JOINT COMMITTEE ON HUMAN RIGHTS

JUSTICE AND SECURITY GREEN PAPER, Cm 8194

NOTE FROM SPECIAL ADVOCATES

TO THE JOINT COMMITTEE

on the supplementary memorandum of the Independent Reviewer of Terrorism Legislation presented to the JCHR

Summary of abbreviations adopted:

GP Green Paper

IR Independent Reviewer

CMP Closed Material Procedure

PII Public Interest Immunity

SA Special Advocate

1. David Anderson QC, the Independent Reviewer of Terrorism Legislation [the IR] has provided written and oral evidence to the Joint Committee on Human Rights in relation to the Justice and Security Green Paper [the GP]:
   (i) A memorandum dated 26 January 2012
   (ii) Oral evidence to the Committee on 31 January 2012
   (iii) A supplementary memorandum dated 19 March 2012

2. This Note is provided by way of brief comment on the IR's supplementary memorandum. In his original memorandum and his oral evidence, the IR had made it clear that his willingness to contemplate a CMP being made available in civil proceedings was contingent upon the following safeguards:
   (1) **Strict necessity**: A CMP should only be available where it was strictly necessary, not to any case involving "sensitive material" as the GP proposes. His suggestion was that "*the court's power to order a CMP should be exercisable only if, for reasons of national security connected with disclosure, the just resolution of a case cannot be obtained by*

other procedural means (including not only PII but other established means such as confidentiality rings and hearings in camera*)*".[1]

(2) **The decision to trigger a CMP must be for the court, not the Government**. The proposal in the GP that a CMP would be triggered in civil proceedings on the basis of a decision taken by the Secretary of State, subject only to judicial review, he described as "*profoundly wrong in principle*".[2]

3. We do not understand the IR's position as to the need for these threshold conditions to have changed. Nor, as we understand it, has there been any change in his recommendation that continuing efforts should be made to improve the CMP procedure, including his suggestion that "*Some of the proposals made by the Special Advocates* [in their collective response to the Green Paper] *seem difficult to resist …*".[3]

The size of the problem in civil claims

4. In his supplementary memorandum the IR has revisited what he had previously said about the size of the problem that CMPs were proposed to address in civil cases, having been provided with further information by the Government. These further views are put forward in the light of information supplied to him at a meeting on 14 March 2012 described by him as being:-

> *"… attended by representatives of the Government and all three intelligence services and by counsel, at which I was talked through seven of the cases, and was left with a bundle of top secret material in each case (including evidence and internal/external advice), which I have taken the opportunity to read."*[4]

5. Of the seven cases provided by the Government, it is apparent that 3 were judicial review claims (two naturalisation cases and one exclusion case) and 3 were damages claims raising "allegations of complicity in detention, rendition and torture by other countries". The nature of the seventh case is not apparent.

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[1] IR's memorandum of 26.1.12, paragraph 22. See also the IR's comment in his supplementary memorandum at para 19: "*No one has sought to persuade me of the need for a CMP in cases not related to national security*."

[2] IR's memorandum of 26.1.12, paras 24 to 26

[3] IR's memorandum of 26.1.12, paras 26 to 30.

[4] IR's supplementary memorandum, para 8

6. For present purposes we leave on one side the category of naturalisation and exclusion cases, which are the subject of a pending judgment of Mr Justice Ouseley, as indicated by the IR at paragraph 12. We are concerned, however, at the conclusion of the IR reached on the basis of his review of three cases selected by the Government to present to him (although said to be "typical of many others") which are claims for damages. The IR's review of these cases has persuaded him that:

> *"there is a small but indeterminate category of national-security-related claims … for civil damages, in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist."*[5]

7. It seems to us that there is a risk that the IR may have been placed in an invidious position similar to that which judges would be in if they had the power to order CMPs in civil proceedings (even, contrary to the GP's proposal, if they were to be given any discretion in the matter beyond that of judicial review of the ministerial decision). Indeed, his position is worse than that of a Judge because he has not had the benefit of a countervailing independent but experienced party, such as a special advocate, to test the claims or contentions made by the advocates for the Government's proposals.
   - In each of the three cases provided to him, following an (untested) introduction to the case by just one side to the contested proceedings, and on a reading of some of the closed material, he has expressed a view that "*there is material of central relevance to the issues that it seems highly unlikely could ever be deployed in open*". However, PII and other existing mechanisms enable sensitive material to be adduced in evidence without being "deployed in open" and without resort to a CMP (through the use of 'in camera' proceedings, confidentiality rings, and so on)[6]. Thus, the IR's view that it is highly unlikely that the material presented to him could be deployed in open does not entail the conclusion that a CMP is the only means by which such a claim could be tried.
   - The view reached by the IR no doubt reflects the view held and expressed to him by the Government representatives presenting him with the material. But the IR heard no argument on the other side[7]. The circumstances are such that the Government has no incentive to devise a way of having the cases heard without a CMP.

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[5] IR's supplementary memorandum, para 19

[6] As observed in the Special Advocates' collective response to the Green Paper, there are also other procedures, short of CMPs, that are not currently part of the procedural tool kit in the UK, but which have been deployed to deal with sensitive material in *habeas* proceedings in the US, which have not been considered in the GP or by the IR.

[7] By contrast, it may be that there would at least be provision, under the regime proposed in the GP, for a SA to be heard on the application for judicial review of the Government's certificate that a CMP was necessary.

- By contrast, our combined practical experience of handling sensitive material in civil claims (as special advocates and otherwise) indicates that, where there is no alternative (because a CMP is not available), a way can normally be found for the claim to be heard acceptably fairly, and without unacceptable disclosure of sensitive material. We have recognised the theoretical possibility that cases may exist which cannot be tried, but there is as yet no example of a civil claim involving national security that has proved untriable using PII and the flexible and imaginative use of ancillary procedures (such as confidentiality rings and "in private" hearings from which the public, but not the parties, are excluded).[8]
- We also fear that the provision of a CMP as an option in such cases would lead to an irresistible tendency for it to be adopted for cases that could, in practice, be tried more fairly (or less unfairly) using existing procedures. For reasons expressed in the SAs' response to the Green Paper, the use of a CMP is inherently unfair. While there may be a degree of unfairness inevitably associated with the use of existing procedures to deal with sensitive material, these existing procedures at least preserve the fundamental principle that the material relied on one party, on which the court bases its decision, can be seen and challenged by the other party. CMPs violate this fundamental principle of fairness, sometimes to the extent that the losing party has no idea how and why he has lost.

8. Thus, notwithstanding that the IR has been persuaded on the basis of the material to which he has been made privy, that there is a "small but indeterminate category of national security-related claims … in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist", we remain unconvinced. Of course, we have not seen the material that the IR has been shown. It is regrettable that no attempt appears to have been made to afford any Special Advocate an opportunity to address the IR in relation to the facts of these cases and as to the contended necessity for a CMP. Nevertheless, we consider that there is at least a chance that our practical experience of operating procedures to deal with sensitive material (both under statutory CMP regimes and the common law of PII) would

[8] In the Guantanamo Bay detainees' claims (*Al Rawi et al*), it is important to recall that the Government settled the claims not only before PII procedures had been tried, but also before the Government's argument that a CMP could be applied at common law had been heard by the Supreme Court (the Government having succeeded on this point at first instance, but lost before the Court of Appeal). Thus, the Government chose to settle the litigation while there was still a prospect of a CMP being ordered. Furthermore, we do not understand the Government to have asserted in *Al Rawi* that the claims would have been untriable without a CMP; rather that a CMP was the preferable procedure – as to which the SC decisively disagreed (even assuming that there was a power to order such a procedure, which was itself in issue).

lead to a different view. Even accepting the conclusion of the IR, it must be recognised that there is likely to be a price to be paid, as it seems inevitable that, once made available, CMPs will be adopted in cases where fairer common law procedures could have been made to work satisfactorily – or at least less unsatisfactorily. This is because the position facing the Court will be of one party (the Government) having determined that a case cannot be heard fairly or at all without a CMP – with no incentive on the part of the Government to make anything other than a CMP work, and every incentive for a CMP to be imposed. That is not dissimilar to the position in which the IR has been put.

9. These concerns are heightened by three features of the proposals in the GP, each of which is highlighted in the IR's first memorandum (as well as the SAs' Response, and other responses to the GP) but not alluded to in his supplementary one:
   (1) The breadth of the categories of civil proceedings potentially affected. Although the IR has been persuaded that that provision of a CMP should be available in a small category of national security-related claims, the GP's proposals are much more far-reaching.
   (2) The fact that it is proposed that the Secretary of State, and not the Court, would determine whether a CMP should apply, subject to review on only a very limited basis.
   (3) The fact that the Government will likely contend that the requirements to disclose the essentials of a case (namely sufficient information to enable him to give effective instructions to his special advocate, so-called 'AF disclosure'[9]) do not apply to civil claims for damages, but apply only in deprivation of liberty cases and those closely analogous to them. This would have the effect that the party deprived of the closed material would not be entitled even to a gist of the essential features of the defence case against him. As we have said, without 'AF disclosure' disclosure this will generally mean that the losing party has no idea how or why he has lost his case, even where the issue being litigated in a civil context is one as serious as alleged UK complicity in rendition or torture/inhuman and degrading treatment.[10] We question how a system that can generate such an outcome can be regarded as acceptable. The IR's description of it as "second best" seems to us to understate the position.

[9] I.e. the minimum level of disclosure that the House of Lords held in *AF (No.3)* was required to be given in order to achieve compliance with Article 6 of the ECHR.

[10] One unspoken corollary of accepting the necessity for a CMP is likely to be the impossibility of trying a range of potential criminal cases against UK officials for, say, collusion in rendition or torture.

10. In this regard, we note and echo the disquiet expressed by the IR's own specialist adviser, Professor Clive Walker, in his response to the GP:

> "*More troubling even than the advancement of government interests at the expense of others is the unthinking crossing of a boundary which may do damage to the legitimacy of the regular justice system."* [11]

Norwich Pharmacal

11. In relation to the *Norwich Pharmacal* jurisdiction, the IR said that it had been "persuasively argued" that:
    - "nothing of operational significance has ever been disclosed under *Norwich Pharmacal*"*;*
    - "the Court of Appeal in its 2010 judgment displayed appropriate respect for the control principle and deference to the assessments of the Secretary of State"; and
    - "the US system itself may not be able always to guarantee the security of foreign intelligence product".[12]

12. But, the IR went on to conclude that "however well-founded such arguments may be, they are in a sense beside the point". This was because, in the intelligence world, "perception counts for a great deal – and justly or otherwise, *Binyam Mohammed* has in some US agencies created a perception of enhanced legal risk associated with the sharing of intelligence".

13. If we have understood it correctly, the IR's reasoning appears to be that, even assuming that our courts already show appropriate respect for the need not to disclose foreign source intelligence material and appropriate deference to Government assessments in this regard, the perceptions of some US officials (which may well be mistaken) justify the UK in giving the US a "species of guarantee" which the US may well be unable (under their own law) to give to us in return.

14. As to what species of guarantee would be acceptable to the US, it seems to us that, if (as the IR says) the anxieties about the *Norwich Pharmacal* jurisdiction first arose as a result of the *Binyam Mohammed* case, the only "species" of guarantee likely to be acceptable to them is

[11] Professor Clive Walker, Submission to the Ministry of Justice, Justice & Security Green Paper, paragraph 7
[12] Paragraph 26 of the IR's Supplementary Memorandum

an absolute guarantee that information derived from them will **never** be disclosed without their permission **whatever the circumstances**.

15. We think it important that the effect of such a guarantee should be fully understood. The effect is that the UK courts would be unable to order disclosure of material obtained in confidence from a foreign intelligence service even if (a) in the opinion of the UK court, it is anodyne and will not cause any damage to the national security of the UK or the foreign state concerned, (b) its disclosure may lead to the death of a British resident because (as in Binyam Mohammed's own case) he needs it to defend himself against a capital charge and (c) the evidence arises in the context of wrongdoing in which UK intelligence officers are 'mixed up'.

16. We consider that the UK Government ought to think long and hard before giving a legislative guarantee in those terms. The suggestion that it should do so because of mistaken perceptions on the part of some US officials seems to us to be particularly questionable.

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