying.

Q196 Chairman: This has to be done very quickly in the next week or so?
Lord Falconer of Thoroton: I agree.
Chairman: Thank you very much indeed.

Tuesday 8 March 2005

Members present:

Mr Alan J Beith, in the Chair

Peter Bottomley
Ross Cranston
Mr Clive Soley
Keith Vaz
Dr Alan Whitehead

Witness: **Rt Hon Lord Goldsmith QC,** Attorney General, examined.

Chairman: Attorney General, good morning and welcome to this Committee. We are very glad to have you with us. Before I start I would ask any colleagues to declare relevant interests they might have.
Keith Vaz: I am a non-practising barrister and my wife holds a part-time judicial appointment.
Ross Cranston: I am a barrister and Recorder.

Q197 Chairman: We started our work looking at SIAC in its original purpose as part of the immigration law but of course extended it obviously into SIAC's role in dealing with the 2001 Act detainees, the Belmarsh detainees, and in the course of it the situation arose that Special Advocate procedure became a likely part of a whole new regime in the High Court and the Court of Session in the High Court of Northern Ireland, under the legislation which is currently having its bumpy ride through the House of Lords. So if we could start by trying to go to the heart of Special Advocate procedure. Given that a large number of Special Advocates have expressed in their evidence to us their concern about the difficulties of the procedure, the difficulties of achieving fairness in it, do you think it can be improved or in some way made into a process in which those taking part feel that they have given the defendant or the applicant an opportunity to rebut potentially false claims made against them?
Lord Goldsmith: Yes, I do. I think there are two aspects of that. One is the question of principle about having Special Advocates, and 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. If there is to be reliance on closed material, because that indicates a threat to national security or safety, then it is extremely important, it seems to me, that that material is tested as robustly as one can do in the circumstances where it may not be possible for that particular material to be disclosed to the person who is affected by it. So I think in principle it is the best system that we can devise and I can say something further about how we came to the system, if that is helpful to the Committee. As to whether or not the procedures can be improved, I believe they can. I read with considerable interest the memorandum of evidence which the Special Advocates put to this Committee, and indeed the evidence which they gave, and I do believe that they do make a number of important points about how the system has been operating, and as a result of seeing that, I asked for work to be done on what we could put together so as to meet those concerns. That work has been going on, and indeed I met a number of the Special Advocates myself yesterday, with the Treasury Solicitor and others present, to talk about what we have in mind, and there are a number of areas of improvement that I now want to put in place so as to meet some of those concerns.

Q198 Chairman: Is not the essence of any improvement summed up by what you said in your description? How can a Special Advocate test something, other than on the basis of his own personal speculation and his experience, if he cannot check the facts with the person who is, not technically but in practice, his client, to whom he cannot speak?
Lord Goldsmith: I do not think that is right because I think that makes an assumption as to what the nature of the material is which is being relied upon, that it is always only of the nature of material which depends upon specific instructions from the individual concerned about that material. The Court of Appeal, for example, made the point in one of the cases—I think it was *M*—that it was plain that the way the Special Advocate had operated on that occasion had had enormous impact on the case, and indeed that was the case, if I have the right case, in which the Court of Appeal reversed the Home Secretary's decision on the basis of an analysis of the material upon which he was relying, as exposed by the Special Advocate.

Q199 Chairman: It is obviously possible, given the ability, skill and experience of Special Advocates, but there must surely be circumstances where it is factual evidence being brought forward—if there is no factual evidence there would be no case going on at all—which is theoretically open to challenge, and unless it is internally inconsistent—that person is alleged to be in two places at the same time—then he does not have that opportunity, unless he uses a procedure which I gather has been very rarely used, in which he can ask the judge for permission to put a particular point to the applicant.
Lord Goldsmith: He can do that. I think that the way that the system can operate is, first of all, that the Special Advocate, before seeing the closed material, is fully entitled—and indeed I would say encouraged—to speak to, let us call him the applicant or the person affected and that person's lawyers to get as much information as he can about both the nature of the case, which has been disclosed

openly—and some part of the case will have been disclosed openly—and what the answer to that is, and as much as possible, about the details of the individual so that when he gets to see the closed material he will already have a very clear picture of what the individual says he has been doing with his life, which he can test and use against the closed material that is being put forward. I do not think it is just a question of internal inconsistencies, if somebody says somebody was in two places at the same time. Quite a lot, for example, depends upon the correctness of inferences perhaps to be drawn from particular material. I have not been personally involved in any of the individual cases of any of the detainees under the 2001 Act, so I do not speak about the details, but I understand that it has been possible to test the strength of the material simply by expert and intelligent cross-examination of the witnesses, so that one can see from that whether the basis upon which suspicion is formed (or if the Act ends up with having a higher standard of proof than that), what that is based on. So I think there is a lot to be done. I do not deny for a moment that there will always be a point at which if there is a specific allegation—for example, to take an extreme case, if the reason for the Home Secretary's concern was intelligence—that on a particular day at a particular meeting particular persons agreed that they would carry out some terrorist atrocity, that is plainly highly important information. The great difficulty from the Home Secretary's point of view is, does he rely upon that or not? If he does not rely upon it then that may mean that people's lives are put at risk. If he does rely upon it and discloses that what he actually knows is that meeting on that day, that may inevitably compromise the source from which that information comes. It may be someone under cover who was present and it may be not that difficult to deduce that that is what it is. So on the one hand you put at risk the lives of people who may be affected if the intelligence is not relied upon; on the other hand, you may put at risk not just the life of the person who is giving you that information but also that person's ability or the ability of the procedures you are relying upon to protect you from future atrocities. In those circumstances it seems to me entirely right that it should be possible somehow to rely upon that material, but what I think would be wrong—which is what we used to do—is to say that that material is relied upon but it is not tested before a court. What used to happen, for example under the 1974 Act, was that the Home Secretary received a report from a Special Adviser which was not disclosed to anybody, so the court is faced with the proposition saying, "The Home Secretary has reached this conclusion on the basis of intelligence. He has had some independent validation but we are not going to allow you to test what it is."

Q200 Chairman: What consequence under the 1974 Act?
Lord Goldsmith: That was the Prevention of Terrorism Act (Temporary Provisions) Act 1974, and we did the same thing.

Q201 Chairman: I am trying to establish, because I cannot remember, what was the consequence of the proceedings that you have just described under the 1974 Act?
Lord Goldsmith: I believe I am right in saying internment. And Exclusions Orders.
Chairman: Exclusion Orders? I was not clear on that.

Q202 Mr Soley: The internment one came from Northern Ireland and I think the same applied there. But the Exclusion Order is what I think you are talking about; is that correct?
Lord Goldsmith: That is absolutely right

Q203 Chairman: They were part of the 1974 Act?
Lord Goldsmith: Yes.

Q204 Chairman: These procedures, which have been used in SIAC, for what were originally immigration decisions, and were indeed an improvement on the Home Secretary arbitrarily making these decisions, are now to be imported into the High Court, which has not operated this way before—the High Court has had closed sessions. The sort of rules which are now envisaged will be new and are presumably being worked on now. Are the Special Advocates being brought into that discussion in the consultations that you have described?
Lord Goldsmith: The meeting that I had yesterday with the Special Advocates was specifically about what package of improvements could be made, and I believe ought to be made, so that they could play a part, the part which Parliament decides should happen in the procedures which are being proposed as a result of this Bill at the moment. So the answer is absolutely yes.

Q205 Chairman: Are the improvements likely to include a greater ability to bring in exculpatory material than the system at present?
Lord Goldsmith: May I indicate what I think the improvements will be and then deal specifically with that? I think there are really six areas. First of all, widening the pool from which Special Advocates are chosen; we need to widen the pool and I intend therefore that we should take steps to do that. Secondly, giving the applicants—I will continue to call them that—the choice within those who are on the list of counsel. Thirdly, giving them increased support from an instructing solicitor. I accept the point that the Special Advocates have made powerfully about that and so I have asked for procedures to be put in place so that they do get substantive support on the closed cases from solicitor or solicitors who are security vetted so that they can handle that material. Fourthly, training, and a package is now being devised for training for Special Advocates, both to deal with open material and closed material. Fifthly, a database. They make the point, and it seems to me a good point, that at the moment they do not have a comprehensive view of important judgments, decisions, arguments, which have taken place, although they say that they have been passing them amongst each other on a network basis. So I think a database of that material is right.

Sixthly, I think we need also to look at providing them with access to expertise which will help them in understanding of and therefore testing the material. There are some practical issues in relation to that.

Q206 Chairman: All of those are supportive improvements which we will come on to, and which you are quite right in saying were put forward by Special Advocates themselves, but none of them changes the procedure or the process or increases the right of the Special Advocate in court—I say in court, in SIAC—to insist, for example as I said earlier, that exculpatory material is produced.
Lord Goldsmith: I am not sure I really follow this point. I have seen it referred to and it seems to me that there plainly is an obligation on the Secretary of State to produce such exculpatory material as he has, and I do not see why it is being said at the moment that he is not producing that

Q207 Keith Vaz: Attorney General, why has it taken you so long to meet the Special Advocates? You said you met them yesterday. You appointed them some time ago and you have been Attorney General now for two and a half years.
Lord Goldsmith: Nearly four years

Q208 Keith Vaz: It seems like two and a half!
Lord Goldsmith: Sometimes it seems like a lot longer! I have to say that I was not aware until I saw the memorandum of evidence that they put into this Committee of the detail of the concerns that they had about the procedure. As soon as I saw that it seemed to me important to address that. So that is in part the answer to the question. But, having seen that, and having seen what they have said to this Committee I thought it right to investigate what improvements could be made. I asked for that to be done and I saw them yesterday. I just make one point because at the time of the resignation of one or two of them there were suggestions in the newspapers that I had been speaking to the Special Advocates, which was not the case at all—I did not speak to any of them.

Q209 Keith Vaz: The system has been operating for eight years. You obviously read the *Mail on Sunday* so you saw Ian MacDonald's resignation; he sent you a letter.
Lord Goldsmith: Yes.

Q210 Keith Vaz: So you were aware of the problems before they gave evidence to the Select Committee. You must have been aware that people like Gareth Peirce was calling the system deceitful or that Neil Garnham was complaining that it represented one man and a dog. You knew about all these things; you have officials, clever, clever people at your officers' department, and nobody picked this up before they gave evidence?
Lord Goldsmith: Let me deal with those three things. The expression that Neil Garnham used—and I have a great respect for Neil Garnham—I heard about and saw it for the first time when I saw it in the evidence he gave to this Committee. I make no criticism of him about that but that is the first time I knew he was using that expression. The first time I saw an expression by Gareth Peirce describing the system as deceitful was when I saw her evidence. But of course that is on an entirely different point, as I understand it, and I well understand and have known for a long time that her attitude and the attitude of others is that the procedure under the 2001 Act was fatally flawed in her view, and indeed that was argued significantly in court. I do not share that view. So far as Ian MacDonald's views were concerned, which I did read about—and of course he did explain them to me also in a letter—those were not, as I understood them, about procedures for Special Advocates but again about his objection to the system under the 2001 Act.

Q211 Keith Vaz: The alarm bells would have rung, would they not? Alarm bells would have rung in your mind and the people who live in Buckingham Gate and operate there, that something was wrong, something was going wrong here and people were concerned not just about the procedure but other issues. Clearly you met them yesterday so you know that something is going wrong.
Lord Goldsmith: I met them yesterday because I asked for work to be done, measures were considered—and indeed you know something about them because the Lord Chancellor when he came was able to indicate where we were going in relation to those—and I said that I thought it very important not just to put forward a package which we thought was right, but that there should be an opportunity for the Special Advocates themselves to comment on it. It was for that reason I asked for them to attend a meeting where the Treasury Solicitor was present so that they could hear what it was and I could hear what they had to say about it.

Q212 Keith Vaz: What was the turnout? How many are there and how many came?
Lord Goldsmith: Nine out of thirteen came.

Q213 Keith Vaz: Presumably you will see the other people?
Lord Goldsmith: I will see anyone who wants to see me. They were all invited.

Q214 Keith Vaz: The Lord Chancellor gave evidence last week and announced a number of changes. Are those the changes that you are referring to?
Lord Goldsmith: Yes, he was referring to the changes that I had asked to be put in place; that is what he was referring to.

Q215 Keith Vaz: So you had those changes prior to the meeting yesterday?
Lord Goldsmith: I do not quite understand what you mean—*had* the changes?

Q216 Keith Vaz: You said that there were a number of points that were coming together.
Lord Goldsmith: Yes, absolutely. Those were the changes that, having seen what the Special Advocates were concerned about, I asked for work

to be done and indeed indicated the areas in which I thought improvements ought to be made, having read what they said. That was then considered at official level and the package was put together and it was presented to the Special Advocates yesterday in my presence by the Treasury Solicitor and discussed with them.

Q217 Keith Vaz: It is just that the issue of consultation comes up now, does it not? We have had the concerns, you have read the evidence, you have reacted quickly to this by putting together a package; you then saw them yesterday. But where does the element of consultation come in? Are you consulting them about these changes or are these the changes that are going to be implemented?
Lord Goldsmith: I absolutely did consult them yesterday because what I did yesterday, we had an open discussion and I asked the Treasury Solicitor—and there were others there as well—to explain each of the elements of improvement which were being proposed, and I invited comments from Special Advocates there and, as you would expect, they were very clear in their views; and, indeed, to some extent what I have said this morning as to what I think the package ought to be has changed as a result of my hearing what they said.

Q218 Keith Vaz: And now there is a new package as a result of the meeting yesterday?
Lord Goldsmith: It is the package I have indicated, yes, indicated this morning.

Q219 Keith Vaz: So that can be implemented immediately or is there a time table or further consultation between those who were not there at the meeting?
Lord Goldsmith: I think we can get on and implement that.

Q220 Keith Vaz: As of today?
Lord Goldsmith: Yes. Start to implement it, it in the sense—

Q221 Keith Vaz: As of yesterday.
Lord Goldsmith: Absolutely.

Q222 Keith Vaz: So you have a new package. Going back to the point that you made, one of the six points was widening the pool of those who have been appointed. How do you make these appointments? How do you choose Nicholas Blake or any of the other people?
Lord Goldsmith: The way it happened was that the system grew, as I think the Committee will know, out of what the European Court of Human Rights said in the Chahal case, when they disapproved of the then system for dealing with removals on non-conducive grounds—the three wise men system—and so the Special Immigration Appeals Commission was set up and these procedures were put in place. At that stage, so I understand, the Treasury Solicitor identified a number of people who were thought appropriate from experience, ability and integrity to do this work. It was put to one of my predecessors as a list, he approved that list and then those people had to be developed vetted. The procedure then is that on an occasion when a Special Advocate needs to be appointed the Treasury Solicitor makes a recommendation to the Law Officers and that recommendation is considered by the Law Officers. As I think you know, it seemed to me better that in relation to the 2001 Act—because I had a personal involvement in representing the Government in the proceedings, although only in the derogation proceedings and not in the individual ones, I did not want to play any part in the selection of those advocates—it was the Solicitor General who approved the recommendations.

Q223 Keith Vaz: So of the 13 how many are from the ethnic minority community and how many are women?
Lord Goldsmith: I have to look at the list.

Q224 Keith Vaz: And since you became Attorney General you have not implemented any changes so far in the appointment process?
Lord Goldsmith: In the appointment process of Special Advocates for this purpose, no. There is another group of Special Advocates where I have implemented changes. I do not know if anybody wants me to talk about that?

Q225 Keith Vaz: You were giving us some figures.
Lord Goldsmith: I can see one woman, 12 men. I am not sure, I do not know each of these, but I do not think there are any in here who are members of the ethnic minority in that group.

Q226 Keith Vaz: So when you talk about widening the pool, presumably only certain people can be appointed anyway because it is not going to be by open competition; you are not going to advertise in the *Sunday Times*, are you?
Lord Goldsmith: I will advertise for people who want to do the work and are willing to do the work.

Q227 Keith Vaz: This will start now? This is the new proposal, you will now advertise?
Lord Goldsmith: Yes, absolutely. There is a resource limit on the number of people who can be selected because they will have to go through the process of developed vetting, which has resource implications, but I can look otherwise for people who are willing to do the work.

Q228 Keith Vaz: I will end on this, that one of the most serious charges Ian MacDonald made is the point about the wider Asian community, particularly the Muslim community, viewing this in some way as a pejorative system. Do you get any sense of that?
Lord Goldsmith: I think that is a much wider question, which I have not understood to have anything at all to do with the system of Special Advocates. I understood the point which has been made by others to be concerned with the effect of the particular measures themselves in the 2001 Act and

indeed other measures or other actions and what impact that has had on the views of, in particular, the Muslim community.

Q229 Keith Vaz: Have you replied to Mr MacDonald's letter of resignation?
Lord Goldsmith: I replied on the same day that I received his letter.

Q230 Chairman: You made a point a moment ago about the use of Special Advocates in other contexts and elsewhere, and there was something you wanted to tell us.
Lord Goldsmith: It is probably helpful to fill in the complete picture because we tend to focus at the moment on Special Advocates in the SIAC procedures, particularly in the 2001 procedures. First of all, that is not the only place where Special Advocates may be used. Where developed vetted Special Advocates may be used includes other tribunals as well, such as the POAC tribunal, which you know about. But there is another category of cases which are essentially criminal cases where material is being put to a judge by the prosecution, asking the judge that that information be not disclosed to the defence on public interest immunity grounds, and in those circumstances occasionally it is necessary for me to appoint, at the request of the judge, a Special Advocate in order to view that material and be present in those hearings which otherwise are closed to the defendant, so as to assist the judge in looking at that material. That was the subject of a decision by the House of Lords in its judicial capacity in a case called *H and C*, where they looked at that, looked at the circumstances in which it took place and indeed the situation for appointment of Special Advocates. In that situation I do not have to find advocates who are developed vetted because it is not normally a security issue, it is simply, for example, the identity of informers

Q231 Chairman: That is a security issue, is it not?
Lord Goldsmith: Not in the sense that it needs someone who is developed vetted, not in that sense.

Q232 Chairman: That surprises me.
Lord Goldsmith: Not in the ordinary criminal context of an informer—and I do not mean an intelligence informer, I mean informers. Or it may be that a particular public interest immunity may relate to the fact that the householder has allowed his or her house to be used for observation, is it necessary for their identification to be disclosed to the defendant? That sort of thing. In those sorts of circumstances I have made an arrangement with the Chairman of the Bar and leaders of the circuit that, together with First Treasury Counsel, they would identify people who they regarded as competent to do this work, from whom a choice could then be made in a given case.

Q233 Chairman: That is a very specific task; it is not like measuring the evidence by which the Home Secretary has reached the conclusion.
Lord Goldsmith: It certainly is, it is a different task, yes. I was answering Mr Vaz's question about whether I had developed any procedures for appointing Special Advocates and it was necessary to do so in that context because that was a new area.

Q234 Ross Cranston: Attorney, you will have seen criticism that there is a conflict of interest in your appointment of Special Advocates.
Lord Goldsmith: Actually I have not. Everyone who speaks about it says that there is not a conflict of interest.

Q235 Ross Cranston: I do not think so either on the basis that I suspect when you are making those appointments you are doing it in a quasi-judicial capacity so there is not a conflict.
Lord Goldsmith: Absolutely.

Q236 Ross Cranston: Can I ask you about this because one point in that discussion that was put to us was that the defendant—let us call the person the defendant—should be able to choose from the panel, and I am wondering what your thoughts on that are?
Lord Goldsmith: That is one of the things I think that he should be able to do. There will be some limitations again because it has to be limited to the panel and there may be reasons why someone that they want to take from the Panel cannot be available. For example, that person may now be in a conflict of interest position because of having acted in another case that received information which then makes it difficult for that person to act in the new case. But subject to that, yes, I think it should happen.

Q237 Ross Cranston: So the principle that the person could have choice?
Lord Goldsmith: Yes.

Q238 Ross Cranston: Assuming that there is a conflict, what about the notion of the court appointing Special Advocates?
Lord Goldsmith: This actually came up in the House of Lords case on the different sort of Special Advocate where again in theory the same point can be made because I am responsible for the prosecution service ultimately, and indeed the judge at first instance had raised the question whether in those circumstances it was appropriate for me to appoint the Special Advocates. The House of Lords looked at that, and I am just searching for the quotation that Lord Bingham provided to the Committee said in terms—and this was not actually controversial in the case, I am pleased to say—that they could not see any better way of doing it in these appointments. They recognised, as everyone else did, that the Attorney acted in a quasi-judicial capacity and that there could be no doubt at all about the integrity of the appointments that were being made.

Q239 Ross Cranston: It might be worse if the court made them.

Lord Goldsmith: I should have dealt with this, but I think there is a real problem if the court does it and the whole point is that the court should be absolutely even-handed between the parties, between the Secretary of State and the applicant, and if the court has the responsibility of appointing the advocate on one side then that is potentially a problem.

Q240 Ross Cranston: Could I ask you whether you have made any assessment as to the number of Special Advocates you are going to need? I take the point about the process of vetting them obviously slowing down the extent to which people can come on stream, but given that the Bill applies to nationals as well as non-nationals and there will be more people coming within the net, as it were, have you made any assessment as to the number of people you need?
Lord Goldsmith: We need to do that when the Bill has finally settled down, if I can put it that way. I was in the process of seeking to expand the pool in any event. It appeared that the pool had been sufficient in size for the cases but it was coming under strain, and so I had already put in place procedures to expand the size of the pool. But it seems to me right, in the light of the new legislation, to deal with that now and to deal with it not by bits and pieces but actually to try to do it in a big bang way in the sense of opening it out completely.

Q241 Ross Cranston: Do you think you will have any difficulty in terms of making the requisite number of appointments?
Lord Goldsmith: I do not think so, no.

Q242 Ross Cranston: I will ask you this question, but in fact you may well say it is not your area because of course you are not responsible for the policy. Putting to one side the Terrorism Bill, could I ask you about the future of SIAC because the figures we have suggest that SIAC in deportation cases has not actually found that anyone can be deported, or there might be one case where someone has been said to be deportable. So the argument put to us, the suggestion put to us was that SIAC really does not have a great deal of work to do. I am not sure about the analysis because cases have been withdrawn, the Home Office has withdrawn cases possibly because they thought they might fail in the application, but the argument put to us is that SIAC does not seem to have much work, apart of course from the security cases. As I say, I am giving you the opt-out if this is not an area where you have responsibility for the policy.
Lord Goldsmith: I do not have responsibility; I do not know the number of cases. I would have thought that there remains a need for a facility of SIAC and my understanding is that all the people who work in SIAC have other jobs, as it were; they do other things as well, either in the immigration field or—

Q243 Chairman: They have a day job, do they!
Lord Goldsmith: Other day jobs, either in the general Immigration Tribunal field or the judiciary but, as Mr Cranston says, it is not really a matter for me.

Q244 Chairman: I would like to have one more go at establishing whether you feel that with practical improvements of the kind that you have listed—and you have listed six of them and they will be in the transcription of our proceedings, which I hope will be available by the time of tomorrow's debates in the Commons—with the exception of practical improvements you do not really see any potential improvement in the process which so many people feel is one in which the person whose liberty is going to be restricted in future, when SIAC cases are deported, has a reasonable opportunity to challenge what is being alleged against him?
Lord Goldsmith: You are asking me specifically about the Special Advocate procedure and I think that the principle of the Special Advocate procedure is the best in principle that can be devised if there is to be material before the court which is being relied upon, but which cannot be disclosed to the applicant. Of course, there are safeguards and there is the important safeguard—and the Special Advocates tell me that they regard it as one of the most important jobs that they have—to ask the Commission in SIAC's case, or it would be the High Court if these changes go through, to order that material which the Secretary of State has sought to keep closed from the applicants is in fact opened to the applicant. That is very, very important and it happened on a number of occasions, I know this, during the SIAC procedures, and they say, "We do not see why this particular material cannot be disclosed," but if the Committee is not aware of this procedure I think it is enormously important. Then it is for the Commission to decide—and it would be for the High Court to decide under the analogous rules—whether the material should be open to the applicant; that the sanction being under the existing SIAC rules that if the Home Secretary is not prepared to do so then he cannot rely upon that material, so he has to withdraw that plank of his case. Certainly important information was as a result of that process then opened up to the applicant. So I think that is one important safeguard. Secondly, it is open to the Special Advocates to ask the Commission to be able to put a specific question or ask for specific instructions from the individual, and again the Commission can take that decision. It does not seem to me to be an unreasonable procedure to say that there may be a real problem because the Special Advocate might think that there is no harm in saying, "Where were you on 16 June?" In fact, there may be very good reason why saying, "Where were you on 16 June?" might actually disclose exactly who the agent is or what the nature of the intelligence gathering process is.

Q245 Chairman: Some of these questions could be turned to more generic questions and some of the disclosure could be of a more generic kind, to sanitise out information which would involve a security risk or risk to an informant. The questioning can be, as I was indicating earlier, "Where were you for most of March?" rather than "Where were you on Thursday 27?"

Lord Goldsmith: Absolutely so, and I would think if a Special Advocate says to the Commission, "They do not want me to ask where he was on 27 March but I think it would help if I could ask him where he was for most of March, what is the harm in that?" if there is not any harm I would expect the Commission or the High Court to say, "Yes, you can," and then that information can be obtained. It is a slightly longer process but it is possible then to make a balance each time between the need to protect the source and to enable instructions to be obtained.

Q246 Chairman: Would it be productive if there were more discussion between you and the security authorities about what the opportunities were in general terms to find ways of communicating more about the case to the person whose liberty was being restricted, without compromising security?
Lord Goldsmith: You asked the question about *me*. I think that one of the advantages of the package of improvements that I think should be put in place is to have more continuity in cases, to have a substantive solicitor—which is the point the Special Advocates make, and I accept it—who is able to see what has happened in previous cases, build on those cases so that the next time around it is not necessary—they did not put it this way, but I put it this way—to reinvent the wheel, and that way the procedures that the security services operate and the Secretary of State operates will over a period of time emerge in any event. And of course, as always happens as we know in court processes, if the court is called upon to make a decision should this be disclosed or not, once they have decided in principle that it should be then that will have an impact on subsequent cases as well I would anticipate. So I think there is lots of opportunity to do it, but whether it is right for me to do it I think it is slightly questionable. I have kept away from the detail of these; I did not think it right, for example, for me to ask the Special Advocates whilst they were actually acting in the proceedings what their problems were because I thought it better that they should be able to absolutely independently get on with the job with which they have been entrusted.

Q247 Mr Soley: Could I pursue this a little because it seems to me that you are trying to constantly reduce the area of information which is not available to the applicant and that would be generally what you would seek to achieve. It seems to me that when you say you are looking at ways in which the system can open to the applicant more information that might be permissible that that might allow, for example, intercept evidence, electronically intercepted evidence? Surely the key here is that what you do not want to do is to identify the source and you also do not want to break the chain of information that is coming into you. That is what the State is interested in keeping secret. But it should not actually stop you revealing the outcome of intercept evidence, for example; is that right or not?
Lord Goldsmith: I think this is a much bigger question because I think the question you are putting to me is much more to do with the question as to whether or not we could change our approach to the inadmissibility of intercept evidence in court, and of course the Home Secretary has been very clear on the decision that has been taken in relation to that.

Q248 Mr Soley: But you have indicated in your answers to the Chair a few moments ago that if the Special Advocates felt that some information could be revealed, they could ask for it and it could be given?
Lord Goldsmith: Yes.

Q249 Mr Soley: That would permit the possibility, would it not, of intercept evidence if the High Court, as it would be, agreed that that could be seen?
Lord Goldsmith: I think that that partly turns upon the technical question as to the application of the Regulation and Investigatory Powers Act and how that operates because that is presently an injunction against certain information being used in court. In terms generally though of this procedure enabling the Special Advocates to say to the Commission—or the court in the future, if that is what it is going to be—"This is information upon which the Secretary of State is relying. I do not see why this information cannot be disclosed to the applicant and his legal advisers or some of it, or in some form, or redacted or under certain procedures," and then invite the court to rule on that. That seems to me to be something which can be done.

Q250 Chairman: Do you share my slight concern that in years to come we are going to have people coming from rather unattractive regimes to look at our Special Advocate procedure because they might like to introduce it themselves into secret hearings?
Lord Goldsmith: No, I do not agree with that and I really want to say why. First of all, this is not a procedure for use in criminal trials.

Q251 Chairman: Except breach of a Control Order of course.[4]
Lord Goldsmith: Yes, breach of a Control Order but I see a distinction between criminal trials and what took place under the 2001 Act and what is proposed here.[5] I think one has to remember that the Special Advocate procedure is a procedure which was actually promoted by the European Court of Human Rights; attention was drawn to it based on a Canadian model by Human Rights organisations. The European Court of Human Rights has subsequently expressed approval of the system and the fundamental reason for that is that once you make a choice—and you have to make a choice—about whether it is possible in certain circumstances for the State to rely upon information which cannot be disclosed, what do you do then? I come back to

[4] Proceedings for breach of a control order are ordinary criminal proceedings and no Special Advocate system applies

[5] *Note by witness:* This point needs clarification. I did not intend to imply that the Special Advocates' procedure would operate where there is an allegation of a breach of a control order. Any prosecution brought for breach of a control order will need to follow the rules for criminal trials

the point, my concern is to ensure that that material is seen by the court, does not take the say-so of the Secretary of State, it is tested as robustly and effectively as possible and that the way to do that is to appoint independent lawyers of the highest calibre, quality and integrity, which is what has happened—that is what all of these Special Advocates have been—who are able to apply their independent judgement and expertise to that material. I accept that the system can be improved in the light of the experience, and that is what I am seeking to do.

Q252 Mr Soley: On this issue again, I understand the point with an authoritarian regime you would not argue it could be used here on conventional criminal grounds, but you would argue that it would be used against dissidents in fact because a dissident is somebody who is challenging the State.
Lord Goldsmith: I think what would happen in an authoritarian regime is that they would say to the court that, "The Executive has made this decision, we are not telling you why, we are not allowing you to test it", or they will have a tame judge who can look at the material," but they certainly will not be saying, "We are now going to allow the appointment of leading members of the independent private Bar to see all the material, to argue in front of the court everything about that material, to cross-examine security agents about why they draw this conclusion or that conclusion, perhaps to call evidence themselves, to argue that some of that material should be shown to the applicants." That is not what you do if you are an authoritarian regime.

Q253 Ross Cranston: And we live in an open and democratic society.
Lord Goldsmith: We do.

Q254 Chairman: We did promise to release you at 10 o"clock and I want to do so, but if there is a paper that emerges from the discussions yesterday and if we could see it, it would be very helpful in the present context to set out in a little more detail the kind of improvements you have mentioned.
Lord Goldsmith: Yes.

Q255 Keith Vaz: Is there a paper?
Lord Goldsmith: At the moment there is not a paper that emerges from yesterday in the form that I can present that paper to you, but plainly there will be as the processes are developed and I will let the Committee have it; but I do not think it will be in time for tomorrow.[6]
Chairman: But our transcript I hope will, and it will be helpful because we have covered some very useful ground this morning. So thank you very much indeed.

[6] Ev 77–78

Written evidence

Evidence submitted by Lord Carlile of Berriew QC

1. I am grateful for the invitation to submit evidence to the Select Committee. I do so as the independent person appointed under section 28 of the *Anti-Terrorism Crime and Security Act 2001* to review the operation of sections 21–23, the detention provisions.

2. It is no part of my role as reviewer to report on the necessity, wisdom or merits of the detention provisions. The Privy Council Committee chaired by Lord Newton of Braintree, which produced its report during 2004, did have as part of its remit a review of the merits.

3. As the Committee knows, the House of Lords has held that the derogation from the ECHR to permit the detentions is unlawful. I understand that the Home Secretary will be making a detailed announcement shortly as to the future of the detention provisions and what is to replace them, and when. Although I have views on these matters, they are outside my reviewing responsibilities.

4. In carrying out my reviewing role, I have been able to see a significant amount of closed material founding the detentions. I have seen the conditions in which the detainees are held at Belmarsh and Woodhill prisons. I have spoken at length to some of the detainees: others have refused to see me.

5. In particular, I have read much of the open and closed transcripts of SIAC proceedings, and all the open and closed judgments. I have discussed the procedure with the past and current chair of SIAC. I have discussed the operation of SIAC and their role with some of the special advocates, including Ian McDonald; and have received a written submission from a special advocate who has not resigned the role but was critical of the effectiveness of the position.

6. I am too the independent reviewer of the working of the *Terrorism Act 2000*. In that capacity I carry out a programme of relevant visits, and make comparative studies of counter-terrorism legislation in the UK and elsewhere. I try to keep myself fully informed as to risk levels and the basis for them.

7. Taking into account the closed material I have seen in both my reviewing roles, I have no doubt that there is an existing and unpredictable risk within the UK, and to UK assets abroad, from Al Qaeda linked terrorists. Some such terrorists are likely to be UK citizens, others foreign nationals.

8. My assessment is that there is a real level of risk of attack on places of mass aggregation—airports, football stadia, music venues and the like. Evidence from AQ attacks abroad (eg New York 9/11, Bali, Madrid) supports the opinion that generally they are more interested in body counts than targeting individuals. The consequence is that the burden of responsibility of the UK government to protect the ordinary citizen in almost any crowd situation is heightened by the identified risk as I have described it. Further, AQ is very different from many other terrorist groups, in that it appears to be a loose connection of associated associates albeit with shared purposes, rather than a paramilitary structure. This difference makes it more difficult to pin down exactly what AQ is at any given time, and who is or may be involved in it or under its penumbra.

9. As I have said in my reports to date, in my view under the terms of the legislation the Secretary of State has been justified in the detentions he has ordered.

10. I have no doubt that SIAC has performed its functions in a thorough and entirely judicial way, and to a high standard within its jurisdiction. The questioning and analysis of evidence by the Commission itself has been robust, and they have striven for fairness. Their generic and individual judgments display a very detailed knowledge, founded on evidence, of the whole picture of AQ activities and related events.

11. The comments in this paper do not relate to SIAC's work other than in relation to the detainees, as that is the area on which I have concentrated as reviewer.

12. In terms of the membership, it is appropriate that SIAC and all its hearings should continue to be chaired by serving judges of the High Court or Court of Appeal.

13. I have some misgivings about the range of other members of SIAC. I am sure that they have always acted with total integrity. However, for the credibility and transparency of the system I would be happier if, whilst one of the members should have experience of security or at least diplomatic work at a high level, the other should be truly a lay person without such experience. I cannot see any real difficulty in finding a small group of such people, who could be security cleared. However, I emphasise that there is no basis for suggesting that the present membership is anything other than thorough and fair within its limited jurisdiction (which of course involves a lower standard of proof than in conventional civil and criminal courts).

14. SIAC has acted with acceptable speed in all cases, since its proceedings commenced in earnest. Initially there was some delay, as I understand it because it was hoped that the derogation issue could be resolved much more quickly than proved to be the case. The hearings before SIAC have been the subject of clear and energetic judicial case management.

15. The periods of detention so far compare without disfavour as against those in Spain, France and the USA. The procedures used in each of those countries are different from our own and from each other. However, in my view the effect on suspects/detainees of the different procedures has been much exaggerated by some. I believe that the fact that France and Spain have not derogated from the ECHR is a vestigial difference in many cases. The Patriot Act and some other USA statutory provisions, and some permitted executive acts, go far beyond anything that would be tolerated as acceptable (legally or politically) in the UK. Any comparisons between ATCSA 2001 and Guantanamo Bay are, I believe, totally unhelpful and include gross exaggeration.

16. It is inevitable that problems arise in any tribunal where the subject of the case, here the detainee, does not see or hear the whole of the evidence and proceedings. The fact that the detainee is left in that position understandably is bound to cause anxiety to all of us more used to the general disclosure procedures of the courts of this country. It is regrettable and should be avoided so far as possible. Understandable too is the frustration of the detainees' private lawyers, who can only see what their clients see.

17. Having seen extensive material, I am in no doubt that national security could be at risk if certain types of evidence were revealed to the detainees. At risk too would be some individuals' lives. The kind of evidence I have in mind includes that provided by (in this context precious) human resources including those who might be described as a term of art as "informants", disclosure of locations used for observation, details of technical facilities available for listening to and/or reading communications, descriptions and identities of police officers and others, and methods of risk assessment used by the control authorities.

18. The special advocate system was introduced in the hope that security-cleared, skilled lawyers with complete disclosure of closed as well as open material would sufficiently protect the interests of the detainees to ensure total fairness of the proceedings. The reasons for the resignations recently of two of the special advocates, Ian McDonald and Rick Scannell, plainly dent any confidence that the special advocates have fulfilled their purpose. The views I have heard and received have not been unanimous with theirs, but it probably represents the conclusion of the majority of the appointed special advocates.

19. If the special advocate system has value, the comments that follow are equally applicable to their involvement in any new legislation and procedures as may be announced shortly by the Secretary of State.

20. That the special advocates have been partly effective has been demonstrated to me by some of their cross-examinations, and by the release of one detainee following the decision of SIAC. The release of another detainee by the Secretary of State may have been affected in part by scrutiny of the evidence by the special advocate, as part of the ongoing Home Office consideration of each case.

21. I have reported in the past that the special advocates should have greater assistance in the preparation of cases. In my view for each case there should be a security cleared case assistant from the security service, capable of assisting to organise a sometimes large volume of papers, and of advising the special advocate as to service procedures and potential relevance to the case. This would assist greatly their understanding of their instructions.

22. In addition, I have reported that there should be training for the special advocates to enable them better to understand the kind of material they are likely to receive, and of how best to deploy it in the SIAC context. I know that there have been some concerns as to how such training could be given without the suspicion that it would dilute the (demonstrable) independence of the special advocates. In this context the Judicial Studies Board, whose contribution to judicial independence has not been questioned seriously, might agree to supervise such training.

23. I suggest too that the special advocates, perhaps under the judicial regulation of SIAC itself, should have a closer relationship with those whose interests they represent. There has been no or almost no such contact in the past in the detention cases. This means that the special advocate has been unable to question the detainee or his lawyers on potentially important matters such as where the detainee was on a particular day, who were his associates, why he was seen to perform certain actions. Given adequate protection of the security of the state on an instance by instance basis, I can see no significant harm in developing the system.

24. The two resignations referred to above highlight that there are problems, but in my opinion these are not beyond repair in a procedure that was bound to evolve in the light of experience.

25. Of one thing I am sure. Those who see closed material and from conclusions based upon it cannot expect the unreserved trust of those who do not. This applies particularly to those detained. This trust gap requires extra vigilance by all with responsibilities in this area, but should not frighten anyone away from exercising those responsibilities in a defensible and proportional way. The consequences following a major terrorist event for any government that had failed to take robust steps to protect the public can only be imagined.

26. As an incidental matter, I am puzzled as to why the House of Lords Judicial Committee dealing with the derogation case saw no closed material, whereas the Court of Appeal (whose decision they overturned) did. However, that probably falls outside this Committee's remit.

27. If I can assist the Committee beyond the scope of this paper, I shall be happy to do so.

Lord Carlile of Berriew QC

24 January 2005

Evidence submitted by Anver Jeevanjee, former member, Immigration Appeals Tribunal

INTRODUCTION AND SUMMARY

Traditionally the UK has always been a large exporter of its population to many parts of the world, including to some refugee producing countries (191,000 persons left the UK in 2003) as economic emigrants, possibly tax avoidance, colonialism or many other reasons. Therefore to have become a relatively miniscule importer of people through Immigration is an anathema. Hence, the enacting of race based legislation by HMG, obviously for the sole purpose to discriminate against foreigners, disguised under the hypocrisy of political correctness to appease or patronise critics from the minority communities and the New Commonwealth. Some would say that the current targeted detentions are simply a crusade against Islam and as basic as "them and us".

I have carefully considered the unique SIAC form of justice in the light of my over 21 years experience of serving within the system of our Immigration and Asylum Appeals and several other appeal tribunals. I have also scrutinised the impact of SIAC on our Community and Cultural Diversity in which my family and I have been actively involved for many more years across the world. My observation of similar jurisdictions under the so called threat of terrorism in some other countries such as India, Sri Lanka, Apartheid South Africa, Burma, China etc., is equally depressing. I have regularly made submissions to the CAC on similar matters. I attach my last one (**not printed**) in respect of my concern for Justice at the Immigration Appeals Tribunal and the rapidly declining independence of members of Judiciary as a whole in the United Kingdom.

Finally, I am of the opinion that SIAC ought to be abolished and its work, if it is at all considered necessary, be transferred within a single Immigration Appellate system, together with all other aliens bunched together. This expensive system has always been in shambles anyway; so a few more onto the pile would not make much difference. We already have powers to consider deportation of foreigners who have been convicted of serious crimes and have served their term of imprisonment. British citizens must only face the Criminal Courts. I also believe that if members of a broader cross section of diversity and genuine cultural awareness were appointed at the Immigration Courts, than at present, it would determine cases with a greater degree of transparency under the convention, speed, cost effectiveness and fairness. There is also a case for reviewing the questionable legislation under which SIAC operates. In my view it is not only unlawful but also incompatible with the convention and racially motivated against foreigners, their wives, children or close families.

SUBSTANTIVE MATTERS

1. Needless to mention that despite being one of the most senior members of the IAT, I have never been invited to sit as a member of this commission. Even if I had, I would most certainly have declined to do so. Some very junior members were hand picked for this job. Anyone who was likely to be experienced, controversial, compassionate, who might raise European or other human right issues and not toe the establishment line would naturally be excluded. Those in power also never list some chairpersons and a past President of the IAT was clearly excluded, as he was perceived to be too liberal minded.

2. However, SIAC sits within Field House, off Chancery lane, in the legal quarter of London. It is in the same building where I also sat at the Immigration Appeals Tribunal. Seemingly security is very tight, particularly so, when SIAC is in session. In my experience it is a total farce for the determined attacker. SIAC members work from offices within the same floor of the building and my colleagues and I share their courtroom when it is free. Although it was all highly secretive I know many who sat on it. I often met them in what I refer to as the "corridors of dictatorial power". Whenever, my cases were adjourned due to our endemic administrative problems and I had time on my hands, I went downstairs to observe the SIAC proceedings as a member of the public. It was interesting to watch the body language and conduct of the court. SIAC carried much greater prejudices against foreigners than does the IAT. Both systems are as institutionally racist under the Stephen Lawrence inquiry principles, as are the police, prisons etc. The only difference being that the former still remains in denial and blatantly rejects any such suggestion, while the later accepts the problem and has gone a long way to do something about it.

3. Islamaphobia is rampant, as most of its suspects or detainees appear to belong to the Islamic faith. The only unique check against SIAC is the overview and wisdom of the Court of Appeal as well as the Law Lords. I recognise the infallibility of sectors of the Judiciary but it appears there is none such immediate remedy for the executive's errors. Furthermore, as many would say, government mistakes are subject to political manipulation, covered up by more untruths and flimsy public enquiries. The USA/UK

or their allies were unable to obtain any evidence against such suspects despite their torturous detention in the modern day concentration camps of Guantanamo or Belmarsh. In Auschwitz and elsewhere in Europe, there was indiscriminate persecution of Jews and of course anti-semitism still flourishes today. However, it now seems, to have spilled over to victimise all Muslims. The US government might have realised the folly and hopelessness of their allegations. I hope the UK will follow suit and stop putting anyone it fancies under its discriminatory stop and search or house arrest program.

4. I am very shocked but not at all surprised with the manner in which such a "kangaroo" court operates in the UK. I had experienced such biased courts under the British colonial apartheid system in Kenya during my service there. Much as one might pretend otherwise, SIAC is not substantially different, perhaps worse. At the very least former terrorists or freedom fighters like Gandhi or Nelson Mandela or even other minor players were made fully aware of charges against them, even under the apartheid laws, which gave them an opportunity to plead either way. SIAC, as far as I understand it, does not offer any such choice.

5. SIAC hearings can only be described as bizarre. The suspect is not told nor has the right to enquire, what the now highly discredited "post Iraq intelligence service" was suspecting her or him for. Therefore the defence remains totally blind folded. Periodically, the court goes into a closed session and the suspect led away into his cells by his security escorts. The suspects must feel bewildered but than who cares? In one case I heard the only issue seemed to be focussed on the suspect having prayed at a certain mosque where the notorious Abu Hamza (now also in detention) is said to have preached terrorism or anti-western sentiments. There was another case where the suspect was questioned about transferring funds collected in a London mosque to Afghanistan. The suspect was trying to prove with an album full of photographic evidence that he had been involved in building schools in that country. I am not sure if he was believed or the standard of proof required by SIAC. The show goes on.

6. During my observation of SIAC, the only person for whom I had the greatest respect and high regard for fairness and competency was Mr Justice Andrew Collins. I believe he is one of our most exceptional Judge's and I feel greatly honoured to have worked with him at the IAT. I have little doubt that he must feel quite uncomfortable with the manner in which the proceedings were conducted. Nevertheless, I observed him handle the Court with the highest standard of professionalism, courtesy and justice as far as was possible under the adverse circumstances in which he, as a High Court Judge then, was placed. It must have been personally painful for him to see Justice for foreigners being so grossly mutilated and discriminatory.

7. It must also be noted that some very eminent and very highly respected lawyers representing such foreigners have recently resigned in desperation. However, the government continue to sideline the House of Lords Judgement, which declared the UK government to be in breach of Human Right Laws. United Kingdom's executive has reached new heights in the undermining of the higher courts. It now clearly puts this country in the same shameful league as those totalitarian regimes it criticises abroad. In fact it might place us lower than even Robert Mugabe's government of Zimbabwe. There were several recent politically embarrassing judicial decisions that the Mugabe government has complied without question.

In conclusion, courts like SIAC and the legislation under which it operates, should have no place in any credible justice system of any democracy.

I would be pleased to give evidence in respect of any of the above points or any further issues the CAC wish to explore, if invited to do so. Alternatively, I have no objection to my above written views being published by the Committee in the respective House of Commons reports and placed in the libraries of the Houses of Parliament or anywhere it chooses to do so.

Anver Jeevanjee
Member Immigration Appeals Tribunal 1983–2004

30 January 2005

Evidence submitted by the UK office of the United Nations High Commissioner for Refugees (UNHCR)

UNHCR writes in response to your request for submissions regarding the workings of the Special Immigration Appeals Commission (SIAC).

UNHCR urges the Committee to consider whether SIAC guarantees "fair and effective procedures for determining status and protection needs."[1] We would like to reiterate our concerns in relation to SIAC, particularly in relation to the limited amount of time available for appeals by detainees, the restriction on the entitlement to an oral hearing, the time limits for the Secretary of State to contest an application for bail, and the summoning of witnesses. UNHCR hopes that this inquiry will consider these fundamental principles in the context of this inquiry.

[1] UNHCR Executive Committee Conclusions No 82, "Safeguarding Asylum", para d(ii), 17 Oct 1997

We hope this information will be of use to you. We would be very interested in receiving the conclusions made by the Committee in writing when the inquiry is complete.

Christian Mahr
Acting Deputy Representative
UNHCR London

2 February 2005

Evidence submitted by the Law Society

The Law Society fully recognises the Government's concern to tackle the potential threat now posed by international terrorism. However, we believe that there is an on-going duty to consider whether the right balance has been struck between the Government's responsibility to protect the country against international terrorism and its democratic duty to uphold the principles of fairness and justice, particularly in relation to the detention of individuals and relevant issues regarding the operation of SIAC. We therefore welcome this inquiry by the Constitutional Affairs Committee.

The Society appreciates the reasons for the setting up of SIAC in the wake of the *Chahal* case[2] and considers that it was a positive development. However, the fact that SIAC was set up for one purpose, namely to deal with the review of deportations on the grounds of national security, but is now being used for another, rather different role—to review the legality of the Home Secretary's Certification of a detainee under Part 4 of the *Anti-terrorism, Crime and Security Act 2001*—gives extra impetus for the need to consider the way that it operates, to ensure that it is doing so appropriately.

The need for this has been further emphasised by the Home Secretary's response to the House of Lords ruling in *A (FC) and Others (FC) v SSHD*, 16 December [2004] UKHL 56 that the indefinite detention without trial of nine men under the Anti-terrorism, Crime and Security Act 2001 is unlawful. The government will now seek to deport suspects to other countries if it has assurances about their treatment. Where that is not possible, suspects will be made subject to a new system of control orders, instead of imprisonment.

When he made the announcement of the new regime, the Home Secretary gave assurances that there will be independent judicial scrutiny of the imposition of a control order, the varying of it and its review or modification. However, it is unclear exactly what the role of SIAC will be with regard to this. Whatever the new regime, the Society is gravely concerned that under the new proposals, suspects may still be effectively detained without trial. We do not believe that can be justified in the light of human rights considerations.

Evidence

We are concerned that the present position concerning the level of certainty required to justify the Secretary of State's assessment is unsatisfactory. The Law Society believes that it should be made clear that the Secretary of State's assessments should only be upheld if it can be shown at least on the standard of proof applicable in civil proceedings that his assessment is justified.

Disclosure

We believe that SIAC should take a robust approach with regard to disclosure of material on the part of the Government and security services. The Society considers it essential that as much information as possible be made available to the appellant and his or her representative. As we have stated before,[3] information should only be withheld from the client where it can be clearly demonstrated that disclosure would result in a serious or credible risk to national security. Not only is disclosure essential to protect the human rights of the appellant, it is also crucial that SIAC has the best possible evidence before it when determining matters of national security. That in turn requires evidence form one party to be subject to challenges by the other.

Use of torture evidence

The Joint Committee on Human Rights stated that:

> there is a significant risk of the UK being in breach of its international human rights obligations if SIAC or any other court were to admit evidence which has been obtained by torture.[4]

The Society shares the Joint Committee's serious concerns and believes that statements and evidence obtained or sourced through torture should not be admissible.

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[2] *Chahal v United Kingdom* (1996) Case No. 70\1999\576\662 European Court of Human Rights
[3] Memorandum of evidence from the Law Society to the Committee of Privy Counsellors, December 2002
[4] Para 29, Joint Committee on Human Rights, Eighteenth Report, 4 August 2004, HL158/HC713

In his press release[5] regarding the judgment in the Court of Appeal case of *A & Others v Secretary of State for Home Department*,[6] which considered the use of torture evidence in SIAC proceedings, the Home Secretary stated that it would be irresponsible for the Government not to take appropriate account of any information which could help protect national security and public safety.

However, the Law Society considers that there is an overriding need to promote adherence to international human rights obligations, especially in third countries. If a prohibition against torture evidence is to be effective, the individual and the courts must have the best information available on which to evaluate any material.

At an individual level, the use of torture evidence threatens the right to a fair trial and presents practical difficulties in challenging torture evidence if sourced from a third party. In relation to third part or witness torture there is an additional problem of achieving a fair trial when the witness is unavailable for cross-examination. At a wider level the international obligation to prohibit and prevent torture[7] is undermined if torture evidence is knowingly admitted for any other purpose other than the prosecution of alleged torture offences. In the long term, it is highly unlikely that the use of torture and oppressive techniques adopted to extract information helps to protect the public.

The Use of intercept evidence

The Society is very disappointed that the government has decided that it will not make intercept evidence admissible, as we remain of the view that to do so would assist with the prosecution of suspects. The Society agrees with the Joint Committee on Human Rights that the case for relaxing the absolute ban on the use of intercept evidence is overwhelming.[8] Moreover, intercept evidence is admitted in other jurisdictions such as Canada, Australia, France, Israel and the United States, and we can therefore see no reason why it should not be admitted here.

Special Advocates

The Society remains concerned about the fairness of the special advocate system operated when cases are heard by SIAC. We are particularly concerned that detainees do not have full information of the case against them and cannot therefore have a fair hearing. We note and agree with the Joint Committee on Human Rights concerns about inequality of arms between the State and the detainee.[9] Neither can suspects choose their special advocate or give proper instructions once the special advocate has seen the closed material.

In view of the way in which SIAC operates and the concerns about how this impacts on the legal and human rights of the appellants, the Law Society supports JUSTICE's proposals for the following safeguards:

> Appointment—an independent "Office of Special Advocates" either within the Legal Secretariat to the Law Officers or elsewhere, some of whom should be legally qualified, which would have direct responsibility for the appointment of special advocates. This would deal with concerns about the transparency and impartiality of appointment procedures.
>
> Training—special advocates should be provided with organised training, perhaps from the Judicial Studies Board. In addition, the content of any official guidance to special advocates should be subject to public and professional scrutiny.
>
> Support—the establishment of an Independent Office of Special Advocates, staffed by security cleared personnel, would ensure transparency regarding appointments. It would also provide advocates with appropriate legal, technical and administration support.
>
> Accountability—the provision of a security cleared solicitor, who could monitor the conduct of the advocate throughout the proceedings, would ensure accountability. An Office of Special Advocates, within which the solicitor could work, would have the benefit of being able to provide appropriate standards and supervision.
>
> Democratic scrutiny—the common law use of special advocates should be put on a statutory basis, so that there can be full democratic scrutiny of arrangements for their use, as well as guidance on the principles and procedures involved.

The Law Society

February 2005

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[5] 11 August 2004, STAT 036/2004

[6] *A & Others v Secretary of State for Home Department* [2004] EWCA 1123

[7] Preamble and Article 2 of *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

[8] Para 56, Joint Committee on Human Rights, Eighteenth Report, 4 August 2004, HC 713, HL158

[9] Para 53, Joint Committee on Human Rights, Fifth Report, February 2003, HC 462, HL 59

Evidence submitted by Amnesty International

PURPOSE

1. On 12 January 2005, the Constitutional Affairs Committee announced an inquiry into the workings of the Special Immigration Appeals Commission (SIAC) and issued a call for written evidence. This submission sets out some key concerns of Amnesty International on SIAC, particularly with respect to its operation in the context of internment proceedings under Part 4 of the *Anti-terrorism Crime and Security Act 2001* (ATCSA).[10]

KEY POINTS

2. Amnesty International considers that the scheme established under Part 4 of ATCSA is incompatible with the Appellants' internationally recognised fair trial rights, in particular under Article 6 of the *European Convention on Human Rights* (ECHR) and Article 14 of the *United Nations International Covenant on Civil and Political Rights* (ICCPR) and/or under Article 5(4) of the ECHR. It is also incompatible with Article 3 of the ECHR, Article 7 of the ICCPR and Article 15 of the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) because, according to the Court of Appeal's judgment delivered on 11 August 2004, the scheme requires the admission of evidence obtained by torture or other ill-treatment where the torture or other ill-treatment was neither committed nor connived in by UK officials.

3. Amnesty International considers that the certification and detention process established under Part 4 of ATCSA, in substance and effect, amounts to the determination of a criminal charge. This is so even though it is plainly not categorised as such under domestic law. Under international human rights law a state cannot circumvent fair trial guarantees by placing outside the ordinary criminal process a procedure which in substance amounts to the determination of a criminal charge.

4. In Amnesty International's view it is the Secretary of State and not SIAC who determines the criminal charge. Under international law, an appeal may be capable of remedying any violation of Article 6 that results from the determination by the Secretary of State. Accordingly, the assessment of the compatibility of the scheme contained in Part 4 must encompass not only the determination by the Secretary of State but also the appeal process. Amnesty International notes that the appeal process is plainly key as it marks the first point in the procedure at which an individual has any possibility to challenge the decision to certify and detain him. If the fair trial guarantees of Article 6 are to be met, then this must be in the proceedings before SIAC.

5. Amnesty International considers that the following aspects of the scheme established under Part 4 of the ATCSA are inconsistent with the UK's international obligations.

6. INDEPENDENCE—The right to a determination by an independent and impartial tribunal. It is a fundamental aspect of a fair trial that the accused's guilt is established by an independent and impartial tribunal and not by the executive. Amnesty International considers that the scheme contained in Part 4 of ATCSA fails to meet the most basic of fair trial guarantees, namely that the determination of the charge be by an independent tribunal. Inherent in the notion of an independent tribunal as guaranteed by Article 6(1) of the ECHR, is that a tribunal has the power to make binding determinations. SIAC's jurisdiction does not have the necessary decision making power required to meet the condition of independence. This is so for two reasons. Firstly, and generally, because the Secretary of State is empowered to issue a fresh certificate and so to override any successful appeal against certification, even absent any change in circumstance. Whether he exercises this power or not, the fact that he is possessed of it in law is sufficient to offend the right to an independent determination. Secondly, SIAC, disconcertingly, ruled that under ATCSA the standard of proof that the Home Secretary has to meet to justify internment is not the criminal standard of "beyond reasonable doubt" but, instead, is even lower than that in a civil case. This means that anyone involved in a civil claim to recover damages (for example as a result of a car accident) must prove their case to a standard higher than that required of the Home Secretary under ATCSA in order to have his decision to intern people—potentially indefinitely—confirmed by SIAC. SIAC ruled, in its "generic" judgment of 29 October 2003, that it does not have full jurisdiction under section 25 of ATCSA because it may not substitute its own finding for that of the Secretary of State. Thus:

> It is a possibility that the Commission could conclude that there were reasonable grounds for the suspicion or belief without itself holding the requisite suspicion or belief. But its task under section 25 is to consider the reasonableness of the grounds rather than to cancel a certificate if, notwithstanding the reasonableness of the grounds, it were unable subjectively to entertain the suspicion or hold the belief to which the statute refers [para 40].

[10] For more information about the ATCSA and Amnesty International's concerns in relation to serious human rights violations that have taken place as a consequence of its enactment, see, inter alia, Amnesty International's written submissions to the House of Lords in the case of *A & Others v Secretary of State for the Home Department*, published by the organisation on 4 October 2004; *UNITED KINGDOM—Justice perverted under the Anti-terrorism, Crime and Security Act 2001* published by the organisation on 11 December 2003. Copies of these two documents are attached to this briefing for ease of reference (**not printed**). In addition, see *Amnesty International's Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001* and *UNITED KINGDOM—Rights Denied: the UK's Response to 11 September 2001*, both published on 5 September 2002 and available at http://web.amnesty.org/library/eng-gbr/reports

In summary, the fact that SIAC has neither the power to make a finally determinative ruling on the lawfulness of detention, nor to substitute its own assessment of the facts for that of the primary decision maker means that it fails to meet the requirements of Article 6(1). In addition, SIAC comprises only a very small number of members. It is clear from the generic judgment of the Commission that much of the evidence adduced by the Secretary of State will be applicable to more than one appeal, it is therefore inconceivable that there will not be occasions on which the same individuals are required to determine disclosure issues and then also to consider the substantive appeal. This situation is further exacerbated by the fact that even if the Commission rules certain material to be disclosable, the Secretary of State may nonetheless decide to withdraw it, rather than disclose it. This results in a real risk of unfairness in that the Commission, in determining the appeal, may have been influenced by such material.

7. The Presumption of innocence—The removal of the presumption of innocence and the attendant lowering of the standard of "proof" to one of reasonable belief and suspicion a standard lower even than the civil standard of proof. The presumption of innocence contains a number of vital safeguards for the avoidance of miscarriages of justice. Implicit is the duty on the state to prove its case so that any doubt is resolved in the accused's favour. The presumption of innocence, enshrined in Article 6(2) of the ECHR and 14(2) of the ICCPR is a peremptory norm which states cannot lawfully violate by invoking Article 15 of the ECHR or Article 4 of the ICCPR. Section 21 of ATCSA permits the Secretary of State to certify not on the basis of proof, but merely of suspicion and belief, albeit held on reasonable grounds. As SIAC noted this "is not a demanding standard for the Secretary of State to meet".

8. The absence of sufficient information and particularised allegations such as to enable detainees to know the case against them and to mount a defence. Open "evidence" consists in the main of assertions. The bulk of the "evidence" supporting those assertions is withheld from the detainees and their counsel of choice and admitted in "closed evidence proceedings". Under the "closed evidence proceedings", detainees and their counsel of choice are denied disclosure of the most important "evidence" against them. This is contrary to Article 6(3)(a)–(c) of the ECHR and Article 14(3)(a), (b) and (d) of the ICCPR.

9. Under the scheme established under Part 4 of the 2001 Act, the first opportunity for the detainees to mount any form of challenge to the process is after the charge has been determined by certification, at the appeal stage. But, even then the decision on the appeal is largely made on the basis of secret evidence heard in his absence in the "closed evidence proceedings" when the state puts forward and the court considers most, if not all, of the specific evidence which forms its case against the accused. This secret process, from which the detainee is excluded, replaces wholesale the ordinary trial process together with the accompanying guarantees of the presumption of innocence, equality of arms, including disclosure and the right to mount a defence. The procedure established under Part 4 is the antithesis of the protections that Article 6 requires.

10. The incursion into the right to be represented by counsel of one's choosing, contrary to Article 6(3)(c) of the ECHR and Article 14(3)(d) of the ICCPR. Under the Part 4 scheme, the special advocate's ability to "represent the interests" of the detainee is hopelessly circumscribed by the restrictions under which he is required to operate. S/he is unable to challenge the evidence or cross-examine witnesses effectively because s/he lacks the material on which to do so, namely informed instructions from the accused. Despite the statutory function with which s/he is charged, s/he is in truth, able to do little if anything to safeguard the interests of the accused. Even if the safeguard of the special advocate is the least restrictive measure that can be applied, in substance, it does little to repair the total eradication, under Part 4 of the ATCSA, of the right to defend oneself that is an essential element of a fair proceeding. The ability of the special advocate procedure to meet the requirements of a fair trial is yet further undermined by the fact that counsel who perform this function are assigned by the Attorney-General; not only a member of the Government seeking to defend the certification under appeal, but the very individual who, in some cases, will be appearing in court to argue against the detainee. This, in and of itself, undermines at least in appearance, the right of the detainee to independent counsel—and thus the right to defence. In summary, the Special Advocates appointed to "represent the interests" of ATCSA detainees are no substitute for legal counsel of one's choice. They are restricted in what they can and cannot do and are unable to discuss secret "evidence" with the individuals concerned, undermining the detainees' ability to challenge "evidence" and the Special Advocate's ability to represent his or her interests.

11. The right to a review suffers from precisely the same deficiencies in securing fair trial guarantees as the original appeal to SIAC under section 25. In essence it is a right in form but not substance. Once an individual is certified it is difficult to conceive of circumstances in which he, rather than the Secretary of State, can bring an end to his certification. There is nothing he can usefully put forward in the review hearing that he has not already advanced in the appeal before the Commission because he remains just as ignorant of the evidence against him as he was at that time.

12. In addition, Amnesty International considers that the consideration by the Secretary of State and SIAC of evidence obtained as the result of torture or other ill-treatment constitutes a further violation of Article 6 of the ECHR and Article 14 ICCPR. It is also a violation of the prohibition on the admissibility in any proceedings (save those against the alleged torturer) of evidence obtained by torture is an essential component of the absolute prohibition on torture and inhuman or degrading treatment contained in Article 3 of the ECHR and Article 7 of the ICCPR.

AMNESTY INTERNATIONAL'S RECOMMENDATIONS TO THE UK AUTHORITIES

13. Amnesty International continues to call for the immediate repeal of Part 4 of the ATCSA.

14. Amnesty International continues to call on the UK authorities to release immediately all persons detained under the ATCSA unless they are charged with a recognisably criminal offence and tried by an independent and impartial court in proceedings which meet international standards of fairness.

15. Amnesty International continues to call for an outright ban on the admissibility of any evidence extracted under torture and for full compliance with relevant international law in this respect.

BACKGROUND

16. Amnesty International has closely monitored the operation of the measures relating to administrative detention under Part 4 of the ATCSA since its implementation. As part of this monitoring process, a delegate of the organisation has attended a number of the open hearings, relating to the appeals against certification before SIAC and before the Court of Appeal, as well as the open sessions of the proceedings concerning the challenge against the derogation brought in July 2002 before SIAC and in October 2004 before the Appellate Committee of the House of Lords. In addition, a delegate of Amnesty International has monitored a number of hearings before SIAC arising from bail applications and review of bail conditions—the latest being the application of two internees heard on Monday 31 January 2004. Furthermore, Amnesty International intervened, in writing, as *Amicus Curiae*, in the proceedings before the House of Lords in the case of *A & Others v Secretary of State for the Home Department*, the so-called derogation challenge. Amnesty International has documented extensively the organisation's concerns arising from the implementation of the ATCSA and SIAC's operation there under.

17. Both prior to and in the wake of the ATCSA's enactment, Amnesty International expressed grave concern that some of its emergency provisions were draconian and would have far-reaching repercussions for the protection of human rights in the UK.

18. The ATCSA was enacted on 14 December 2001, barely a month after draft legislation had been laid before Parliament. Such a rushed legislative process raises doubts as to the thoroughness, adequacy and effectiveness of the legislative scrutiny that the ATCSA was afforded by the UK Parliament. At the time of debating the draft legislation, Amnesty International expressed concern at the extraordinarily short time made available for parliamentary and public scrutiny of the complex draft legislation, particularly as most of its provisions were permanent, and the temporary provisions allowed for potentially indefinite deprivation of liberty without charge or trial.

19. Amnesty International believes that Part 4 of the ATCSA is inconsistent with international human rights law and standards, including treaty provisions by which the UK is bound.

20. Amnesty International opposes detention under Part 4 of the ATCSA. It is detention ordered by the executive, without charge or trial, for an unspecified and potentially unlimited period of time, principally on the basis of secret evidence which the people concerned have never heard or seen, and which they were therefore unable to effectively challenge.

21. Amnesty International has repeatedly expressed concern that Part 4 of the ATCSA has created a shadow criminal justice system devoid of a number of crucial components and safeguards present in both the ordinary criminal justice system and national procedures for the determination of refugee status.

22. Amnesty International continues to express concern that proceedings under the ATCSA fall far short of international fair trial standards, including the right to the presumption of innocence, the right to present a full defence and the right to counsel.

23. The organisation believes that, for all intents and purposes, under the executive's application of Part 4 of the ATCSA people have been effectively "charged" with a criminal offence, and have been "convicted" and "sentenced" to an indefinite term of imprisonment without a trial.

24. In addition, having monitored bail proceedings before SIAC, Amnesty International is concerned about the content of the right to bail under the ATCSA which is more restrictive than that provided for under international law. The organisation understands that under the ATCSA, bail could only be granted if the detention conditions were such as to fall within the ambit of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the prohibition of torture or other ill-treatment.

25. Amnesty International is also profoundly concerned at the likely reliance by the UK executive on "evidence" that was procured under torture of a third party (ie not the appellants), in the UK executive's presentation of such "evidence" in ATCSA proceedings before the SIAC. This "evidence" is said to have been obtained at Guantanamo Bay, Bagram and possibly in other undisclosed locations where people are held in US custody purportedly in the so-called "war on terror".

26. Amnesty International continues to express concern that the UK authorities have taken advantage of the legal limbo and the coercive detention conditions in which UK nationals, and possibly others, were and have been held at Guantanamo Bay to interrogate them and extract information for use in ATCSA proceedings before SIAC here in the UK.

27. Amnesty International has continued to remind the UK authorities, including the judiciary, of the fundamental prohibition on accepting evidence in any judicial proceedings if obtained as a result of torture, enshrined, *inter alia*, in Article 15 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* to which the UK is a State Party. Article 4 of the same instrument states that state parties must criminalise all acts of torture, as well as any acts which constitute complicity or participation in torture. The organisation considers that the use of evidence obtained under torture undermines the rule of law and makes a mockery of justice. Torture not only debases humanity and is contrary to any notion of human rights, but it can also lead to decisions based on totally unreliable evidence. The willingness of the UK authorities to rely on evidence extracted under torture fundamentally undermines any claim to legitimacy and the rule of law and contravenes international human rights law and standards. Amnesty International has continued to express concern that in showing such a willingness to rely on evidence extracted under torture the UK government and the SIAC have given a green light to torturers world-wide.

Amnesty International

7 February 2005

Evidence submitted by the Department for Constitutional Affairs

Background

1. SIAC was established by the Special Immigration Appeals Commission Act 1997 to hear appeals against immigration and asylum decisions where, because of national security or other public interest considerations, some of the evidence on which the decision is based cannot be disclosed to the appellant.

2. In such cases, the decision will often rely heavily on assessments prepared by the security and intelligence services. In these instances, there is a substantial risk that if the person concerned becomes aware of the detail of the evidence against him, the source of the evidence will be compromised. This could mean that surveillance techniques are revealed and lives potentially put at risk.

3. The Government believes it must be able to take account of such evidence in the interests of safeguarding national security. At the same time, it recognises that deportation from the United Kingdom may have significant consequences for the individual concerned and in the interests of fairness, he or she should be allowed to challenge that decision. The procedures under SIAC are designed to provide the person concerned with an avenue of appeal and the reasons for that decision to be scrutinised judicially whilst also avoiding the risk of the source being compromised.

4. A right of appeal to SIAC against an immigration or asylum decision arises where the Secretary of State for the Home Department has certified under section 97 of the 2002 Act that the decision has been taken:

- in the interests of national security;
- in the interests of the relationship between the United Kingdom and another country; or
- otherwise in the public interest.

5. Since the 1997 Act, SIAC's jurisdiction has subsequently been extended by the *Anti-Terrorism, Crime and Security Act 2001* (the 2001 Act) and the *Nationality, Immigration and Asylum Act 2002* (the 2002 Act).

6. Section 21 of the 2001 Act enables the Home Secretary to certify a person as a suspected international terrorist, if he reasonably believes that the person's presence in the United Kingdom is a threat to national security and suspects that the person is a terrorist. This allows the individual to be detained, even when there is no imminent prospect of his being removed from the United Kingdom. There is a right of appeal to SIAC against the certificate under section 25 of the 2001 Act. SIAC also has responsibility under section 26 of the 2001 Act for reviewing on a regular basis each certificate that is in force.

7. Section 30 of the 2001 Act also designates SIAC as the appropriate tribunal for any legal proceedings to question a derogation by the United Kingdom from Article 5(1) of the *European Convention on Human Rights*, which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom. Proceedings challenging the Derogation Order, brought into force on 13 November 2001, (*A (FC) and others (FC) v Secretary of State for the Home Department*) were at first instance heard by SIAC under this section.

8. The 2002 Act further extended the jurisdiction of SIAC to include appeals against a decision of the Secretary of State to make an order depriving a person of a British citizenship status, where the Secretary of State for the Home Department certifies that the decision to deprive was based wholly or partly in reliance on information which he believes should not be made public. Section 40 of the *British Nationality Act 1981* (the 1981 Act), as amended by the 2002 Act, provides that a person may be deprived of his citizenship status if he has done anything seriously prejudicial to the vital interests of the United Kingdom or a British overseas territory.

9. SIAC additionally has powers to hear applications for bail by persons detained under the Immigration Acts, including those detained under those Acts by virtue of the 2001 Act, in those cases where the appeal lies to SIAC.

10. Where SIAC makes a final determination of an appeal, any party to the appeal may bring a further appeal on any question of law material to that determination. An appeal may be brought only with the permission of SIAC or, if such leave is refused, with the permission of the appropriate appellate court. This further right of appeal with leave was extended to bail decisions by SIAC in respect of persons certified as suspected international terrorists under the 2001 Act with effect from 22 September 2004 under the provisions of the *Asylum and Immigration (Treatment of Claimants, Etc) Act 2004*.

Legal Aid

11. Proceedings before SIAC are within the normal scope of the civil funding scheme, the Community Legal Service. Cases will therefore be supported if they satisfy the appropriate means and merits criteria for funding. The merits criteria for civil funding are set out in the Funding Code which is made under the *Access to Justice Act 1999* and approved by Parliament. The Code covers matters such as minimum prospects of success and cost benefit of the case.

12. Proceedings before SIAC were brought within the scope of the Community Legal Service scheme by the Lord Chancellor's direction dated 10 December 2002. The Direction was superseded by paragraph 2(1)(ha) to Schedule 2 to the *Access to Justice Act 1999* (inserted by the *Immigration and Asylum Act 2002*) with effect from April 2003. Before SIAC came into scope such cases could only be funded through the exceptional funding procedure under section 6(8)(b) of the *Access to Justice Act 1999*.

Composition of the SIAC panel

13. Proceedings before SIAC are heard by a panel of three members. The composition of the SIAC panel is specified in the 1997 Act, as amended by the NIA Act 2002:

— one member must hold or have held high judicial office; and

— one must be, or have been, the Chief Adjudicator or a legally qualified member of the IAT.

(The second requirement will, from 4 April, be amended to require that one member must be or have been a legally qualified member of the AIT.)

14. The Lord Chancellor has the power to appoint one of the members of SIAC to be its Chairman. The current Chairman of SIAC is Mr Justice Ouseley. Membership of SIAC currently comprises 22 judicial members, 13 legal members and 13 lay members.

Proceedings before SIAC

15. The procedures to be followed in proceedings before SIAC are prescribed in the *Special Immigration Appeals Commission (Procedure) Rules 2003*. Those procedures as far as possible mirror those followed in ordinary immigration and asylum appeals, but with special provisions to allow the Secretary of State to rely on evidence without disclosing it to the appellant or his representative, where to do so would be contrary to the public interest.

16. In order to protect sensitive intelligence information, the members of SIAC have been the subject of developed security vetting (DV), as has the person acting on behalf of the Secretary of State for the Home Department.

17. Rule 4 of the 2003 Rules places a general duty on SIAC, when exercising its functions, 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. The Commission is also required (by rule 44) to exclude the appellant and his representative from a hearing or party of a hearing if it considers it necessary in order to ensure that information is not disclosed contrary to the public interest.

18. Under section 6 of the 1997 Act the relevant law officer (the Attorney-General, the Advocate General or the Attorney-General for Northern Ireland) may appoint a special advocate to represent the interests of the appellant in any proceedings from which he and his legal representative are excluded. The law officer has a discretion rather than a duty to appoint a special advocate, but the Secretary of State may not rely on "closed material" (ie evidence which has not been disclosed to the appellant or his representative) unless a special advocate has been appointed.

Special Advocates

19. There is a two-stage process: selection and appointment.

Selection

— The Attorney General maintains three civil panels of junior counsel to the crown[11] who are approved to undertake Government work, according to their experience and seniority. Competition to become junior counsel to the crown is strong and appointment to the panel is by way of an open, fair and transparent process.

— From these panels, Treasury Solicitor's Department recommends to the Attorney General a potential list of lawyers with appropriate experience.

— Following approval by the Attorney General, lawyers are subject to full developed security vetting (DV), before they are selected to join the "pool" of DV counsel.

— Lawyers in the "pool" may be appointed to act for either, the Secretary of State, or as Special Advocates, in any given case, subject to there being no conflict of interest between cases.

Appointment

The legal provisions

— *S6(1) Special Immigration Appeals Commission Act 1997*—the Attorney General "may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded".

— *The Special Immigration Appeals Commission (Procedure) Rules 2003* provide that the Attorney General shall be notified by the Secretary of State of a pending appeal if the Secretary of State intends to oppose the appeal and intends to object to the disclosure of material to the appellant.

— *Rule 34(3)* provides that this is so that the "relevant law officer may appoint a Special Advocate to represent the interests of the appellant in proceedings before the Commission."

Procedure

— The fact that detainees' special advocates are appointed by the Attorney General, who himself has personally represented the Secretary of State before SIAC has generated concerns about the appearance of fairness of the process by which the detainee's interests are represented in closed hearings. In order to address these concerns the Law Officers have agreed that the Solicitor General (acting pursuant to section 1 of the Law Officers Act 1997) appoints the Special Advocate.

— Upon receiving notification from the Home Secretary, the Solicitor General considers whether or not to appoint a Special Advocate.

— From the "pool" of DV lawyers, recommendations are put forward by Treasury Solicitor's Department on the basis of an assessment of the level of experience that is necessary for a particular case and availability of counsel.

— The Solicitor General considers the recommendations and decides whether to appoint a Special Advocate to a case. [Those appointed to be Special Advocates understand the nature of their role before they are appointed].

— The appellant (or his representative) is notified of the proposed appointment and is given the opportunity to make representations as to whether no special advocate should be appointed or there is any good reason why the named advocate should not act (for eg a conflict of interest).

Time limits

20. The *SIAC(Procedure) Rules 2003* set out the time limits for appeals to SIAC exercising its powers under the 1997 Act. These include immigration decisions taken under the 1981 Act, the 2001 Act or the 2002 Act.

— An appellant in detention: not later than five days after the date on which he is served with the decision. An appellant in the UK: not later than 10 days after the date on which he is served with the decision.

— An appellant outside the UK: not later than 28 days after either the date on which he is served with the decision, or, where he is in the UK at the time of the decision, and may not appeal while in the UK, not later than 28 days after the date o which he left the UK.

The Commission may extend the time limits if satisfied that there are justifiable special circumstances.

[11] Not all counsel on the Special Advocates list are members of the civil panels of junior counsel to the Crown, see Ev 81, para 7

21. The 2001 Act sets out the time limit for appeals to SIAC against certification as a suspected international terrorist by the Secretary of State for Home Department. An appeal against certification must be given within a period of three months beginning with the date on which the certificate is issued or with the leave of SIAC after the end of this period but before commencement of the first review by SIAC (See next paragraph).

22. Under the 2001 Act, SIAC must hold a first review of each certificate issued by the Secretary of State for Home Department as soon as is reasonably practical after the expiry of 6 months beginning with the date on which the certificate was issued.

23. Parties may also make an application for permission to appeal on a question of law to the Court of Appeal, the Court of Session or the Court of Appeal in Northern Ireland, from a final determination by the Commission of an appeal or a review.

24. The prescribed time limits stipulate that an application for leave must be filed with the Commission not later than five days after the applicant has been served with a copy of the determination where the applicant is in detention; otherwise, the application must be filed not later than 10 days after service of the relevant determination.

Siac procedures

25. The Government believes these procedures provide an appellant with a fair and effective means of challenging decisions while ensuring that sensitive information is protected from disclosure, and that the composition of SIAC provides it with the expertise necessary both to assess intelligence material, and to consider and decide appeals within its jurisdiction. Immigration and nationality matters do not fall under the head of civil rights and obligations, and the provisions of Article 6 of the ECHR therefore do not apply. However, if they did, the Government considers that SIAC's present procedures fully meet the requirements of that Article as they relate to civil procedures. This view was endorsed by the Court of Appeal in March 2004 (*Between Secretary of State for the Home Department and M* C2/2004/0516).

26. **Annex A** sets out a process guide for hearings before SIAC.

Annex A

SIAC process guide

Notice of appeal

- An appeal to the Commission is made by sending a completed form SIAC 1 to the Special Immigration Appeals Commission by hand, post or fax.
- When filing a notice of appeal with the Commission a copy of the notice and any documents must be served at the same time on the Secretary of State for the Home Department.
- Upon receiving the notice of appeal the Commission will issue an appeal number and acknowledge receipt to the parties.

Secretary of State's reply

- If the Secretary of State for Home Department intends to respond to the appeal he must provide the Commission with a summary of the facts relating to the decision being appealed and the reasons for the decision, the grounds on which he opposes the appeal and the evidence which he relies upon in support of those grounds.
- If the Secretary of State objects to any of this material being disclosed to the appellant then he must inform the Commission of the reasons for his objection. The Secretary of State at this stage will contact the Attorney General's office so that a Special Advocate may be appointed. Once appointed the Special Advocate will contact the appellant and his representatives.
- The Secretary of State must make available to the Special Advocate any material that he provides to the Commission and to the appellant any material that is not contrary to the public interest.
- There is no time limit within the rules for the Secretary of State to oppose the appeal so the Commission may call a directions hearing to specify a time for the Secretary of State to oppose the appeal and to serve the closed material on the Special Advocate.
- The Commission may call a directions hearing at any stage in order to issue directions for the conduct of proceedings. All parties are usually involved. A directions hearing can be chaired by a single member of the Commission.
- Once the Special Advocate has had sight of the closed material he or she may no longer communicate directly or indirectly with the appellant or his representative.

Consideration of Secretary of State's objection

— Upon seeing the closed material the Special Advocate may make submissions as to why the material should be disclosed to the appellant. The Secretary of State has the opportunity to respond. The Special Advocate and Secretary of State may meet to try to resolve issues of disclosure.

— If there remain any issues which the Secretary of State and the Special Advocate are unable to resolve then these will be decided by the Commission at a hearing. This requires a panel of three members of the Commission.

— Neither the appellant nor his representative is permitted to attend the hearing. The Commission will make a ruling on all remaining issues of disclosure. The Commission may call a directions hearing to provide a timetable for the submission of skeleton arguments, evidence and witness statements prior to the hearing of the appeal.

Hearing

— All parties are notified of the date, time and place of the hearing in writing by the Commission. The UK representative of the UNHCR is also notified of the hearing.

— The hearing will be presided over by a panel of three members of the Commission.

— The proceedings will be open except where the Commission has to consider closed evidence in which case only the Special Advocate and the Secretary of State will be present.

Determination

— At the conclusion of the hearing the Commission will reserve judgement and will probably set a date for delivery of its determination.

— The Commission must record its decision in writing and may produce an open and closed version of its determination.

Leave to appeal from the Commission

— An application to the Commission for leave to appeal to the appropriate court (either the Court of Appeal, the Court of Session or the Court of Appeal in Northern Ireland) must be made not later than 10 days after the party seeking leave to appeal has received written notice of the determination. There is no prescribed form.

Bail

— The Commission can entertain an application for bail from an individual who is detained. An application must be made in writing to the Commission.

— The Commission must then serve a copy of the bail application on the Secretary of State and arrange a hearing.

— A single member of the Commission can hear a bail application.

Certification review

— The Commission must hold a first mandatory review of a certificate issued under s21 of the 2001 Act six months after the date of issue of the certificate or 6 months after determination of an appeal against the issue of the certificate.

— If the certificate is maintained a further review will take place every 3 months thereafter.

The Department for Constitutional Affairs

February 2005

Annex B

Anti-Terrorism, Crime & Security Act 2001—Detainees Under Part 4

A table setting out the number of people who have been certified and detained under the Act and providing an update on their current position can be found on http://www.homeoffice.gov.uk/docs3/atcsa—detainees.html

DEPORTATION SINCE 1997

Case		*Date certificate received*	*Decision*
1			Deport upheld but not removed
2			Deport upheld lost on Art 3
3			Deport upheld lost on Art 3
4		28/10/02	Abandoned
5		06/02/03	Withdrawn by S of S released from court
6		05/12/02	18/02/05 upheld
7		10/06/03	Withdrawn
8		18/08/03	Withdrawn
9		13/12/04	Pending
10		16/02/01	Exclusion—lifted by S of S
11	O	27/12/02	Withdrawn by the S of S

The names of the cases have been removed because it is Home Office policy to maintain confidentiality in immigration cases, for reasons of personal privacy and data protection.

11 appeals received;

1 S of S decision not to revoke a DO upheld
1 pending
2 withdrawn by appellants
2 decisions to deport withdrawn by S of S
1 appeal abandoned
2 deportations upheld but lost on Article 3
1 deportation upheld but not removed
1 appeal against exclusion (exclusion lifted by S of S)

Of the 11 above, 1 is currently detained under the *Immigration Act 1971* pending removal.

No persons have so far been deported as a result of decisions which have been appealed to SIAC. Although the Home Office has been successful in three appeals against deportation, two of the appellants have not been removed because SIAC found that removal would contravene the ECHR, specifically Article 3. The other appellant was not removed because he was no longer regarded as a threat to national security at the conclusion of the appeal. This was the first appeal to SIAC and was tested as far as the House of Lords.

These three cases are the only deportation appeals to have been fully heard by SIAC. We continue to take action against those who represent a threat to national security and make every effort to secure deportations. SAIC has recently upheld the decision of the Secretary of State to refuse to revoke a deportation order.

DEPRIVATION OF CITIZENSHIP

1 appeal received

Case 1, 17/04/03 appeal received, Adjourned at appellant's request

Detained: initially under extradition powers, currently held in custody pending trial on criminal charges in the UK.

Supplementary evidence submitted by the Department for Constitutional Affairs

SUMMARY OF THE GOVERNMENT'S RESPONSE TO SPECIAL ADVOCATES' CONCERNS

INTRODUCTION

The Special Advocate system is necessary to protect the public interest in not disclosing the sensitive material, while allowing independent scrutiny of that sensitive material by an advocate appointed to represent the interests of the appellant. Lord Carlile has expressed the view that "the provisions [relating to the procedure before SIAC] maintain a reasonable balance between fair proceedings and the reality of life-threatening risk to the public and to law enforcement agencies". However, there are a number of concerns raised by the Special Advocates which are legitimate and which the Government believes can be addressed very positively. The Government believes that the package of measures, which it proposes goes a substantial way towards meeting the Special Advocates' legitimate concerns.

Choice of Special Advocate

An Appellant should be able to select from a security-vetted panel of counsel the person he would like to act as his Special Advocate subject to the following provisos:

(a) there must be no conflict with any other appeal in which that Special Advocate is acting; and

(b) the Special Advocate must not have had prior access to relevant closed material, as otherwise he would not be in a position to speak to the Appellant or his legal representative.

Expanding the pool and experienced base of the Special Advocates

The Attorney General will be looking to strengthen the existing Panel by recruiting more Special Advocates with experience of handling witnesses in civil cases and also criminal lawyers, in the next recruiting exercise.

Support

The Government believes that enabling an instructing solicitor to have access to the closed material will significantly assist the Special Advocates. One lawyer alone cannot be expected to cope with the increased workload. It is proposed that, in order to make this work securely and effectively in practice, there should be two solicitors acting as a Special Advocates' instructing solicitor. This two-lawyer model comprises a solicitor who is security-vetted to a level at which he will be able to access and handle closed material. He will be the substantive instructing solicitor, possibly supported by administrative staff. He will have the very considerable benefit of seeing the closed material, will engage with the substance of the case and be in a position to perform a full instructing solicitor role, and provide most of the administrative support needed by the Special Advocates.

The other lawyer—the procedural instructing solicitor—may or may not be security-cleared but will deliver the initial brief to the Special Advocate with any open material, as well engaging in correspondence with the parties and for example, attending directions hearing and liaising in relation to listing.

Access to independent expertise

The substantive instructing solicitor, with detailed knowledge of the closed material in a particular case and with experience of the nature of closed material generally, will be a position to provide effective instructions in this area and to advise where appropriate on the possible need, subject to the agreement of SIAC/the Court, for expert evidence.

Training and database

A comprehensive written training/briefing pack, comprising both open and closed material, will be provided to the Special Advocate when he is instructed.

A comprehensive database of relevant judgments, rulings, skeleton arguments and the like—again comprising open and closed material—will also be provided to the Special Advocate.

Next steps

The Government believes that the above measures will go a long way towards meeting the Special Advocates legitimate concerns. However, as the Government is committed to meeting as many of the Special Advocates' concerns as possible, the Special Advocates will be consulted on these proposals.

Department for Constitutional Affairs

1 March 2005

Evidence submitted by a number of Special Advocates

A. Introduction

1. Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA) introduced a procedure by which foreign nationals suspected of involvement in terrorism can be detained without trial on the certificate of the Home Secretary. Detainees may appeal to the Special Immigration Appeals Commission (SIAC), which can hear open evidence (which the detainees and their representatives are shown) and closed evidence (which they are not). Where the Home Secretary relies on closed evidence (every case so far), Special Advocates are appointed to represent the interests of the appellant in the closed hearings.

2. The introduction of a power to detain a suspect on the basis of closed evidence marks a departure from previous practice in this country. Those who promoted Part 4 of ATCSA claimed that this departure was justified by the threat posed by various terrorist groups. They also claimed that the unfairness inherent in relying on evidence not shown to the detainee was mitigated by the provision of Special Advocates and by the existence of the SIAC procedure.

3. The Government has proposed that the detention regime in Part 4 of ATCSA should be replaced by a new regime which will provide for a range of controls, from electronic tagging to house arrest, which could be applied to foreigners and British citizens alike. The details of this proposed new regime have not, at the time of writing, been made public. However, it is understood that the legality of the new control orders will continue to be subject to review by a court or tribunal and that the Home Secretary will continue to rely, before such court or tribunal, on closed evidence, in respect of which Special Advocates will continue to represent the appellant's interests.

B. The purpose of this submission

4. The authors of this submission are currently acting as Special Advocates in certification appeals under Part 4 of ATCSA or have acted in relation to the challenge to the compatibility of the Act with the European Human Rights Convention, which recently culminated in the decision of the House of Lords. This submission contains no comment on the question whether the provisions of Part 4 of ATCSA constitute a proportionate response to the threat faced by the UK (a question on which the House of Lords has recently ruled),[12] nor any recommendation or assessment in relation to the new proposals (which are for Parliament to consider). It has a much more limited purpose—to identify, from the perspective of those who have experience of appearing in closed hearings before SIAC, and insofar as is consistent with the authors' professional[13] and statutory[14] obligations:

- the limitations under which the Special Advocates perform their function and the ways in which they could be enabled to do so more effectively (section C); and
- other salient features of the appeal regime under Part 4 of ATCSA which may fall to be reconsidered in debate on the new proposals (section D).

C. The limitations of the Special Advocates' function

5. Special Advocates are appointed by the Law Officers under s. 6 of the SIAC Act 1997 to "represent the interests of the appellant in any proceedings before [SIAC] from which the appellant and any representative of his are excluded". Their functions are further defined by r. 35 of the SIAC (Procedure) Rules 2003 as "to represent the interests of the appellant by "(a) making submissions to the Commission at any hearing from which the appellant and any representative of his are excluded; (b) cross-examining witnesses at any such hearings; and (c) making written representations to the Commission".

6. The function of the Special Advocates was considered by the Court of Appeal in *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, [2004] 2 All ER 863, the first and only case in which SIAC allowed an appeal against certification. Giving the judgment of the court, Lord Woolf of Barnes CJ said:

> . . . The 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.[15]

After giving its reasons for dismissing the Home Secretary's application for permission to appeal against SIAC's decision, the court said this:

> . . . 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.[16]

7. 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

[12] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 WLR 87

[13] See especialy 709.1 of the Code of Conduct of the Bar of England and Wales

[14] See s 6 of the Special Immigration Appeals Commission Act 1997 and r 36 of the *Special Immigration Appeals Commission (Procedure) Rules 2003*

[15] At [13]

[16] At [34]

advance the interests of the appellants by doing so.[17] Whether we can "ensure that those detained achieve justice" is another matter. The contribution which Special Advocates can make is, in our view, limited by a number of factors—some inherent to the role and others features of the current procedural regime. We have tried to point out ways in which the latter might be changed. By doing so, we should not be taken as expressing any view as to whether or not the regime would be capable of achieving fairness if these changes were made.

Inability to take instructions

8. The inability to take instructions on the closed case is undoubtedly the most serious limitation on what Special Advocates can do. This limitation has not been universally understood. For example, in his evidence to the Select Committee on Home Affairs on 8 March 2004, Lord Carlile of Berriew QC (the person appointed under s. 28 of ATCSA to review the operation of the detention provisions) was under the misapprehension that Special Advocates are free to talk to the Defendant's lawyers:

> *Committee:* How do they communicate with their clients then, in writing?
>
> *Lord Carlile of Berriew:* They [Special Advocates] do not communicate with their clients very much at all. Indeed, I am not aware of any significant level of communication with the "client". Certainly, there are communications with the private lawyers for the detainee, the detainees always have their own lawyers, their own solicitors, their own barristers; of course, their own barristers do not see the closed material. So there is plenty of room for an iterative process between the Special Advocate and the conventional lawyers, but I would like to see the Special Advocate able to bypass the conventional lawyers in certain circumstances."[18]

9. There is in fact no contact between the Special Advocates and the appellant's chosen representatives in relation to the closed case and, therefore, no "iterative process" of the kind described. Under the *SIAC (Procedure) Rules 2003,* Special Advocates are permitted to communicate with the appellant and his representatives only *before* they are shown the closed material. In practice, our experience is that appellants have not generally chosen to take advantage of this opportunity (perhaps, in part a reflection of the lack of confidence in the *unilaterally* appointed security cleared lawyer: see below). Such communication is, in any event, unlikely to be of much use to the Special Advocates, since they do not at this stage know the nature of the closed case the appellant has to meet. Once the Special Advocates have seen the closed material, they are precluded by r. 36(2) from discussing the case with any other person. Although SIAC itself has power under r. 36(4) to give directions authorising communication in a particular case, 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 (ie matters unrelated to the particular factual sensitivities of a case).

10. 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 appellant has an answer to any particular closed allegation, except insofar as the appellant 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 appellants in the open case which is provided to the appellants.[19] 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 appellant 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.

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[17] There are also circumstances in which individual Special Advocates have taken the view that, on the facts of a particular case, it would not be in the appellant's interests to participate in a particular hearing. This course was deprecated in strong terms by one tribunal (Collins J in *Abu Qatada*) but regarded as entirely appropriate by another (Sullivan J in *S*). The authors of this submission are clear that there may be situations in which it is not in the interests of the appellant for his Special Advocates to participate in a particular hearing. The question whether Special Advocates should participate or not is one which they must answer in the exercise of their own independent judgment, taking into account all the circumstances of the case. Special Advocates have to consider the extent to which, given the limitations inherent in their role, they can advance the appellant's interests in any closed hearing

[18] See www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/515/3031106.htm

[19] It is one of the Special Advocates' most important functions to ensure that as many as possible of the documents relied upon by the Home Secretary are disclosed to the appellant, whether in whole or in part or in gist form. Appellants will have an idea from material which is disclosed to them after this exercise the extent to which these representations by the Special Advocate have been successful. Often, it will be apparent to them that the released information was already publicly available. Moreover, even when the Special Advocate's representations are successful and further material or gists are disclosed to the Appellants, communication between the Appellants and their lawyers on the one hand and the Special Advocates on the other is still restricted. The Appellants can (if they wish) write to the Special Advocate (via the Treasury Solicitor) but without SIAC's permission the Special Advocate cannot respond or engage in a dialogue over the significance of the newly disclosed material. In principle it would be possible to overcome the problem by the use of teams of Special Advocates, some being appointed or seeing the closed material later, but that in turn raises considerable logistical issues

Lack of an independent, security-cleared solicitor

11. Counsel generally act on instructions from a solicitor, whose firm is involved in the preparation of the case. 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. If the Special Advocates' function is to be retained, an independent, properly resourced, security-cleared instructing solicitor should be provided.

Lack of training and co-ordination

12. The function of a Special Advocate is sufficiently different from that of an advocate in other proceedings that training would be of assistance. It could usefully be provided to new Special Advocates by those who have previously performed the function.

13. Under the present system, most Special Advocates instructed in certification cases will not have performed the role before.[20] It would be a major advantage to have a solicitor who is familiar with, and has access to, previous closed SIAC decisions which establish principles used to determine issues that routinely arise in the course of closed proceedings. There is a substantial body of closed decisions, adumbrating the relevant principles and practice under which closed hearings proceed. These are nowhere summarised or collated. These judgments are not routinely supplied to Special Advocates, but have to be requested. A Special Advocate who does not know what rulings have been handed down may judge it necessary to request and digest all the closed rulings even though many of these may be irrelevant. Each newly instructed Special Advocate has to repeat this laborious process because of the absence of the continuity of knowledge that would come from a security-cleared solicitor who was routinely instructing Special Advocates in SIAC proceedings. Similar points can be made in relation to factual disputes and contexts which reoccur. By contrast, of course, the Secretary of State is always a party to SIAC proceedings. His civil servants and lawyers will have the opportunity to build a common fund of experience.

14. If the Special Advocates' function is to be maintained, provision should be made for (i) training and (ii) an independent instructing solicitor to keep a database of closed rulings and to provide advice and assistance on points of law and fact relevant to the performance of the Special Advocates' functions.

Policing disclosure

15. A point that frequently arises in connection with the Special Advocates' disclosure function is that information that is said to be classified has in fact been released (or is later released) in other parts of the world, for instance in the course of foreign criminal proceedings.

16. Accordingly, in testing whether or not part of the Secretary of State's case should remain "closed", or should be made "open", Special Advocates seek, in the best interests of their client, to keep a weather eye on materials released in other jurisdictions. There are, of course, very substantial constraints on their ability to do so: (i) because of the security strictures under which they must work; (ii) because of limitations in their knowledge as to relevant foreign proceedings or disclosures; and (iii) for obvious reasons of resources. Keeping track of such material is an especially large job given the extent of potentially relevant information available as a result of shared (but subsequently disclosed) intelligence, in a potentially significant range of languages.

17. If the Special Advocates' function is to be maintained: (i) the primary onus on the Secretary of State in continually reviewing "closed" cases against ongoing disclosures made both by the domestic and worldwide security services must be clarified,[21] so as to alleviate in part the burden on the Special Advocates and to provide the Special Advocates with materials with which to test the Secretary of State's position on non-disclosure; and (ii) the Special Advocates must be given the resources sufficient to enable them best to identify and evaluate such materials, so as continually to track developments.

[20] Appellants are entitled to speak to their Special Advocates before they see the closed material. However, a Special Advocate who has seen closed material relating to one detainee is not permitted to speak to another detainee. It follows that new Special Advocates must be instructed for each appellant or set of appellants unless the appellant indicates that he does not wish to speak to his Special Advocate

[21] We would suggest that there should be set procedures that require the Secretary of State to identify: (a) the consideration he has given to public domain sources; (b) what published sources have been, are or are to be checked; (c) how often they are reviewed; (d) the means of review; and (e) how the situation will be monitored, in particular by liaison with friendly agencies

Lack of access to independent expertise

18. Some of the closed evidence which Special Advocates have to deal with would, in ordinary civil litigation, be referred to independent experts (eg those with particular knowledge of the political situation in a particular country or region or, in some cases, scientific or technical experts). Special Advocates have no access to any such experts. Nor do they have access to independent interpreters to provide translations of material of which the original source is in a foreign language. They therefore have to rely on experts and interpreters provided by the Secretary of State. This gives rise to a potentially serious inequality of arms in closed proceedings.

19. Parliament may wish to consider whether there should be some provision to enable Special Advocates to draw on independent expertise where appropriate.

Lack of a body capable of providing assistance to Special Advocates

20. The recommendations at paragraphs 11–19 above suggest that some form of standing body is necessary which would enable Special Advocates, cleared solicitors and appointed experts to work together and assemble (where appropriate) databased materials.

No choice of representation

21. The nature of the role played by Special Advocates demands that they should be security cleared. That means that an appellant will never have a completely free hand in choosing who should represent him or her. But the present regime gives the appellant *no* choice whatsoever. From his perspective, the Special Advocates are selected at the discretion of a Law Officer who is a member of the executive which has authorised his detention. In these circumstances, it would not be surprising if the appellant had little or no confidence in his Special Advocates. There is no reason of principle why the appellant could not be allowed to choose his Special Advocate(s) from a panel of security cleared advocates. This indeed has been the practice under the 1997 Act, although the inter-relationship of cases may give rise to problems of conflict in the cases under Part 4 of ATCSA.

The Pool from which the Special Advocates are Drawn

22. From our experience of acting as Special Advocates, we suggest that the principal requirement for a Special Advocate in proceedings before SIAC is the ability to absorb and analyse information that may be in voluminous documents, and to cross-examine effectively on the basis of this. Such abilities are not confined to public law practitioners. While public law issues do sometimes arise in relation to closed material, the nature of the work may also require skills which those such as criminal lawyers or those with experience of handling witnesses in civil cases, would be equally if not better qualified to perform.

D. Other salient features of the appeal regime under Part 4 of ATCSA

Standard of Proof

23. Section 21(1) of ATCSA empowers the Home Secretary to issue a certificate in respect of a person if he "reasonably (a) believes that the person's presence in the UK is a risk to national security and (b) suspects that the person is a terrorist". "Terrorist" for these purposes includes a person who belongs to or supports or assists a group which "the Secretary of State suspects... is concerned in the commission, preparation or instigation of acts of international terrorism" (s. 21(2)-(4)). Section 25(1) empowers SIAC to cancel a certificate if it finds that there are no reasonable grounds for a belief or suspicion.

24. It is relevant to note that, when SIAC first came to consider what was meant by these words, the only analogies it could find were provisions which authorised detention following arrest for periods of hours or days.[22] The standard of evidence required to detain someone for a short period prior to charge has, in effect, been adopted as capable of justifying indefinite detention. Although SIAC has accepted that the length of

[22] In *Ajouaou, A B, C, and D*, 29 October 2003, at [43]–[44], SIAC (Ousley J, Mr C M G Ockleton and Mr J Chester) referred to *O'Hara v Chief Constable of the RUC* [1997] AC 286 (which concerned a provision authorising detention for 48 hours, extendable by a further 5 days), *Hough v Chief Constable of Staffordshire* [2001] EWCA Civ 39, *The Times,* 14 February 2001 (which concerned a provision which authorises detention for 24 hours before charge, extendable to a further 36 hours in certain circumstances) and *Fox, Campbell & Hartley v UK* (1990) 13 EHRR 157 (which concerned a provision authorising arrest and detention for up to 72 hours prior to charge)

the detention (in these cases, potentially indefinite) is relevant to the question whether a particular suspicion is regarded as "reasonable", SIAC's ability to review evidence relied upon by the Home Secretary is fundamentally limited by the tests laid down in the legislation. In SIAC's own words:

> It is our task under section 25 to examine the evidence relied on by the Secretary of State and to test whether it affords us reasonable grounds for the relevant belief and suspicion; it is not a demanding standard for the Secretary of State to meet. The very formulation of the statutory tests gives significant weight to his views and expertise, which reflects his role as the Minister answerable to Parliament. . .[23]

25. The Court of Appeal, although it considered the use of the expression "not a demanding standard" to have been "unfortunate", upheld SIAC's interpretation of the test laid down by the statute.[24]

26. Parliament may wish to consider whether the standard which the evidence for the new control orders must meet should continue to be so undemanding.

Evidential approach to unproven allegations

27. Initially, it was suggested by counsel for the appellants that an allegation relied upon as supporting a suspicion should not be taken into account unless SIAC found it proven on the balance of probabilities.[25] That submission was rejected by SIAC, which held that it was "necessary to look at the case as a whole and ask, on a global approach, whether there was a danger.[26] The Court of Appeal upheld this approach, noting that intelligence material, by its nature, often does not admit of proof, even on the balance of probabilities.[27] Those of us who have participated in closed hearings have observed the following type of cross-examination:

> *Special Advocate*: Do you accept that document A, though consistent with the sinister explanation you attribute to it, is equally consistent with another completely innocent explanation?
>
> *Witness*: Yes.
>
> *Special Advocate*: So, the sinister explanation is no more than conjecture?
>
> *Witness*: No. Document A has to be considered alongside documents B, C, D and E. When viewed as a whole, on a global approach, the sinister explanation is plausible.
>
> *Special Advocate*: But you have already admitted that documents B, C, D and E are in exactly the same category: each of them is equally consistent with an innocent explanation and with a sinister one.
>
> *Witness*: Yes, but when viewed together they justify the assessment that the sinister explanation is plausible and form the basis of a reasonable suspicion.

28. In framing any new legislation, Parliament may wish to consider to what extent it should permit SIAC (or its successor) to take into account allegations of past conduct which it finds not proven (even on the balance of probabilities).

Judicial deference

29. When considering the reasonableness of the Home Secretary's belief that the appellant's presence in the UK is a risk to national security, SIAC accords "considerable deference" to the assessment of the Home Secretary.[28] The position when assessing the reasonableness of the Home Secretary's suspicion that the appellant is a terrorist is slightly different. Here, SIAC claims not to accord deference.[29] However, on most questions, the relevance of particular evidence will depend on an assessment. Those who carry out the assessment (members of the Security Service) are regarded by SIAC as experts. SIAC, although not bound to accept this evidence, nonetheless has due regard to the expertise and experience of the person who is giving the evidence. Thus, when faced with (for example) a coded conversation which is said to bear a particular meaning or a question about the reliability of a source, SIAC treats the assessment of the Security Service witness as a judge in civil proceedings would treat (for example) the evidence of a doctor or surveyor or engineer giving expert evidence. Unlike in ordinary civil litigation, however, the Special Advocate has no opportunity to call expert evidence in reply (see paragraphs 18–19 above).

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[23] *Ajouaou et al*, at [71]

[24] *A and 9 others v Secretary of State for the Home Department* [2004] EWCA Civ 1123, [2004] HRLR 38, per Pill LJ at [49]

[25] Where an allegation of past conduct is relied upon in support of an anti-social behaviour order under the Crime and Disorder Act 1998, the allegation must be disregarded unless it is proved to the *criminal* standard: *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, at [37], [82]–[83] & [114]

[26] *Ajouaou et al*, at [61]

[27] *A and 9 others v Secretary of State for the Home Department*, see esp. per Laws LJ at [223]–[238]

[28] *Ajouaou et al*, at [69]

[29] *Ibid*, at [70]

30. Judges in civil cases are familiar with the task of weighing the competing and sometimes conflicting evidence of experts on even the most arcane subjects. SIAC has the advantage over the Secretary of State that it will have had the opportunity to hear the evidence of witnesses tested by cross examination.[30] It also has the advantage over judges in many civil cases that it is an expert tribunal.[31]

31. Parliament may wish to consider whether the deference which it has been said SIAC should show to Security Service assessments is relevant when considering the appropriate standard of proof in certification appeals.

Nicholas Blake QC, Andrew Nicol QC, Neil Garnham QC, Angus McCullough, Philippa Whipple, Tom de la Mare, Jeremy Johnson, Daniel Beard, Martin Chamberlain

7 February 2005

Supplementary evidence submitted by a number of Special Advocates

THE ROLE OF SPECIAL ADVOCATES IN JUDICIAL PROCEEDINGS UNDER THE PREVENTION OF TERRORISM BILL

INTRODUCTION

On 22 February 2005, the Home Secretary presented the *Prevention of Terrorism Bill* (the Bill) to the House of Commons. The provisions in that Bill are intended to replace Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA).

This paper is submitted by a group of Special Advocates who are currently or who have been acting in proceedings under Part 4 of ATCSA. We suggest that it is read in conjunction with our recent submission for the Committee's inquiry into the workings of SIAC.[32] Our purpose is to raise issues that Parliament may wish to consider as to the role of Special Advocates under the procedures envisaged in the Bill.[33]

PROVISIONS FOR CONSIDERATION OF REFERENCES FOR DEROGATING CONTROL ORDERS

Clause 2(1) of the Bill empowers the Home Secretary to make a control order that deprives a person of his liberty. Clause 2(2) requires the Home Secretary, when he makes such an order, immediately to refer it to the court. Clause 2(3) provides that the court's consideration on such a reference must begin no more than 7 days after the day when the control order was made.

As we understand it, the provision for a review by the court within a maximum of 7 days is seen by the Government as a safeguard for those who are to be deprived of their liberty by a decision of a minister. We believe that, in assessing the effectiveness of that safeguard, it is crucial to understand exactly how this preliminary review will work. On this question, there are several practical points to be made.

First, in our original Submission, we drew attention to the fact that the standard which, under ATCSA, the Home Secretary's evidence was required to meet had been described by SIAC as "not a demanding one". We suggested that a question arose as to whether the test for the new control orders should continue to be so undemanding. The test which applies under clause 2(1) is plainly more demanding than that which applied under the old regime. The Home Secretary must be satisfied, on the balance of probabilities, that an individual is or has been involved in terrorist activity. Moreover, when the court conducts a hearing into the matter, it is required by clause 2(5) to make its own determination of the matters of which the Home Secretary was required to be satisfied. However, when the matter is first considered by the court (within 7 days of the original decision to impose the order) the test is quite different: the court will not be asked to consider whether an individual "is or has been involved in terrorism-related activity"; instead, it will have to ask itself whether the matters relied on by the Home Secretary are "*capable of constituting reasonable grounds*" for the making of a derogating control order. That test appears to be even less demanding than that which applied under Part 4 of ATCSA since it requires the court to decide whether there are reasonable grounds (as opposed to whether the matters relied upon are *capable* of constituting reasonable grounds, as the Bill provides).

Secondly, it is unclear what is supposed to occur within 7 days of the making of the control order. What is the "consideration" required by clause 2(3) to involve? There are three possibilities:

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[30] *See M v Secretary of State for the Home Department*, at [34]

[31] See 299 HC Official Report (6th Series) col 1055, cited in *M v Secretary of State for the Home Department per* Lord Woolf CJ at [2]

[32] Owing to the lack of time since the presentation of the Bill, it has not been possible for all the authors of the first submission on SIAC to consider and agree this supplemental submission

[33] This supplemental submission was prompted by an inquiry from the Committee as to the role of Special Advocates at preliminary hearings in relation to derogating control orders under clause 2 of the Bill. The authors have taken the opportunity of raising certain other matters which can immediately be seen to arise from the Bill. Given the time available to consider it, it has not been possible to give careful consideration to every provision in the Bill

— *Consideration on the papers only (without a hearing)*—If this is what is envisaged, then there is no reason why it should not occur within 7 days. However, without any evidence or argument from or on behalf of the detained individual and given the very low test which the Home Secretary's evidence has to meet, it is difficult to see the court doing anything other than continuing the detention unless, from the papers he himself submits, it can be seen that the Home Secretary has taken leave of his senses. In virtually every case, any real critique of the Home Secretary's decision would have to await the "hearing" envisaged in clause 2(4)(c).

— *A hearing with the detainee represented but no Special Advocate*—This would provide a limited opportunity for the court to hear argument on open material, though the position of the Home Secretary's lawyers (who would no doubt have been involved for some time before the control order was made) and the detainee's lawyers (who, once instructed, might have on average about two or three days to prepare for the preliminary hearing) would be far from equal. More fundamentally, however, if and to the extent that the Home Secretary relied on closed evidence, the detainee's lawyers would be unable to challenge that evidence.

— *A hearing with the detainee represented and a Special Advocate*—This would in theory provide an opportunity for the court to hear argument on the adequacy of both open and closed evidence. However, it seems to us wholly unrealistic to suppose that, within 7 days, Special Advocates could:

  — be selected and briefed—the pool of advocates who have the appropriate security clearance is small and the process of obtaining clearance takes many months; the current Special Advocates are busy barristers who cannot simply drop all other professional commitments when required; so, unless the number of Special Advocates were greatly increased, the chances of finding one (or two) available to prepare for and appear at a hearing with only 7 (or fewer) days' notice would be negligible;

  — take delivery of the relevant material—the nature of the material relied on means that special arrangements are necessary for its delivery and reception. Our experience has been that those arrangements cannot be made at a moment's notice;

  — read the material, and prepare submissions on it—the quantity of material relied on differs from case to case. In some cases, the material is voluminous and dense and has taken weeks rather than days to read. The special arrangements necessary for the preparation and delivery of secure documents also add to the logistical difficulties; and

  — attend a hearing.

Thirdly, one of the most important functions of the Special Advocate involves checking and if necessary making submissions as to whether any of the closed material should in fact be made open. It is clear that there will be no opportunity to perform this function within the first 7 days.

Fourthly, a Special Advocate, once he has seen the closed material, is presently effectively prohibited from communicating with the detainee or his lawyers. If a Special Advocate is to appear and play any meaningful part in a preliminary hearing, he will have to see the closed material as soon as the control order is made. That means that, if the present prohibition on communication is maintained:

— there will be no opportunity for the detainee or his lawyers to speak to the Special Advocate *at all*—an even more serious limitation than exists under the present regime on the ability the Special Advocate to represent the interests of the detainee;[34] or

— if the detainee is permitted and wishes to speak to his Special Advocate, two Special Advocates (or two sets of Special Advocates) will have to be instructed in his case—one to appear at the 7 day preliminary review and a second, who has not yet seen the material relied on or any other related material, who can therefore liaise with the Appellant and/or his lawyers before being served with the closed material and then take part with the first Special Advocate at the full hearing. We would add that it has been the usual practice for a pair of Special Advocates to be instructed for each detainee. In view of the nature of the material and restrictions on the Special Advocates discussing it with others, this is a sensible practice. It also accords with experience in the use of Special Advocates in relation to SIAC's other work.

Control order proceedings

In our view (on the basis of our experience of the SIAC system), the effectiveness of judicial oversight of control orders made by the Home Secretary will depend to a large extent on the procedure applicable (as well as the standard of review that the court conducts). Our submission on SIAC was in large part directed to aspects of the procedure applicable before that body which we thought required further consideration.

[34] Even the present rule, which permits contact between Special Advocates and detainees only before the Special Advocates have seen the closed material, represents a serious limitation on the ability of the Special Advocates to perform their function: see our submission on SIAC

The Bill says very little about procedure. Virtually everything is left to "rules of court" which are to be made initially by the Lord Chancellor.[35] But unlike the SIAC (Procedure) Rules, which had to be laid before and approved by both Houses of Parliament,[36] the rules applicable to control order proceedings will not even have to be laid before, let alone approved by, either House insofar as they relate to proceedings in England & Wales.[37] Furthermore, when he makes these rules, the Lord Chancellor is not required to consult with anyone apart from the Lord Chief Justice. Even that consultation can be done before the Act is passed—and therefore before the scope of the power to make the rules is known.[38] Those considering these provisions may wish to consider whether these arrangements are adequate to ensure that the procedure allows for effective judicial oversight of control orders.[39]

One of the very few matters of procedure which is specified in the Bill itself appears in paragraph 4(3)(c) of the Schedule. That provision requires the procedure rules to secure:

> that the Secretary of State is not required for the purposes of any control order proceedings or relevant appeal proceedings to disclose anything to the relevant court, or to any other person, where he does not propose to rely on it in those proceedings.

That provision seems to us to ensure that, in one respect at least, the procedure applicable in control order proceedings will offer less protection to those subject to control orders than the SIAC regime offers to those detained under Part 4 of ATCSA. To date, the Home Secretary's officials have accepted (despite the absence of any obligation in the SIAC (Procedure) Rules to this effect) that, if they come across closed material which they do not propose to rely on but which might assist the detainee, they must disclose it to the Special Advocate.[40] Counsel for the Home Secretary accepted that it was their responsibility to identify any such material and to ensure that it was disclosed.[41] SIAC, for its part, recorded and welcomed this acceptance.[42] It might be thought that such an informal system is itself inadequate.[43] But, leaving that question aside, paragraph 4(3)(c) appears to remove even the informal disclosure obligation. Applied literally, it would absolve the Secretary of State of any obligation to disclose (a) evidence which undermined completely his case; or (b) evidence that supported (or led to a relevant chain of enquiry for) the defence. We question whether this properly reflects the intention of the draftsman.

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28 February 2005

Evidence submitted by JUSTICE

Introduction

1. JUSTICE is a British-based human rights and law reform organisation with around 1600 members. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. JUSTICE has been closely engaged with the debate over counter-terrorism legislation in the UK and the role played by Special Immigration Appeals Commission ('SIAC') in particular in respect of persons detained under Part 4 of the *Anti-Terrorism Crime and Security Act 2001* ("ATCSA").[44] While we note that Part 4 itself is soon to be replaced by fresh counter-terrorism legislation, we regard the issues raised by this inquiry to be of continuing importance.

3. JUSTICE also has a particular history of engagement with issues surrounding the use of special advocates, both in the context of SIAC proceedings and elsewhere. It intervened in the 1997 case of *Chahal v United Kingdom* before the European Court of Human Rights in which the possible use of special advocates was first judicially considered and which led to the subsequent creation of SIAC.[45] It submitted

[35] In relation to proceedings in England, Wales or Northern Ireland: see clause 9 and Schedule, paragraph 3(1) & (2)

[36] *Special Immigration Appeals Act 1997*, s. 5(9)

[37] When the powers to make rules of court are exercised initially in relation to proceedings in Northern Ireland, they are to be made by statutory instrument subject to annulment pursuant to a resolution of either House: Schedule, paragraph 3(5)

[38] Schedule, paragraph 3(4)

[39] We have written to the Lord Chancellor and Lord Chief Justice suggesting that we be given the opportunity to comment on the draft rules before they are made

[40] *Ajouaou, A B, C, and D*, 29 October 2003 (Ousley J, Mr C.M.G. Ockleton & Mr J. Chester), at [52]

[41] *Ibid*, at [53]

[42] *Ibid*, at [54]

[43] Compare, for example, the formal requirements in the Criminal Procedure and Investigations Act 1996 in respect of "unused material" gathered by the police and prosecuting authorities in criminal investigations

[44] See eg JUSTICE response to the Home Office Consultation on Counter-Terrorism Powers, August 2004; JUSTICE response to Joint Committee on Human Rights Review of Counter-Terrorism Powers, June 2004; JUSTICE response to House of Lords Select Committee on the European Union Sub-Committee F Inquiry into EU Counter-Terrorism Activities, September 2004

[45] 23 EHRR 413 at para 144

evidence to the Lord Justice Auld's Review of Criminal Courts in England and Wales in 2001 supporting the use of special advocates in criminal proceedings for the purpose of public interest immunity applications.[46] In July 2004, it intervened in *Roberts v Parole Board* before the Court of Appeal concerning the appointment of a special advocate in a parole review hearing.[47] In November 2004, JUSTICE published a study on the use of special advocates in SIAC proceedings as part of a report on their use in civil and criminal proceedings generally.[48]

Summary

4. In this submission, JUSTICE highlights the following concerns regarding SIAC's use of:

- civil proceedings to determine indefinite detention under Part 4 of ATCSA 2001;
- evidence contrary to Article 15 of the Convention Against Torture; and
- special advocates in closed proceedings under Part 4 of ATCSA.

The use of civil proceedings to determine indefinite detention under Part 4 of ATCSA 2001

5. In JUSTICE's view, the central defect of the operation of SIAC since November 2001 has been the use of civil proceedings to determine issues relating to indefinite detention. This defect flows, however, not from SIAC's own procedures but from the government's decision to adapt SIAC from a specialist immigration tribunal to a de facto counter-terrorism court under Part 4 of ATCSA.

6. This "choice of an immigration measure to address a security problem"[49] has meant that persons detained indefinitely under Part 4 have lacked the essential guarantees of due process provided by the criminal law—ie the presumption of innocence,[50] standard of proof beyond a reasonable doubt,[51] to be present at an adversarial hearing,[52] the assistance of counsel of their own choosing,[53] and so forth.

7. While the guarantees offered by SIAC's procedures were appropriate to its original civil function (reviewing deportation decisions on national security grounds), the use of the same tribunal to judicially review the Home Secretary's decision to indefinitely detain suspected terrorists has been inadequate to the task of protecting those detainees' rights to liberty. As Lord Nicholls of Birkenhead noted in the recent House of Lords decision in *A and others v Secretary of State for the Home Department:*[54]

> Nor is the vice of indefinite detention cured by the provision made for independent review by [SIAC]. The commission is well placed to check that the Secretary of State's powers are exercised properly. But what is in question . . . is the existence and width of the statutory powers, not the way they are being exercised.

8. Specifically, SIAC's function under Part 4 has not been to determine whether those detained are guilty of any criminal offence but only to determine—on a standard of proof below even that of the ordinary civil standard—whether the Home Secretary had reasonable grounds for suspecting that a detainee has been involved in terrorism and, hence, posed a risk to the national security of the UK.[55] As SIAC itself noted in October 2003, "it is not a demanding standard for the Secretary of State to meet".[56]

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[46] See JUSTICE Response to Auld, January 2002, para 82

[47] [2004] EWCA Civ 301

[48] See Metcalfe "'Representative but not responsible': the use of special advocates in English Law" (2004) 2 *JUSTICE* Journal 11-43

[49] *A and others v Secretary of State for the Home Department* [2004] UKHL 56 per Lord Bingham of Cornhill, para 43. See also Lord Hope of Craighead at para 103: "[I]t would be a serious error, in my opinion, to regard this case as about the right to control immigration. This is because the issue which the Derogation Order was designed to address was not at its heart an immigration issue at all. It was an issue about the aliens' right to liberty"

[50] See Article 6(2) of the European Convention on Human Rights: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"

[51] See eg *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481–482 per Viscount Sankey LC

[52] See Article 14(3)(d) of the International Covenant on Civil and Political Rights; Article 6(1) ECHR. See also *Brandstetter v Austria* (1991) 15 EHRR 378, para 66; *Mantovanelli v France* (1997) 24 EHRR

[53] Article 14(3)(c) ICCPR; Article 6(1) and 6(3)(c) ECHR. See also *Pakelli v United Kingdom* (1983) 6 EHRR 1; *Goddi v Italy* (1982) 6 EHRR 457

[54] See n49 above, para 82

[55] See *Ajouaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003), para 48: "The test is . . . whether reasonable grounds for suspicion and belief exist. *The standard of proof is below a balance of probabilities* because of the nature of the risk facing the United Kingdom, and the nature of the evidence which inevitably would be used to detain these Appellants' [emphasis added]

[56] *Ibid*, para 71. In *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123, the Court of Appeal subsequently noted that SIAC's expression was "unfortunate" but correct insofar as it was merely emphasising that "the standard is a different one from that applied in ordinary litigation which is routinely concerned with finding facts" (para 49 per Pill LJ)

The use of evidence contrary to Article 15 of the UN Convention Against Torture

9. Article 15 of the *UN Convention Against Torture* provides that:[57]

> any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings

10. However, in October 2003, the Chairman of SIAC rejected an argument by the detainees that SIAC should refuse to consider evidence that may have been obtained by way of torture in a third country:[58]

> 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 .... We are, after all, concerned in these proceedings not with proof but with reasonable grounds for suspicion.

11. This was subsequently upheld by the Court of Appeal in August 2004, which held that SIAC was not obliged to exclude evidence that had been obtained under torture in another country by non-UK officials.[59] In November 2004, the UN Committee Against Torture expressed its concern that UK law failed to fully implement its obligations under Article 15 and recommended that:[60]

> the [UK] should appropriately reflect in formal fashion, such as legislative incorporation or by undertaking to Parliament, the Government's intention . . . not to rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture; the [UK] should also provide for a means whereby an individual can challenge the legality of any evidence in any proceeding plausibly suspected of having been obtained by torture;

12. This latter recommendation reflects the fact that not only is evidence obtained by way of torture in a third country admissible in SIAC proceedings, but SIAC lacks any procedure by which the fact of such torture can even be established.[61] In other words, SIAC has no way of knowing—no procedure by which it can assess—whether the evidence put before it has been obtained by torture or not.

13. The failure of SIAC to rule out the use of evidence gained under torture abroad stands in stark contrast to the express purpose of the Convention, which is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world".[62] Indeed, SIAC's failure also contrasts markedly with the position set out in the FCO's 2004 Human Rights Report that "[t]orture is abhorrent and illegal and the UK is opposed to the use of torture in all circumstances".[63] The report further quotes the Foreign Secretary Jack Straw as saying, "I am proud of the UK's leading efforts in the campaign to prevent torture worldwide".[64] On the basis that the use of torture evidence anywhere weakens the struggle against torture everywhere, we regard SIAC's refusal to exclude such evidence from its proceedings as a thoroughly retrograde step.

The use of Special Advocates in closed proceedings under Part 4 of ATCSA

14. At the time of writing, the government has indicated that it intends to replace Part 4 of ATCSA but it has not yet published draft legislation containing its proposed new arrangements. Although we welcome the repeal of indefinite detention without trial, we recognise that the use of special advocates in proceedings involving the use of sensitive intelligence material is unlikely to abate. We therefore identify seven issues relevant to the ongoing use of special advocates: (1) procedural fairness; (2) appointment; (3) training; (4) professional support; (5) communication with the appellant; (6) accountability; and (7) representation of the appellant's interests.

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[57] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984, signed by the UK on 15 March 1985 and ratified on 8 December 1988

[58] *Ajouaou*, n55 above, para 81

[59] The appeal court held that Article 15 CAT was not enforceable as it had not been incorporated into domestic law. It also ruled that torture evidence obtained abroad was not excluded by either common law principles or the provisions of the European Convention on Human Rights. See *A and others*, n56 above at para 133 per Pill LJ

[60] Para 5(d), Conclusions and recommendations of the Committee against Torture in respect of the United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, CAT/C/CR/33/3, 25 November 2004. See also, Liberty and JUSTICE submission to the United Nations Committee Against Torture in response to the United Kingdom's fourth periodic report (October 2004), paras 8–14

[61] See *A and others*, n56 above, at para 129 per Pill LJ: "It would be. . .unrealistic to expect the Secretary of State to investigate each statement with a view to deciding whether the 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"

[62] Preamble to Convention Against Torture, n57 above. The International Commission of Jurists has now identified excessive counter-terrorism measures as a grave threat to the rule of law (see the Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, 28 August 2004). In particular, Article 7 states, "[e]vidence obtained by torture, or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings"

[63] Foreign and Commonwealth Office, *Human Rights: Annual Report 2004* (Cm 6364: September 2004) at 182

[64] Speech at the UK ratification of the Optional Protocol to the *UN Convention Against Torture,* 10 December 2003, *ibid* at 183

Procedural fairness

15. In JUSTICE's view, the appointment of a special advocate involves serious limitations on an appellant's right to fair proceedings. The rights limited include the appellant's right to know the case against him;[65] be present at an adversarial hearing;[66] examine or have examined witnesses against him;[67] be represented in proceedings by counsel of his own choosing;[68] and to equality of arms.[69]

16. As regards the notion of "equality of arms" in particular, it is plain that the appellant (the detainee) in SIAC proceedings does not enjoy anything remotely close to an equal footing with the respondent (the Secretary of State): not only is the respondent able to withhold relevant material from the appellant, but the respondent is entitled to be present at all times. Nor does the respondent suffer any of the kinds of restrictions upon communication with counsel that are imposed on the appellant.

17. The appellant, by contrast, is not entitled to be present throughout the proceedings. He is also prevented from knowing all the evidence against him, as the special advocate who represents him in closed session is forbidden to discuss the closed material with him. Although the special advocate is able to cross-examine witnesses on the appellant's behalf, the appellant is denied the full benefit of this right—without knowing the closed evidence against him, he cannot indicate to counsel the points upon which witnesses should be challenged. In the same way, the entitlement of the appellant to his own counsel throughout the proceedings is useless to the extent that his own counsel would also be prohibited from attending the closed hearings and knowing the closed evidence against him.

18. The fact that a special advocate is appointed by a government official and that the appellant has no say in the choice of advocate is another plain interference with the appellant's right to counsel "of his own choosing".[70] This lack of choice is significant, not least because choice of counsel is an important factor in promoting the confidence of persons subject to proceedings in their legal representatives. Such choice is even more important in proceedings where the government is the respondent.

19. Despite the severity of such limitations on procedural rights, JUSTICE recognises that they may nonetheless be justified in certain cases because of a compelling need to protect some countervailing interest, such as the life of a witness or an intelligence source. In our view, the extent to which such restrictions can be justified depends not only on the seriousness of the risk posed by disclosure of the evidence, but also on the kind of proceedings in question. Indeed, in some circumstances, we note that the use of special advocates may even improve the fairness of proceedings towards an appellant—such in deportation proceedings on grounds of national security (ie SIAC's original function) or in public interest immunity applications made ex parte in criminal proceedings (as approved by the House of Lords).[71] Even in such cases, however, we consider that the use of special advocates must remain "a course of last and never first resort".[72]

20. In JUSTICE's view, the use of special advocates cannot be justified in situations where an appellant's liberty is at stake—such as in SIAC proceedings under Part 4 of ATCSA. This is because the kinds of restrictions that may be acceptable to protect national security in an employment tribunal hearing or a deportation hearing are unacceptable where an individual faces imprisonment or other serious interference with their right to liberty. Although special advocates might be used to determine preliminary issues in such cases (such as non-disclosure applications on grounds of public interest immunity), the notion that a person could ever be subject to criminal sanction or other deprivation of liberty without knowing the full case against them is antithetical to basic concepts of justice.

Appointment

21. We note that the Joint Committee on Human Rights has expressed concern that responsibility for the appointment of special advocates in SIAC proceedings and elsewhere lies with the Attorney General, who is not only a government minister but, as the Joint Committee noted, has personally appeared for the government in proceedings before SIAC.[73]

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[65] See Article 14(3)(a), the right "to be informed . . . of the nature and cause of the charge against him"; Article 6(3)(a). See eg *Nielsen v Denmark* (1959) 2 YB 412 (Commission)

[66] Article 14(3)(d) ICCPR; Article 6(1) ECHR. See eg *Brandstetter v Austria* (1991) 15 EHRR 378, para 66; *Mantovanelli v France* (1997) 24 EHRR

[67] Article 14(3)(e) ICCPR; Article 6(1) and 6(3)(d) ECHR. See eg *Unterpertinger v Austria* (1986) 13 EHRR 175

[68] Article 14(3)(c) ICCPR; Article 6(1) and 6(3)(c) ECHR. See eg *Pakelli v United Kingdom* (1983) 6 EHRR 1; *Goddi v Italy* (1982) 6 EHRR 457

[69] Article 14(1) ICCPR: "all persons shall be equal before the courts and tribunals"; Article 6(1) ECHR has been interpreted as providing an implied right to each party to a "reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent", *De Haes and Gijsels v Belgium* (1997) EHRR 1 at para 53

[70] The right to a counsel of one's own choice is not absolute under Article 6(3)(c) ECHR but the general rule is that the appellant's choice should be respected. See n68 above

[71] *R v H and C* [2004] UKHL 3

[72] *Ibid*, para 22

[73] "Review of Counter-terrorism Powers", 18th report of session 2003–004, 4 August 2004 (HL 158, HC 713), paras 38–41. The Attorney has appeared for the Secretary of State in proceedings against those detained under Part 4 ATCSA before SIAC, the Court of Appeal and the House of Lords—see *A and others*, n49 above

22. On the one hand, we share the concern of the Joint Committee at the appearance of the Attorney-General appointing special advocates on behalf of those he is personally arguing should be detained under Part 4. In circumstances where a detainee has no choice over the counsel appointed to represent him in closed proceedings, and who is not directly responsible to the detainee for the conduct of his case, there is an apparent conflict of interest where the choice of that counsel is made by a government minister who is himself involved in proceedings for the other side. As a matter of transparency and impartiality, it is important that justice should not only be done, "but should manifestly and undoubtedly be seen to be done".[74]

23. On the other hand, we note that, as a consequence of the Attorney's personal involvement in SIAC proceedings, the actual appointment of special advocates for those proceedings has been made by the Solicitor General, also a government minister but not herself otherwise professionally interested in SIAC proceedings.[75] Moreover, where the same issue was raised concerning the appointment of special advocates in criminal proceedings (where the Director of Public Prosecutions is also appointed by the Attorney General), the House of Lords recently ruled that:[76]

> 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 . . .. 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.*

24. In light of the above, we do not regard the current procedures for appointment as wholly unsound. However, given the increasing use of special advocates in UK law in general,[77] JUSTICE considers there may be a case for establishing an independent "Office of Special Advocates",[78] either within the Legal Secretariat to the Law Officers or elsewhere, that would have direct responsibility for their appointment and allay broader concerns about transparency and impartiality of the appointment procedure.[79]

25. In a separate note, it has been suggested by Lord Carlile that the pool of special advocates should be "widened well beyond those with detailed knowledge of administrative law".[80] This is partly because, in Lord Carlile's view, SIAC proceedings are typically fact-intensive[81] and future cases are unlikely to raise fresh issues of administrative law,[82] and also because, as the Newton Report also noted, "each [SIAC] appeal requires a fresh security cleared special advocate who has not been exposed to the closed material . . . The supply of such advocates is limited".[83] So long as the criteria for the appointment of such advocates were sufficiently open and transparent, and prepared in consultation with the appropriate professional bodies, we would support Lord Carlile's suggestion.

Training

26. Lord Carlile has also suggested that special advocates working on SIAC cases should receive "organised training" at which advocates could "can discuss and share common problems, resolve their approach to procedural and formidable ethical issues, and receive the kind of help typically given in courses run by the Judicial Studies Board for full and part time judges".[84] Some special advocates have doubted whether the analogy with judicial training is a sound one,[85] but most agreed that those appointed as special advocates ought to receive some kind of training to highlight the practical, ethical and legal problems they were likely to face. Most thought that it would be especially useful to share (without disclosing closed material) information on common approaches to particular issues.[86] At the same time, we agree that it is important for

[74] *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart

[75] Response from Special Advocate D to JUSTICE study on SIAC proceedings—see Metcalfe, n48 above. A copy of the study is attached to this submission

[76] *R v H and C,* n71 above, at para 46

[77] See *ibid* and *Roberts v Parole Board and Secretary of State for the Home Department* [2004] EWCA Civ 301

[78] JUSTICE is grateful to Special Advocates I and O for their suggestion of this development

[79] The House of Lords also suggested that "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", *R v H and C*, n71 above, para 46

[80] Lord Carlile of Berriew QC, *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003*, para 75

[81] In JUSTICE's study, this view was strongly endorsed by Special Advocate D who said that "all those involved in SIAC proceedings need to deal with facts" and that there was a danger of lawyers becoming "excited by the legal and human rights issues to the detriment of getting buried in the facts"

[82] Lord Carlile, n80 above, para 75: "many if not most of the issues of human rights and administrative law have been fully argued and adjudicated upon. The examination of cases by special advocates in future cases is likely to be more akin to the everyday work of many criminal advocates who appear routinely in difficult cases"

[83] Privy Counsellors Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC 100: 18 December 2004), para 198

[84] Lord Carlile, n80 above, para 73

[85] See eg Special Advocate C, D and E

[86] Special Advocate D said "It is pointless (and wasteful of time and money) for special advocate B to start from scratch working out an approach to an issue which special advocate A has already done and could pass on"

the sake of transparency that the content of any official guidance should be made known to the detainees.[87] Accordingly, we support Lord Carlile's recommendation for some kind of formal training for special advocates. The establishment of a formal office to oversee the appointment of special advocates would help ensure consistency and transparency in this regard.

Professional Support

27. Lord Carlile has noted problems with the amount of material received by special advocates in SIAC proceedings and suggested that advocates be assigned a "security-cleared case assistant, who could categorise all the papers in consultation with the special advocate and provide some degree of assistance and act as a conduit of information to deal with queries by the advocate".[88] Special advocates have also expressed to us concern at the lack of administrative and technical assistance.[89] In particular, it was suggested that special advocates would benefit greatly from having access to someone with expertise in intelligence matters "who can provide the sort of help that, in technical civil litigation, one gets from an expert".[90] It was suggested that former (rather than currently-serving) members of the intelligence services might be appropriate persons to provide such independent advice and explanation to special advocates.[91]

28. On a related point, we also note that the Treasury Solicitor lawyers responsible for instructing special advocates in SIAC cases are apparently not themselves security-cleared. Special advocates have expressed concerns over the adequacy of these arrangements, including:

- the risk of inadvertent disclosure of closed material in corresponding with a non-security cleared instructing solicitor;
- the absence of a central mechanism for obtaining relevant material (eg submissions from previous SIAC cases, transcripts, etc); and
- special counsel having to undertake without assistance factual research of a type normally carried out by solicitors.

29. While it is correct that the relationship between Treasury Solicitor lawyers who brief special counsel and the special counsel themselves is not directly analogous to that of a barrister and an instructing solicitor (because the special advocates do not receive "instructions" per se),[92] we think it is clear that special advocates should have full benefit of a solicitor who is fully conversant with the case at hand, in the same way that a barrister in normal proceedings would have. If it is deemed acceptable for a detainee's interests to be represented by counsel not of his choosing and who is not professionally responsible to him for the conduct of his case, at the very least that special counsel should be sufficiently well-equipped to represent his interests in his absence. Two special advocates suggested to us that the problems of lack of assistance:[93]

> could be ameliorated to some extent by the establishment of an independent "Office of Special Advocates" staffed by security-cleared personnel (some of whom should be legally qualified), responsible for dealing with correspondence, collating relevant documents and carrying out the factual research normally undertaken by solicitors.

Alternatively, they suggested that "an independent firm of solicitors could be appointed (subject to the usual vetting requirements) to carry out this work". We have already noted that the special advocate procedure has already been extended beyond the sphere of national security.[94] Accordingly, we think there is a strong case for the establishment of an independent office along the above lines to ensure transparency in the use of special advocates, and to provide them with the appropriate legal, technical and administrative support.

Communication with the Appellant

30. The Joint Committee on Human Rights has complained that the lack of communication between a detainee and special advocate once a special advocate has viewed closed material in a case is a severe restriction on fair proceedings:[95]

> the rule that there can be no contact whatsoever between the detainee and the special advocate as soon as the advocate sees the closed material also means that there is little meaningful contact between the detainee and the representative of their interests in the closed proceedings

[87] Special Advocates I and O
[88] Lord Carlile, n80 above, para 74
[89] eg Special Advocates C, D, I and O
[90] Special Advocate D
[91] *Ibid.* The special advocate suggested that "such assistance would enable the special advocates more effectively to test the Security Service case"
[92] We are grateful to Special Advocate D for elucidating this point
[93] Special Advocates I and O
[94] see n71 above
[95] JCHR, n73 above, para 40

The JCHR have given their view that "there is a strong case for considering the scope for relaxing the rigid rule that prohibits any contact between the detainee and their special advocate once the advocate has seen the closed material".[96]

31. Communications between special advocates and detainees in SIAC cases are governed by rule 36 of the 2003 SIAC procedure rules.[97] In fact, as several special advocates have been at pains to point out, rule 36 does not prohibit all communication between detainees and special advocates once the special advocate has seen the closed material.[98] Rule 36(4) allows special advocates to apply to SIAC for directions allowing communication with a detainee in such circumstances, although rule 36(5) allows the Secretary of State to object to either the form or content of that communication.[99]56 Similarly, rule 36(6) allows detainees to write to the special advocate via their lawyer, but the special advocate is not permitted to reply save as directed by SIAC. JUSTICE nonetheless agrees that rule 36 imposes serious restrictions on the right of detainees to communicate freely with their legal representatives.[100] We also question whether the risks posed by inadvertent (or inferential) disclosure of sensitive material are in fact sufficiently serious to justify such restrictions. Accordingly, we would support the Joint Committee's call for the current level of restriction on communication between appellants and special advocates to be reconsidered.

Accountability

32. Section 6(4) of the Special Immigration Appeals Commission Act provides that special advocates "shall not be responsible to the person whose interests he is appointed to represent". While we recognise that there are prudent policy grounds for this provision, JUSTICE is gravely concerned at the lack of formal accountability that it entails. The practice of the profession of barrister or advocate is concomitant not just with a duty to the court but also with an ultimate responsibility to the person whom one represents. Accordingly, we consider that any severing of that responsibility can only be justified in the most exceptional of cases.

33. JUSTICE wishes to make clear that we have no criticism whatsoever of the professionalism of those who have served as special advocates and we have no doubt that, as Lord Carlile has noted, "the effectiveness of special advocates to date has been significant".[101] But we remain concerned at the lack of any alternative formal safeguards taken to ensure that special advocates act effectively to represent the interests of those detained: the right of persons detained under counter-terrorism legislation to fair proceedings should not be left to the professionalism of particular individuals to conduct themselves appropriately.

34. It has been suggested that, in SIAC proceedings, the duty owed by special advocates to the court may be sufficient to ensure this. Although we accept that in practice, a judge in closed proceedings is likely to provide an effective check against any obvious misconduct by an advocate, we are sceptical that a duty to the court alone would be enough of a safeguard in every circumstance. Although the calibre of special advocates is currently high, it is possible to frame a hypothetical case of a special advocate whose negligent mishandling of a case goes unnoticed by the court or the other parties. Moreover, it is apparent that this kind of negligence would not be checked under current arrangements: first, because a detainee and his lawyers are precluded from knowing the substance of the closed material justifying the case against them; and secondly, because those instructing the special advocate are not themselves security-cleared and so unable to second-guess his or her decisions in an effective manner. It seems to us that this is the kind of matter that would be suitable for the Office of Special Advocates to monitor. It would also provide an obvious opportunity for formal consultation with the judiciary, the Bar Council, the College of Advocates, the Law Society and other interested professional bodies (such as the Administrative Law Bar Association), to establish with appropriate standards for the professional conduct of special advocates.

Representation of the appellant's interests

35. Related to the accountability of advocates is an even more fundamental point about the role that special advocates play in representing the interests of the appellant. This issue arose in the SIAC case of *Abu Qatada v Secretary of State for the Home Department,*[102] in which the appellant indicated that he would not attend the open hearings or otherwise participate in the proceedings in any way because:[103]

[96] *Ibid*, para 41

[97] *Special Immigration Appeals Commission (Procedure) Rules 2003* (SI 2003/1034)

[98] One Special Advocate described the restriction on communication as "widely misunderstood"

[99] Special Advocate D said that requests under rule 36(5) "have been made and allowed. But great care has to be taken and, to my mind, such communication should only ever be in writing"

[100] While it is correct that a special advocate does not enjoy a lawyer-client relationship with a detainee, a special advocate is nonetheless appointed to represent a detainee's interests and, as such, can accurately be described as a detainee's "legal representative"

[101] Lord Carlile, n80 above, para 70

[102] SC/15/2002, 8 March 2004

[103] *Ibid*, para 5

> he considered that the decision on his appeal had, in effect, already been taken. He had chosen not to play any part precisely because he has no faith in the ability of the system to get at the truth. He considered that the SIAC procedure had deliberately been established to avoid open and public scrutiny of the respondent's case, which deprived individuals of a fair opportunity to challenge the case against them.

36. When the closed hearings began, the two special advocates appointed to represent the appellant notified SIAC "that after careful consideration they had decided that it would not be in the appellant's interests for them to take any part in the proceedings".[104] For itself, SIAC found that the evidence against the appellant was so strong "that no special advocate however brilliant" could have persuaded it otherwise and "[t]hus the absence of the Special Advocates has not prejudiced the appellant".[105] Nonetheless, SIAC recorded its concerns as follows:[106]

> We are conscious that the absence of a Special Advocate makes our task even more difficult than it normally is and that the potential unfairness to the appellant is the more apparent. 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 appellant's desire not to appear to add any credence to the system which he regarded as inherently unfair. And any concerns about particular matters would be and should have been dealt with by the exercise of discretion in deciding what to challenge, what to elicit and what submissions to make.

37. Delivering his annual review of the operation of Part 4 of ATCSA in 2004, Lord Carlile addressed the case and came to the conclusion that it would be 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".[107] He recommended that, whether by statutory amendment or otherwise:[108]

> 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.

38. JUSTICE disagrees with this suggestion, on the basis that it is not for Parliament or the government to determine by way of regulation what the interests of a mentally competent appellant in SIAC proceedings are—nor to direct to his or her representatives what those interests should be—in the face of an appellant's clear wishes. Not only would such a direction undercut the independence of the lawyers involved, but it would undermine one of the core assumptions of the ideal of individual autonomy—that each person is the best judge of his or her own interests.[109] It would also run counter what was originally presented to Parliament in 1997 by the Home Office Minister during the debates on the Special Immigration Appeals Commission Bill, who stated that "the special advocate must make a judgment about the way in which the appellant would have wanted his case to be argued".[110] We accept that it is undoubtedly frustrating to a court where a special advocate determines that nonparticipation in proceedings is what an appellant wants. Although there can sometimes be a issue of whether a detainee's wishes as expressed run contrary to his apparent interests, we do not see this issue arising where a detainee is a mentally competent adult. In JUSTICE's view, a special advocate should follow, so far as practicable, a detainee's instructions even though he or she is statutorily enjoined from being professionally responsible to the detainee.

39. An appellant who is subject to the special advocate procedure is deprived of many things: physical attendance throughout the course of proceedings; full disclosure of evidence adverse to his case; the right to cross-examine witnesses; choice of counsel and the ability to communicate with them in confidence. The basic freedom to determine one's own interests should not be one of them.

Eric Metcalfe
Director of Human Rights Policy
JUSTICE

7 February 2005

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[104] *Ibid*, para 8
[105] *Ibid*, para 9
[106] *Ibid*
[107] Lord Carlile, n80 above, para 78
[108] *Ibid*, para 80
[109] See eg *Re MB (Caesarean)* (1998) BMLR 175
[110] Mike O'Brien, 3rd reading, HC debates, 26 November 1997, col 1039

Annex

JUSTICE STUDY ON THE USE OF SPECIAL ADVOCATES IN SIAC PROCEEDINGS

In June 2004, JUSTICE wrote to 19 barristers who had been confirmed by the Treasury Solicitor's Department as having been appointed to act as special advocates in Special Immigration Appeal Commission ("SIAC") cases, both in respect of persons detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001 and under the general jurisdiction of SIAC in deportation cases on the grounds of national security.

The aim of the letter was to invite those who had been appointed as special advocates to give their views on the operation of the system in general (as opposed to their experience of particular cases), what problems (if any) may occur, and whether the system could be improved or should be replaced. It was agreed that special advocates who participated in the study would not be identified, nor that any views they expressed would be published without their prior consent. In addition it was indicated that JUSTICE may use some of the comments as part of its own response to the then-ongoing Home Office consultation on counter-terrorism powers.

Of the 19 special advocates written to, 10 responded—four by way of written reply, four by telephone interview, and two in face-to-face interviews.

Q1. APPOINTMENT PROCEDURES

Do you think the present arrangements for appointment of special advocates are satisfactory? How do you think they may be improved?

None of the special advocates thought that the current arrangements for appointment were especially unsatisfactory. While several acknowledged the appearance of the Attorney General making the appointment was problematic, they drew attention to the fact that the actual appointment of special advocates for those proceedings has been made by the Solicitor General precisely to avoid any conflict. The view of the House of Lords in R v H and C—that the Attorney General has certain functions as an "independent, unpartisan guardian of the public interest in the administration of justice" and that the appointment of special advocates is one of them—was also referred to.

Do you agree with Lord Carlile's suggestion that the current pool of special advocates in SIAC should be "widened well beyond those with detailed knowledge of administrative law"?

Almost all special advocates we spoke to agreed with this suggestion, noting that SIAC proceedings were more fact-intensive and involved greater cross-examination than most administrative law proceedings. One advocate in particular warned that "all those involved in SIAC proceedings need to deal with facts" and that there was a danger of lawyers becoming "excited by the legal and human rights issues to the detriment of getting buried in the facts". Another noted that:

given that many cases before SIAC no longer require much legal analysis but depend on a painstaking analysis of the facts and (preferably) good cross-examination skills, consideration should now be given to appointing some first rate criminal barristers

Another special advocate agreed with the need to widen the pool but cautioned that "a permanent panel runs the risks of inbuilding the system".

Q2. TRAINING

Do you agree that such training would be useful? Are there any particular issues on which you think it would be helpful to receive training or assistance?

Almost all the special advocates thought that some kind of training would be a good idea, given the novel role being performed and the practical difficulties involved. However, several questioned whether Lord Carlile's analogy with judicial training was the right one, and some of the more senior advocates were concerned about taking an overly-formal approach. Nonetheless, almost all agreed that those appointed as special advocates ought to receive some kind of training to highlight the practical, ethical and legal problems they were likely to face. Most thought that it would be especially useful to share (without disclosing closed material) information on common approaches to particular issues. Two advocates indicated that the content of any official guidance should be made known to the detainees, for the sake of transparency.

Q3. Instructions from solicitors/appointing body

Do you consider the current procedure for instructing special advocates to be adequate? How do you think the procedure could be improved?

One of the most consistent concerns expressed by all the special advocates was the lack of administrative and technical assistance. This was seen as particularly problematic, given the often technical nature of the closed intelligence material. In particular, it was suggested that special advocates would benefit greatly from having access to someone with expertise in intelligence matters "who can provide the sort of help that, in technical civil litigation, one gets from an expert". It was suggested that former (rather than currently-serving) members of the intelligence services might be appropriate persons to provide such independent advice and explanation to special advocates. Still another proposal was that advocates should be able to have recourse to a "library of closed judgments".

On the issue of the lack of adequate instructions from the Treasury Solicitors, some special advocates were keen to clarify that they are not instructed per se. Most special advocates nonetheless expressed concern that they did not have the benefit of an instructing solicitor who would, in the normal course of events, assist the barrister with the preparation of the case. Particular problems identified included:

- the risk of inadvertent disclosure of closed material in corresponding with a non-security cleared instructing solicitor;
- the absence of a central mechanism for obtaining relevant material (eg submissions from previous SIAC cases, transcripts, etc); and
- special counsel having to undertake without assistance factual research of a type normally carried out by solicitors.

Two special advocates suggested to us that the problems of lack of assistance:

> could be ameliorated to some extent by the establishment of an independent "Office of Special Advocates" staffed by security-cleared personnel (some of whom should be legally qualified), responsible for dealing with correspondence, collating relevant documents and carrying out the factual research normally undertaken by solicitors.

Alternatively, they suggested that "an independent firm of solicitors could be appointed (subject to the usual vetting requirements) to carry out this work". Other special advocates to whom this was put agreed that that might be an appropriate way forward.

Q4. Dealings with the appellant

What kinds of problems may potentially arise from the restrictions on communication between special advocates and the subject of proceedings?

All the special advocates spoken to acknowledged the profound difficulty of representing an appellant whom one could not communicate with. At the same time, several special advocates were at pains to point out that the SIAC rules do not prohibit all communication between detainees and special advocates: advocates can discuss matters with an appellant before the closed hearing, the appellant can continue to pass information on a one-way basis even during the closed hearing, and there is a vetting procedure that allows an advocate who has seen the closed evidence to send written communications to an appellant, albeit subject to vetting by SIAC and any objections of the Home Office. Nonetheless, they saw no obvious solution to the basic problem. As one advocate said:

> The obvious problem is that instructions from the detainee cannot be taken on the closed material. If instructions have been obtained on the open material . . . then they ae not really of much use. The open material is so anodyne that it gives no clue to the nature of the real case against the detainee.

A number of special advocates indicated that they encountered particular problems with this aspect of proceedings, but were unable to comment further.

Q5. Accountability and professional ethics

Do you see any problems with special advocates not being answerable to the individuals whom they represent? Do you have any suggestions for different ways in which such accountability might be secured?

Most special advocates either did not see this as a problem or thought that any problem was more theoretical than real. In practice, they noted that the selection procedures and vetting would make it highly unlikely that a special advocate would be appointed who would fall below the standard expected. Others noted that the duty owed by special advocates to the court might be sufficient to ensure effective accountability. At least one advocate thought that it was correct that advocates were not professionally responsible to the appellants:

On the contrary, to inject accountability to the client into the relationship, the same as or similar to that owed to clients properly so-called, would make the special advocates' task more difficult. My approach to being a special advocate was to do everything I could for the appellant as if he were a client.

Evidence submitted by Sir Brian Barder KCMG

THE SPECIAL IMMIGRATION APPEALS COMMISSION: ASSETS AND DEFECTS

EXECUTIVE SUMMARY

1. Certain features of SIAC make it unsuitable for appeals against detention, which should be ordered only by the courts. A SIAC-type procedure for sensitive evidence should be available to a criminal court. Terrorist suspects should be tried by judge and jury for offences actually committed under wide-ranging existing laws, not deported or detained on the basis of a minister's belief or suspicion about what they might do in future.

2. In exceptional deportation cases where the allegations said to justify deportation can't be tested in a criminal court, SIAC should be mandated to determine the case for deportation, using existing procedures for hearing "closed evidence" where strictly necessary. The interpretation of its powers and functions, and of the relevant laws, by the Court of Appeal in 2000 and the House of Lords in 2001 should be re-defined, clarified and tightened by Parliament.

SIAC: THE FALL-OUT FROM ITS FIRST CASE

3. SIAC was originally established in 1997 to hear appeals against deportation orders in national security cases where some of the information on which the home secretary's decision was based couldn't safely be disclosed to the appellant without compromising its sources (human or technical)—the "closed evidence". The home secretary's power to imprison, indefinitely and without trial, terrorism suspects who could not safely be deported to their countries of origin, and who couldn't find any other country willing to accept them, was granted only in 2001, after 9/11. From SIAC's first case (September 1999) until 2001 there was no power to detain a person ordered, but not able, to be deported other than after conviction of a criminal offence by a court, a procedure ruled out in many cases by the impossibility of using SIAC procedures for the "closed evidence" in an ordinary court.

4. As a founder lay member of SIAC, not a lawyer but with experience of dealing with secret intelligence, I sat on only one case, its first (appeal by Shafiq Ur Rehman, a Muslim cleric in Oldham, against deportation). SIAC found for Rehman; the home secretary appealed against our decision on points of law (SIAC's findings of fact are not appealable); the Court of Appeal reversed our main legal rulings in 2000 and ordered SIAC to re-hear the case in the light of its own legal rulings; Rehman appealed to the House of Lords; and in 2001, immediately after 9/11 (although their judgments had been prepared before 9/11), the Law Lords upheld the decisions of the Court of Appeal. During all that time SIAC was effectively unable to hear any further substantive cases pending the Law Lords' rulings on the issues raised in *Rehman*. In the event the Home Office withdrew the deportation order against Rehman and the case was accordingly not re-heard in SIAC. But the legal rulings by the Court of Appeal and the Law Lords raised serious questions about SIAC's scope for doing its job.

"CLOSED EVIDENCE" AND "CLOSED HEARINGS"

5. In the Rehman case, as in most subsequent SIAC cases, most of the evidence was heard in open sessions, with Rehman and his lawyers present. Of the evidence categorised by the Home Office as unsafe to be disclosed to the appellant and therefore needing to be treated as "closed evidence", some was held by SIAC not to require protection: some was referred back to the Home Office for "redaction"—editing to conceal its sources so that it could then be treated as open evidence; some of it SIAC decided could be disclosed to the appellant but heard in private session without the presence of the public or the press. The remainder was withheld from Rehman and his lawyers, and heard in closed sessions with the appellant's interests represented by a Special Advocate.

6. The principle that an accused person has the right to know all the evidence against him is obviously important. But if that principle is observed to the letter in terrorism cases, where disclosure of clinching evidence to a terrorist suspect might put the life of an informer in danger (and thus greatly hinder the security service's ability to recruit or infiltrate future informers, an essential weapon for pre-empting acts of terrorism) or, by revealing details of surveillance techniques, might prejudice their future use, the consequence could be that the suspect would be free to continue his activities, an obviously unacceptable risk (although the risk could be minimised by intensive surveillance). Experience in the *Rehman* case persuaded me that the "closed evidence" procedure was the least objectionable solution to this dilemma, despite the breach in the principle of full disclosure that it entails. The Special Advocate in the *Rehman* case was skilful and effective in testing the "closed evidence", even though unable to take instructions

from Rehman on it, and the disadvantage suffered by Rehman from the withholding of part of the evidence against him was reduced to what seemed to me an acceptable minimum. In view of recent controversy, however, it needs to be emphasised that information from telephone and other intercepts is only a minor element in the types of evidence that may require special protection, and that making intercept evidence admissible in ordinary courts is unlikely to make much difference on its own.

7. The whole SIAC régime, in deportation and especially in detention cases, can be justified *only* on the assumptions that (a) "closed evidence"procedures can't be used in a criminal court, and (b) a person ordered to be deported or detained on national security grounds can't be charged and tried in such a court. In the great majority of cases, I believe that both assumptions are false. There seems no cogent reason why a special criminal court for terrorism cases should not employ SIAC-like procedures for hearing "closed evidence"cin closed hearings with a Special Advocate representing the accused's interests, where the presiding judge has ruled that the evidence concerned does need this protection. I also question the suggestion that the jury system could not be used in such a court because of the difficulty of disclosing the "closed evidence" to the jurors: I see no insuperable difficulty in having the jurors vetted and security-cleared in the same way as the judge and Special Advocate (and indeed SIAC members). The extra time and modest expense involved in vetting the jury would be more than justified by the need to preserve the right of the accused to jury trial. The disadvantage to the accused inherent in the non-disclosure to him of some of the evidence ought not to be further aggravated by denial of his right to a jury trial.

8. It is sometimes argued that a person reasonably suspected of being likely to commit a terrorist act in the future, and thus a potential future threat to national security, may not yet have committed any criminal offence with which he can be charged and, if convicted, imprisoned or deported. Hence the chief justification for SIAC, whose present (limited) function is to decide whether the home secretary's deportation or detention orders are "reasonable", not whether an appellant is guilty of an offence or likely to commit an offence in future—an important distinction. But there is a serious problem with this argument. The basis for "suspicion" that someone is a terrorist and "belief" that he is a risk to national security, the conditions needing to be satisfied for the home secretary to make a detention order, is sometimes inherently incapable of being proved: and it is almost impossible to show that his suspicion and belief are "unreasonable", which is all that SIAC can do, unless the grounds put forward to justify them are wildly irrational or manifestly insubstantial—as admittedly SIAC has occasionally found them to be. Such a disturbingly low threshold for depriving anyone of their liberty can't be justified, as indeed the Law Lords found in December.

9. The régime is not only disproportionate: it is also unnecessary. The *Terrorism Act 2000* and the *Anti-Terrorism, Crime and Security Act 2001* both define "terrorism" and "terrorist" extremely widely; the former specifically labels as a terrorist anyone who "is or has been concerned in the commission, preparation or instigation of acts of terrorism" [my emphasis]. If there is evidence showing "beyond a reasonable doubt" (the standard of proof rightly required in criminal cases) that a suspect has done or said anything that indicates even preparation for a terrorist act in the future, he is guilty of an imprisonable offence. If the home secretary can't produce and prove evidence against a suspect that answers to that description, or to any of the other definitions of terrorism in the two key Acts, then it's hard to accept that his "suspicion" and "belief" that the person is a terrorist and a risk to national security can be regarded as "reasonable". The existing laws provide ample scope for anyone suspected by the home secretary of terrorist involvement to be charged and tried in a criminal court (if necessary a court authorised to use SIAC-type procedures for hearing "closed evidence", as discussed in para 7 above) for an offence under anti-terrorist legislation comprising acts done in the past that can be proved beyond a reasonable doubt, not a suspicion or belief about what might happen in the future.

10. All these arguments apply equally in principle to aliens and British citizens alike, to those suspected of terrorist involvement whom the home secretary wishes to detain indefinitely, or to deport, or (if unable to deport) to detain pending possible future deportation. The decision on all such suspects' deportation or detention should be taken by a criminal court assessing alleged past behaviour constituting a *prima facie* offence under the anti-terrorist laws, not by a minister, however statesmanlike, on the basis of his unprovable belief and suspicion about possible future behaviour.

SIAC'S FUTURE ROLE AND FUNCTIONS: IMPLICATIONS OF THE LEGAL RULINGS BY THE COURT OF APPEAL AND THE LAW LORDS

11. It seems unlikely in the light of the Law Lords' decision of 16 December 2004 that SIAC can have a defensible role in whatever new system is approved by Parliament to replace the discredited Part 4 of the *Anti-Terrorism, Crime and Security Act 2001*, empowering the home secretary to imprison without trial terrorist suspects whom he can't deport because deportation would expose them to danger of torture or other mistreatment in their countries of origin. I have argued earlier that suspects in this category should be imprisoned only by order of a criminal court after trial and conviction for offences under existing anti-terrorism laws. This would leave no role for SIAC. However, there is a case for accepting that where the home secretary reasonably suspects a foreign national of being a terrorist and thus a risk to national security (however defined—see para 12b below), he should be authorised to apply to SIAC for the suspect's deportation without necessarily requiring him to be tried in a criminal court, nor being obliged to prove in the application that he has committed a criminal offence, although there should always

be a presumption that anyone who appears to have committed an offence under UK law should be prosecuted and tried, if the CPS so decides, rather than being dealt with by fiat of the executive. The remainder of this submission considers what changes might need to be made in the law if SIAC loses its role in appeals against detention but is retained to determine applications for (or, as now, to hear appeals against) deportation in the few national security cases where for whatever reason criminal charges and trial are undesirable or impossible.

12. In overturning most of SIAC's key legal decisions in the Rehman case (para 4 above), the Court of Appeal issued a number of directions, later confirmed by the Law Lords, which have been widely criticised (not only by me: a distinguished academic lawyer described the appeal court's judgment to me as "the worst of any senior British court since the second world war") as placing such stringent limitations on SIAC's power to question the reasonableness of the home secretary's deportation orders as virtually to defeat parliament's intentions in establishing the Commission. The principal of these appeal court rulings were:

(a) The Court of Appeal relieved the home secretary of any obligation to *prove*, even to a lower civil level of the balance of probabilities, any specific allegations put forward as evidence of the reasonableness of his deportation order: he was entitled to take "a global approach" to all the facts leading to his conclusion that the suspect's presence in the country was a risk to national security, but not necessarily to prove any one of them. Deportation, while perhaps a less grave interference in the liberty of a UK resident than detention, is still a sufficiently disruptive penalty to impose on a person and his family as to require at least the civil level of proof of specific acts actually done in the past, most of which could normally be expected to constitute offences under the anti-terrorism laws, if they are to justify labelling him as a terrorist and deporting him. Where the acts alleged do appear to constitute criminal offences, the home secretary might be required by law to report them to the Crown Prosecution Service for a decision on possible prosecution, before applying to SIAC for a deportation order. Failure to do so would be grounds for SIAC to refuse the application (or to allow an appeal against deportation).

The flavour of the Court of Appeal's ruling on this point is best conveyed by the following quotation, on which I refrain from further comment for fear of indictment for contempt of court:

> It is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion.

(b) The Court of Appeal rejected SIAC's definition of "national security" (relating it to the security of the UK and British citizens) as unduly "narrow", and substituted a much more wide-ranging definition embracing any act that might prejudice the UK's relations with another country which might retaliate against British interests, including in ways that might damage its collaboration in security matters. The judgment even suggested that any act, even if posing a threat only to a country other than Britain, could be construed as a threat to Britain's national security simply by being against Britain's *interests*. Such a far-fetched and sweeping interpretation of "national security", defying common sense and ordinary usage, ought to be corrected by a properly narrow definition laid down by Parliament.

(c) The Court of Appeal also laid down the principle that it is for the government and not for any court, including SIAC, to decide what constitutes a threat to national security, on the (dubious) grounds that this is a mainly political assessment depending on information available to the government but not to the courts. On the face of it, this leaves very little if any scope for SIAC to question the reasonableness of any deportation or detention decision by the home secretary taken on national security grounds. In the Law Lords' subsequent historic judgment of 16 December 2004 on detention without trial (issued by a different group of law lords), the senior Law Lord, Lord Bingham, acknowledged that national security was "the area of policy in which the courts are most reluctant to question or interfere with the judgment of the executive", but pointed out that "nevertheless the courts have a special duty to look very closely at any questionable deprivation of individual liberty. Measures which result in the indefinite detention in a high-security prison of individuals who have not been tried for (or even charged with) any offence, and who may be innocent of any crime, plainly invite judicial scrutiny of considerable intensity." Deportation, especially of a person such as Rehman who had lived with his family in Britain (legally) for several years without ever having been charged with any offence, also constitutes a serious deprivation of individual liberty, and Lord Bingham's pronouncement deserves to be enshrined in any new law re-defining SIAC's role and functions, thus restoring to the Commission its ability to look behind the home secretary's deportation decisions or applications in regard to the alleged threat to national security so as to assess their reasonableness.

Conclusions

13. No-one should be detained by order of the executive. Suspicion of terrorist involvement needs to be supported by evidence proved beyond reasonable doubt of an offence under existing anti-terrorist legislation, for which the suspect should be tried in a criminal court with a jury, if necessary employing SIAC-like procedures to protect sources. SIAC should have no role in detention cases, including cases where the home secretary is prevented from deporting an alien because of the risk of torture or other ill-treatment in his country of origin.

14. Where the home secretary wishes to deport an alien on national security grounds, the first option should be a criminal trial requiring proof of allegations against him where, as will usually be the case, these constitute an offence. When the allegations can't be tested in a criminal court, SIAC should determine whether they have been proved and whether they justify deportation. Parliament should lay down the level of proof and definition of national security to be applied by SIAC, and require SIAC to assess the reasonableness of the home secretary's assessment of the alleged threat to national security in each case.

Sir Brian Barder KCMG

7 February 2005

Evidence submitted by Liberty

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at www.liberty-human-rights.org.uk

Introduction

1. Liberty welcomes the opportunity to respond to the Constitutional Affairs Committee consultation on the Special Immigration Appeals Commission (SIAC). The call for evidence followed the decision of the House of Lords in *A and others v Secretary of State for the Home Department* on 16 December 2004. Since publication of this consultation the Home Secretary Charles Clarke has announced his intention to end the use of SIAC to determine appeals against certification under Part 4 of the *Anti Terrorism and Security Act 2001* (ATCSA). Instead he is proposing a new system of "control orders". On the basis of an intelligence assessment the Secretary of State will consider whether he suspects that an individual is, or has been, concerned with terrorism. He will then be able to impose a variety of controls on the individual. Controls will range from restrictions on movement or communications to home detention. Some form of quasi-judicial or judicial appeal or review will be available to the subject. During this process material relating to the imposition, variation, review or modification of control orders will be heard in a mix of open and closed session.

2. It is clear from this that the control order appeal or review process will use special advocates. Because of this our response will focus on the use of special advocates when dealing with alleged terrorists through the proposed control orders rather than on the operation of SIAC itself. Although the purpose of this response is not to comment on the desirability of efficacy of control orders, it is appropriate to compare Part 4 ATCSA and the new system. If they are essentially the same process, the criticisms levelled at the use of special advocates for part 4 determinations in SIAC[111] will still be relevant.

3. The 2004 Home Office discussion paper "Reconciling Liberty and Security in an Open Society" considered and quickly discounted plans to extend Part 4 detention to British citizens. The paper accepted that "while it would be possible to seek out other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be very difficult to justify".[112] Indefinite detention without due process is unjustifiable wherever the detention takes place. We do not believe that control orders will offer any greater semblance of due process than Part 4 ATCSA detention. If the Constitutional Affairs Committee accepts that there is merit to this argument we urge it to ask the Government to explain why it now accepts the use of such draconian powers are justified.

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[111] For example see the comments of Lord Nicholls *A v others* at paragraph 82 "Nor is the vice of indefinite detention cured by the provision made for independent review by the Special Immigration Appeals Commission"

[112] Home Office discussion paper paragraph 36

SIAC, CONTROL ORDERS AND THE HUMAN RIGHTS ACT

4. The new system will be introduced through primary legislation in the coming months. Detailed information on how control orders will operate is not available at the time of writing. Charles Clarke will give evidence to the Parliamentary Home Affairs Committee (HAC) and the Joint Committee on Human Rights (JCHR) on 7 and 8 February respectively. Unfortunately it will be too late to incorporate any of the comments he makes into this submission. The House of Lords Appellate Committee determined that detention was unlawful as it breached Article 14[113] of the *Human Rights Act 1998* (by being discriminatory in applying only to foreign nationals) and Article 5[114] HRA (by being a disproportionate response to the threat faced). It also quashed the UK's derogation from the *Human Rights Act*. In his statement to the House of Commons on 26 January the Home Secretary described the restrictions arising from control orders as being "proportionate to the threat each individual posed". As control orders will apply to both British and foreign nationals they will no longer be overtly discriminatory. However, we do not agree with the assessment that residential (as opposed to custodial) detention and flexibility of orders will make them proportionate. The right to liberty does not distinguish between detention in prison or at home. While some degree of proportionality may be implicit in consideration of Articles 5 and 6 HRA,[115] detention of suspected terrorists can only ultimately be justified in anticipation of criminal proceedings. Neither control orders nor Part 4 ATCSA are processes preparatory to criminal trial. Because of this we do not believe there is any reason why the use of special advocates would be more acceptable with control orders.

5. There is however one important distinction between Part 4 ATCSA and the new proposed system of control orders. Whereas the right to a fair trial is not directly applicable to the original jurisdiction of SIAC,[116] it is applicable to control orders which are domestic civil proceedings. Therefore many of the features of the special advocate process used in SIAC which are also likely to be used in relation to control orders could raise issues under Article 6. The Government has stressed that these are civil proceedings which would not attract the Article 6 protections particular to criminal process. However ECHR jurisprudence has established that the European Court of Human Rights (ECtHR) will not be tied by the vocabulary of national legislation.[117] Professor Andrew Ashworth maintains that the lead case of *Benham v UK* requires the ECtHR to consider whether the proceedings are brought by a public authority, have punitive elements and have potentially serious consequences.[118] Potentially indefinite house arrest (and even lesser restrictions such as tagging) will clearly satisfy this test. Given the strength of the argument that control orders will be considered to be criminal process for the purposes of Article 6 the following elements of the Article do not sit comfortably with the use of special advocates:

- 6 (3) (a) to be informed promptly. . .in detail, of the nature of the accusation against him;
- 6 (3) (c) to defend himself in person or through legal assistance of his own choosing;
- 6 (3) (d) to examine or have examined witnesses against him.

6. In both civil and criminal proceedings Article 6 requires that there be equality of arms—a fair balance between the parties. The fact that the appellant will not be present throughout control order appeal proceedings and will not have access to much of the material makes it clear that there will not a fair balance between the parties. A further prerequisite of criminal proceedings under Article 6 is the presumption of innocence, the concept that goes to the heart of fair trial and extends back to the Magna Carta. Concerns as to how control orders will undermine the presumption of innocence have already been expressed widely. We are sure the Committee is well aware of them and would only emphasise that the use of special advocates will compound these concerns.

7. If control orders are introduced it is difficult to see how they will be compatible with Articles 5 and 6. The Government clearly anticipates that this will not be. As Charles Clarke said in his statement to the Commons, "The Government, of course, intends to ensure that any future powers we take in legislation are wholly compatible with the provisions of the ECHR, if necessary employing a new derogation to that effect." This is somewhat strange in implying that a human rights opt out legitimises intentional convention breaches. It also suggests that the Government has not appreciated the significance of the House of Lords judgment. Paying lip service to proportionality does not negate the Lords' crushing indictment of detention without trial. The Government should also appreciate that the Lords were willing to quash the previous derogation.

THE USE OF SPECIAL ADVOCATES

8. There is a fundamental problem with the use of special advocates which makes them inappropriate for proceedings where the state is seeking recourse against an individual based on allegations of actions or behaviour by him. As there is no possibility of taking instructions the special advocate cannot properly test the evidence against him. As any criminal law practitioner is aware, testing the case against their client and putting their client's case to prosecution witnesses is the heart of an effective defence. If, for example, the prosecution

[113] The Prohibition on Discrimination
[114] The Right to Liberty and Security
[115] The Right to a Fair Trial
[116] Although principles of procedural fairness and natural justice mean they may be indirectly relevant
[117] *Benham v UK* (1996) 22 EHRR 293
[118] Professor Andrew Ashworth, Article 6 and the fairness of trials (1999) Crim LR 261

is alleging that the defendant was somewhere at a particular place and time, how is it possible to challenge the assertion without instructions? It would be difficult enough to effectively defend a criminal trial on this basis. In civil or SIAC proceedings, where the burden of proof for the state is substantially lower, it is virtually impossible. This central concern was summarised by the JCHR in its report on anti terrorism powers which said;

> we consider it a significant problem that the special advocate for the detainee is appointed by the Attorney General, who not only represents a party to the proceedings before SIAC, but is the only legal representative present during the closed hearings, in the absence of the detainee or their legal representative.[119]

9. Concerns over the uses made of special advocates have often come from advocates themselves. Scathing comments made by special advocates who have resigned, such as Ian MacDonald QC who referred to Part 4 ATCSA as an "odious blot on our legal landscape." These criticisms are likely to increase should legislation allowing control orders be passed. In February 2004 six special advocates[120] wrote an open letter to the Home Secretary expressing concerns at plans then circulating to use them in criminal trials saying,

> 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.

This disquiet arose from concern that they would be used in criminal trials. However the criminal process contains greater protection for the defendant than civil law. We imagine these views would be expressed in even stronger terms in relation to control orders.

10. Special advocates do have a place in the English legal system. Their use (and the creation of SIAC) arose from the decision of the ECtHR in 1996 in the case of *Chahal v UK*.[121] Mr Chahal was an Indian Sikh separatist who the Government wished to deport. He claimed that if removed he would be likely to face torture. The creation of SIAC was a response to his case. For someone in Mr Chahal's position there were two questions to determine. Firstly, whether or not he was conducive to public good in the UK and therefore not entitled to stay. Secondly, whether he would be safe if deported to India. By definition, secret intelligence would be more pertinent to the first question and it is here that special advocates would play a role. Rightly or wrongly due process and presumption of innocence are not relevant to determining whether a foreign national is entitled to stay in the country. This was therefore, legally, an administrative decision.

11. There is a profound distinction between the use of special advocates for administrative determinations and for quasi criminal tribunals. Making Part 4 ATCSA part of the immigration process or describing control orders as civil law powers does not reflect their true nature. The use of special advocates cannot be justified when there is to be the consideration of evidence that can result in an individual being restricted of liberty or freedom of movement other than preparatory to trial. The House of Lords said that the use of special advocates during Part 4 ATCSA determinations was insufficient cure for fundamental departures from the rule of law. There is nothing in the Government's new proposals to suggest that a future House of Lords ruling will not be equally damning.

Gareth Crossman
Policy Director
Liberty

February 2005

Supplementary evidence submitted by Rt Hon Lord Goldsmith QC, Attorney General

CONSTITUTIONAL AFFAIRS COMMITTEE THE OPERATION OF THE SIAC TUESDAY 8 MARCH 2005

In answering Clive Soley's question this morning about intercept evidence in the context of SIAC procedures, I referred to the provisions of the *Regulation of Investigatory Powers Act 2000* ("RIPA") as relevant to the issue.

What I had in mind was a decision of SIAC. I have confirmed that the decision was an open one to which it is therefore possible to make reference. That decision is the preliminary ruling in *A, X, Y and Others v Secretary of State for the Home Department* (2003). As it may be helpful to the committee's deliberations, I enclose a copy.

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[119] JCHR, *Review of Counter-terrorism Powers*, 18th report of session 2003–04, 4 August 2004 (HL 158, HC 713)

[120] Nicholas Blake QC, Andrew Nicol QC, Manjit Singh Gill QC, Ian Macdonald QC, Rick Scannell and Tom de la Mare, letter to *The Times*, 7 February 2004

[121] 23 EHRR 413

You will see that the view taken by SIAC was that provisions of RIPA did not of themselves preclude SIAC from ordering the disclosure of intercept material. However, it is also right to note that this does not mean that the Commission would in fact order disclosure of such material. This is because it may take the view that there are good public interest reasons for not disclosing the material in question, such as it may reveal operational techniques or prejudice security measures. Indeed I would have thought that this would in any given case be highly likely.

It is of course a different question what the analysis would be under the new procedure proposed in the present Bill.

Rt Hon Lord Goldsmith QC
Attorney General

8 March 2005

Annex

SUMMARY OF THE GOVERNMENT'S RESPONSE TO SPECIAL ADVOCATES' CONCERNS FOLLOWING MEETING WITH SPECIAL ADVOCATES ON 7 MARCH 2005

BACKGROUND

Nine out of 13 Special Advocates attended the meeting on 7 March 2005, chaired by the Attorney General. The Special Advocates received a copy of the "Summary of the Government's Response to the Special Advocates' Concerns"[122] in advance of the meeting. The Treasury Solicitor led the discussion on the proposals. This paper sets out briefly what steps have been taken since the meeting, to implement the proposals.

EXPANDING THE POOL AND EXPERIENCE BASE OF THE SPECIAL ADVOCATES

The Attorney General will strengthen the existing Panel by recruiting more Special Advocates with experience of handling witnesses in civil cases and also criminal lawyers.

Advertisements for special advocates will be placed in the professional journals: *Counsel* and *Law Society Gazette* for barristers and solicitors, respectively. Owing to publishing deadlines, the next advertisement will appear in Counsel in May. The Attorney General is anxious for recruitment to begin as soon as possible and May is unacceptable. The Attorney is looking to the Bar Council for guidance on promulgating the advertisement to members of the Bar in a fair, open and transparent manner.

CHOICE OF SPECIAL ADVOCATE

It was agreed that an Appellant should be able to select from a security-vetted panel of counsel, the person he would like to act as his Special Advocate subject to the following provisos:

(a) there must be no conflict with any other appeal in which that Special Advocate is acting; and

(b) the Special Advocate must not have had prior access to relevant closed material, as otherwise he would not be in a position to speak to the Appellant or his legal representative.

Further thought is needed on how to compile the list of advocates and how to promulgate the list, for example, whether it should contain potential conflicts of interest in the first instance.

In the meantime, a list of security-vetted counsel will be provided to the Appellant. Once the Appellant has chosen a special advocate, he will be informed of any conflicts of interest. If none, the Law Officers will appoint accordingly.

SUPPORT

A team of three-government lawyers will form a "Special Advocates Support Office" [SASO] located in the Treasury Solicitor's Department. Developed-vetting applications for SASO's lawyers are being made urgently. One senior lawyer is already security-cleared. The lawyers will provide a full instructing solicitor role for the Special Advocates.

SASO will operate entirely independently of the immigration teams, which act for the Secretary of State for the Home Department.

Detailed discussions are taking place in relation to how SASO should operate and be resourced.

TRAINING AND DATABASE

A comprehensive written training pack, comprising both open and closed material, will be provided to the Special Advocate when he is instructed.

A comprehensive database of relevant judgments, rulings, skeleton arguments and the like—again comprising open and closed material—will also be provided to the Special Advocate.

It is envisaged that a draft will be ready by Thursday 31 March and it would be circulated to Special Advocates for comment.

[122] Ev 52–53

ACCESS TO INDEPENDENT EXPERTISE

It is recognised that Special Advocates should have access to some expertise to enable them to understand and test intelligence material. This is an important issue—there are practical and resources implications. The Attorney General has asked for further discussion within government on how this proposal could be best achieved.

Letter from Rt Hon Alan Beith MP, Chairman, Constitutional Affairs Committee to Rt Hon Lord Goldsmith QC, Attorney General

In your evidence this morning you stressed the importance of the function performed by Special Advocates in relation to disclosure of material and the rulings that can be made by the Special Immigration Appeals Commission as to whether disclosure to the applicant would contravene the public interest as defined in the rules.

You indicated to us that you did not understand the point being made by some commentators about exculpatory material. You stressed the duty on the Secretary of State to disclose all material to the Commission whether helpful to his case or not.

Two broad issues arise: first, the nature of the duty on the Secretary of State to disclose exculpatory material to the Commission; and, second, the Commission's ability to direct that such material should be disclosed.

The Committee understands that during some of the first round of individual appeals under the *Anti-Terrorism, Crime and Security Act 2001*, the Secretary of State accepted the practice of reviewing material with a view to identifying exculpatory material. It is unclear to the Committee whether there is any 'duty' to do so; and, if so, where any such duty is stated. We have been unable to identify any provision in the primary legislation, or the SIAC procedure Rules, that indicate such a duty.

While there is statutory obligation to act fairly, there is apparently no over-riding "interests of justice test" available to SIAC in regulating these proceedings. Even if such a duty was to be implied, it is difficult to see how it could be policed effectively. It would surely depend on the views of the intelligence services officer as to what appears to be exculpatory, rather than the Special Advocate who is representing the applicant and who would be mindful of fairness and the interests of justice.

Furthermore, even if exculpatory material was disclosed to SIAC, which then ruled that the material could be disclosed to the applicant and his advisers without damage to the national interest, there is no power to enforce such a ruling if the Secretary of State objects to it under Rule 38(7) of the *SIAC 2003 Rules*. (We understand that the rules proposed under the *Prevention of Terrorism Bill* are similar).

The current rules mean that if the Secretary of State loses a public interest ruling at SIAC, he may continue to proceed with the certification and detention, relying on other *inculpatory* material. We understand that he is not compelled to withdraw the certificate in preference to non-disclosure, which prevents SIAC having any sanction under the Rules. It appears to us that the Secretary of State can simply state that he is not relying on the exculpatory material. This is in spite of the fact that the applicant would want to be aware (and should be aware) of the existence of any crucial exculpatory material.

1. Can you clarify the nature of the duty on the Secretary of State, discussed above?
2. Are the Rules relating to disclosure going to be placed on a statutory footing, or clarified into transparent guidelines that can be relied upon before whatever court is tasked with considering these matters in the future?
3. What mechanisms will be introduced to ensure that Special Advocates, representing such applicant, have sight of all potentially exculpatory material?

We would appreciate it if you could provide us with a note that deals with these questions and the broader issues raised by return, given the urgency of these matters.

Rt Hon Alan Beith MP
Chairman
Constitutional Affairs Committee

8 March 2005

Letter from Rt Hon Lord Goldsmith QC, Attorney General to Rt Hon Alan Beith MP, Chairman, Constitutional Affairs Committee

SPECIAL IMMIGRATION APPEALS COMMISSION

Thank you for your letter of 8 March 2005, concerning the Secretary of State's obligation to disclose exculpatory material.

Responding to your question (1), in my evidence to the Committee yesterday I spoke as I did because I regard it as obvious that where the Secretary of State has exculpatory material, it should be disclosed. I am not of course responsible for policing the process but I understand that it operates in the following way.

It is important to stress first of all that the Secretary of State is under a public law duty to act fairly in the proceedings. The disclosure of exculpatory material is not dealt with explicitly in the 1997 Act or the 2003 Rules. However, procedures are in place to ensure that the evidence is assembled in a balanced and non-partisan manner. These include a mechanism for dealing with material on which the Secretary of State does not propose to rely. This provides for all unused material concerning the appellant to be checked by the Secretary of State's counsel to see whether it includes exculpatory material. Any such material is disclosed to the special advocate in the first instance. There follows further consideration by the special advocate and SIAC as to whether any of the exculpatory material should be made open and disclosed to the appellant. Even where unused material remains completely closed, SIAC will be aware of the position and can ultimately decide on the fairness of the proceedings.

As in all proceedings—not just those before SIAC—the process of disclosure inevitably relies on the integrity and professionalism of those operating it.

The arrangements described above have been considered by SIAC, which commented as follows in the case of *Ajouaou and A, B, C, and D v Home Secretary* (29 October 2003):

> We did not feel, notwithstanding occasional complaints and concerns about disclosure of material to the Special Advocates, that there had been any unfair holding back of material, although of course we are not in a position to know for sure. But there is a disclosure system in place, it is operated honestly, so far as we could judge, and we were not persuaded by anything which emerged that there had been a failure to appreciate significant material which would help an Appellant, although again the Respondent was not best placed to judge how particular material might be used by an advocate" (paragraph 281).

Turning to your questions (2) and (3), I am not in a position to say what the position will be under the rules in future. Policy responsibility for these matters rests with the Home Secretary and the Lord Chancellor. Moreover the position under the *Prevention of Terrorism Bill* is of course uncertain at present. Under the Bill as amended by the House of Lords yesterday, the rules would be made by the Lord Chief Justice after consulting the Lord Chancellor.

I am copying this letter to the Lord Chancellor and (with yours) to the Home Secretary.

Rt Hon Lord Goldsmith QC
Attorney General

9 March 2005

Letter from Rt Hon Lord Goldsmith QC, Attorney General to Rt Hon Alan Beith MP, Chairman, Constitutional Affairs Committee

SPECIAL ADVOCATES: ADDITIONAL INFORMATION FOR THE COMMITTEE ON THE OPERATION OF SIAC

1. Prior to 1997, there was no mechanism in England and Wales for material withheld from an Applicant in proceedings to be considered and challenged on his behalf by a specially appointed advocate. In immigration deportation cases, a decision to deport a person from the United Kingdom on grounds of national security was taken by the Home Secretary personally, on the basis of all relevant material. There was no formal right of appeal against such deportation decisions. The Home Secretary's decision was reviewed by an Advisory Panel, colloquially known as "The Three Advisers" or the "Three Wise Men", which made recommendations on whether the Home Secretary's decision to deport should stand. The Panel's recommendations were purely advisory and it *was* able fully to review the evidence relating to national security threat—this material was not disclosed to the Applicant or his legal representatives because to do so would potentially compromise national security.

2. This position changed with the case of *Chahal v UK* 23 EHRR 413. Mr Chahal was an Indian national with indefinite leave to remain in the United Kingdom. He was made the subject to a deportation order on the grounds of national security in 1990. He then claimed asylum but his application was refused. Having failed to overturn the deportation order before the Panel, he took his case to the European Court of Human Rights ('ECtHR'). One of the claims made by Mr Chahal was that his detention pending deportation was unlawful since any detention could only be with a view to deportation. If the Home Secretary had deported Mr Chahal, the deportation would be in violation of Article 3 of the Convention.

3. In its judgment, the ECtHR (at *paragraphs 121–133*) held that that the existing arrangements in the United Kingdom were not Convention compliant because they did not allow a detained person to have the basis of his detention reviewed by the Court and that there was no effective domestic remedy for refusal of an asylum application. The ECtHR accepted that the use of confidential material might be unavoidable where national security is at stake but referred with approval, to what it had been told by the interveners namely, Liberty, Amnesty International, the AIRE Centre and JCWI of the Canadian procedures for dealing with similar

cases. The Canadian remedy was to allow "*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"* (*paragraph 131*). The Court only cited the Canadian model and made no mention (if the interveners in *Chahal* had made any) of other jurisdictions where Special Advocates are used.

4. In response to the *Chahal* decision, Parliament passed the Special Immigration Appeals Commission Act 1997 to hear immigration and asylum appeals where there are national security issues. For instance, where intelligence is part of the evidence and that material cannot be released to the Appellant, or his representatives, for fear of compromising sources and/or United Kingdom's national security. The Commission's (SIAC) role was subsequently extended to hear appeals under the *Anti-Terrorism, Crime and Security Act 2001* by persons certified as suspected international terrorists, and conducts reviews of their certification. SIAC also hears appeals against deprivation of citizenship.

5. The Special Advocate was therefore, first introduced in the Special Immigration Appeals Commission Act 1997. The system of Special Advocates is designed to balance the right to a fair hearing, in circumstances where an Appellant and his representative may be excluded from part of the hearing, with the need to protect national security.

6. In order to create a list of Special Advocates, the Treasury Solicitor of the time identified a number of people who were thought appropriate by way of experience, ability and integrity. That list was submitted to one of my predecessors, who approved the list and counsel were accordingly, developed-vetted.

7. Not all counsel on the Special Advocates list are members of the civil panels of junior counsel to the Crown. There are Queen's Counsel such as Nicholas Blake QC and Andrew Nicol QC, who are leading members of the Bar in their fields. They have not been members of the panel but are considered to have good 'claimant' experience and expertise.

8. Since 1997, sixteen Special Advocates have been appointed in SIAC hearings and thirteen are now operating within the SIAC system.

9. The Special Advocates system has emerged in several other contexts, both statutory and non-statutory—including PII hearings in criminal cases as set out in the House of Lords decision in *R v H and C* [2004] 2 WLR 335, the High Court control orders, the Parole Board, planning appeals and the Proscribed Organisations Appeals Commission.

10. Not all advocates need to be developed-vetted in order to be appointed as a Special Advocate. Much depends on the nature of the material in which a Special Advocate is appointed to test. By way of an example, with Special Advocates in criminal PII proceedings, the Attorney General set up a separate panel in consultation with the Chairman of the Bar, Circuit Leaders and First Treasury Counsel. To date, the Law Officers have appointed seven special advocates.

11. The Special Advocate system is necessary to protect the public interest in not disclosing the sensitive material, while allowing independent scrutiny of that sensitive material by an advocate appointed to represent the interests of the appellant. Lord Carlile commented,

> "the provisions [relating to the procedure before SIAC] *maintain a reasonable balance between fair proceedings and the reality of life-threatening risk to the public and to law enforcement agencies. The special advocate is a valuable lever in ensuring that balance. SIAC itself is the vigilant fulcrum".*[123]

12. Brooke LJ in *A, X and Y and Others v Secretary State for the Home Department* said,

> ". . . the special advocate procedure is a better way of dealing with this than any procedure devised in this country in the past. Contrast, for example, section 4 of the Prevention of Terrorism (Temporary Provisions) Act 1974, whereby the Home Secretary received advice in private from an independent adviser in relation to challenges against an exclusion order and was not obliged to disclose the content of the advice, or to say whether he accepted it or not."[124]

13. Lord Woolf CJ in *M v Secretary of State for the Home Department* said,

> ". . . 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."[125] (It should be noted that this was made before the decision in the House of Lords).

Rt Hon Lord Goldsmith QC

15 March 2005

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[123] Lord Carlile of Berriew QC—Review 2003

[124] Para 89—*A, X and Y and others v Secretary of State for the Home Department* Court of Appeal (25.10.2002)

[125] Para 34, Lord Woolf of Barnes CJ in *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, [2004] 2 All ER 863

Letter from Rt Hon Lord Falconer of Thoroton QC, Lord Chancellor and Secretary of State for Constitutional Affairs to Rt Hon Alan Beith MP, Chairman, Constitutional Affairs Committee

I am writing about two matters that are outstanding from the Select Committee's inquiry into SIAC.

I. Special Criminal Court in Ireland

During my appearance before the Committee on 1 March 2005, Clive Soley MP raised the prospect of using a Special Court as an alternative to Control Order proceedings in the High Court. I undertook to make enquiries about the Special Criminal Court (SCC) in the Republic of Ireland and to provide the Committee with the relevant details.

It is evident from those enquiries that the SCC would not offer a viable alternative to the scheme of control orders that we have established under the *Prevention of Terrorism Act 2005*. The SCC was established to provide for a trial—without a jury—of a criminal offence where there is a fear that a jury might be subverted by a terrorist organisation or organised crime. It sits with three judges instead of a single judge and a jury. The SCC applies the same rules of evidence that apply in the ordinary criminal courts, which means that the prosecution must have evidence that is admissible in a criminal court and that satisfies the criminal standard of proof. It is not, therefore, set up to provide for the sort of difficulties which I set out below.

First, we are often dealing with those who are engaged in the preliminary stages of some terrorist activity or in the indirect facilitation of terrorism—for example, fund raising through fraud, training, encouraging or otherwise supporting terrorist activity. In such cases, an ordinary criminal prosecution might indeed be possible, but going the extra step and making a specific link to a terrorist motive is very difficult. Even where such prosecution is possible, it might not be for an offence that carries a sentence which would guarantee the public sufficient protection.

Secondly, information about suspected terrorists may not be admissible in a criminal court, or may not be of a nature that would satisfy the criminal standard of proof. On the other hand, individual pieces of information or intelligence taken together can paint a convincing picture that the person is involved in activity which is likely to pose a threat to our security. In these circumstances, the Government needs to take action to protect the public.

Finally, even where information would be admissible in a criminal court, it might be damaging to disclose. Individuals considered for control orders will be suspected of posing a threat to national security. The disclosure of some information to those individuals may compromise the sources or techniques used to collect that information. Allowing these individuals access to such information could compromise our national security and put the safety of the public at risk.

For all these reasons, the SCC would not solve the issues that the *Prevention of Terrorism Act 2005* is designed to meet. The scheme of control orders—which are preventative orders—will ensure that the Government is able to control individuals who are suspected of involvement in terrorist-related activity, but who cannot easily be prosecuted through the criminal courts.

During the passage of the Bill, we responded to concerns that control orders should be swiftly and properly reviewed by the courts. The Act provides for derogating control orders to be made by the High Court on application by the Secretary of State. Non-derogating control orders will be made with the court's permission or, if made without permission, will be subject to an automatic reference to the High Court. In either case, the court's initial consideration will be followed by a substantive hearing at which all parties and a special advocate can be present. The Government believes that the judicial proceedings in the High Court, which are based on the SIAC model, strike a fair and reasonable balance between the need, on the one hand, to secure justice and, on the other, to prevent disclosures of information contrary to the public interest.

II. The treatment of exculpatory material

In your letter of 8 March to the Attorney General, which you kindly copied to me, you enquired whether the disclosure of exculpatory material would be placed on a statutory basis and whether special advocates would have sight of all potential exculpatory material. During my appearance before the Committee, Ross Cranston MP had expressed concern that rules of court might weaken, rather than strengthen, the existing practice of the Government by which the Secretary of State discloses all relevant material including exculpatory material to the court and, where one is appointed, to the special advocate.

We listened to the concerns of the Committee and others on this issue and we responded by moving an amendment to the Schedule of the Bill. Paragraph 4(3) of the Schedule to the Act requires that rules of court must, among other things—

(a) require the Secretary of State to provide the court with all the material available to him and which is relevant to the matters under consideration;

(b) require the Secretary of State to disclose to the other party all that material, except what the court permits him to withhold on the ground that its disclosure would be contrary to the public interest; and

(c) provide that if the Secretary of State chooses nonetheless to withhold material that he has been directed to disclose, then—

(i) he may not rely on that material himself, and

(ii) if that material might assist the other party in opposing an argument put by the Secretary of State then that argument may be withdrawn from the court's consideration.

Paragraph 4(3) will ensure that rules of court make provision for the disclosure of all relevant material. I have already made the first rules in relation to England and Wales and the relevant rules on disclosure are set out in the Civil Procedure Rules, Part 76, rules 76.27 to 76.29.

I hope this letter provides all the necessary reassurances. I am copying this letter to the Home Secretary and the Attorney General.

Rt Hon Lord Falconer of Thoroton QC
Secretary of State for Constitutional Affairs and Lord Chancellor

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