SPECIAL ADVOCATES' FURTHER MEMORANDUM TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE JUSTICE AND SECURITY BILL[1]

Introduction

1. A group comprising nearly all Special Advocates with substantial experience of the role has previously commented on the proposals in the Green Paper and on the Bill as presented to the House of Lords. Individual special advocates have also given evidence in relation to the Bill to the Joint Committee on Human Rights on separate occasions.[2] Since then, the Bill has been amended in the House of Lords and, again recently, in the Public Bills Committee of the House of Commons.

2. We now submit this further memorandum, first to reaffirm our view that no compelling justification for the proposals in Part 2 of the Bill has been made out, notwithstanding the Government's assertions to the contrary; and second to comment on some of the recent amendments.

3. As previously, these views are given from our perspective as practising Special Advocates with extensive experience of closed material procedures (CMPs) in the various statutory contexts in which they currently operate. Independently of our role as Special Advocates, we also have substantial collective experience of acting as counsel in civil claims both for and against the Government.

CMPs are inherently unfair

4. We have made very clear in our previous submissions that we consider CMPs to be inherently unfair and contrary to the common law tradition, because they allow the court to makes its decision based on evidence which one party is unable to see or comment on or challenge.

5. We do not need to repeat what we have said before. But there is one point which deserves to be emphasised. It concerns the requirement to give the excluded party a "gist" of the evidence deployed against him. This requirement is imposed in certain cases by virtue of Article 6 of the European Convention on Human Rights. But in other cases, the Supreme

[1] The signatories to this memorandum comprise almost all currently active Special Advocates. Of those who have not signed none has expressed disagreement. Because of the need to produce this memorandum quickly, after the Committee stage of the Bill, it was not circulated to the entire body of counsel authorised to act as Special Advocates.

[2] Justice and Security Green Paper: Response from Special Advocates, 16 December 2011; Oral evidence to the JCHR of Angus McCullough QC and Jeremy Johnson QC, 31 January 2012; Special Advocates' Memorandum to the JCHR, 14 June 2012, Oral evidence to the JCHR of Angus McCullough QC and Martin Chamberlain, 26 June 2012; Letter to the JCHR from Angus McCullough QC and Martin Chamberlain, 2 October 2012

Court has held that Article 6 does not require the provision of any "gist" whatsoever.[3] In these cases, there is no overriding requirement to tell the excluded party anything at all about the case against him.

6. The Government's stance in recent litigation indicates that it will seek to argue that the requirement to give a "gist" of the closed material is limited to a very narrow category of case where it is seeking to detain individuals or subject them to severe restrictions on liberty. If this stance is accepted by the domestic and European courts, it is quite possible that, in the majority of civil claims subject to a CMP, there will be no "gisting" requirement at all.

7. In this connection, it is important to emphasise that the requirement in clause 8(1)(d) to provide the excluded party with a "summary" of the closed material is subject to clause 8(1)(e), which provides that the summary must not contain material the disclosure of which would be damaging to national security. What this means is that it will be possible to have proceedings in which the court's decision is based entirely on evidence about which one of the parties has been told nothing at all.[4]

8. As we have said before, reforms with this effect would have to be very compellingly justified.

No case for CMPs

9. The Government has repeatedly asserted the necessity for the measures in Part 2 of the Bill and claimed that, without them, the existing rules governing exclusion of sensitive material – public interest immunity or "PII" – mean that it has been or will be obliged to settle cases, paying large sums of money to undeserving claimants.[5]

10. As we have previously stated, we do not accept this purported justification for the introduction of CMPs across all civil proceedings. Under existing law, in any case where the exclusion of sensitive material means that the Government cannot fairly defend itself, it is open to the Government to apply to strike the case out.[6] The unfairness to the

[3] *Tariq v Home Office* [2012] 1 AC 452.

[4] There are already cases like this in the Special Immigration Appeals Commission. One prominent one is *RB (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110.

[5] See e.g. the Foreword by the Rt Hon Kenneth Clarke to the HM Government Response to the Joint Committee on Human Rights Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill: "*There is no doubt that the Justice and Security Bill is absolutely necessary. We find ourselves faced with an ever increasing number of cases which cannot be properly adjudicated by the Courts. It also means the taxpayer is liable for substantial amounts of money in cases which the Government has not been able to defend*."

[6] *Carnduff v Rock* [2001] 1 WLR 1786.

claimant of cases being struck out in this way was identified in the Green Paper as part of the rationale for the expansion of CMPs.[7]

11. If, as the Government suggests, there were really a substantial number of cases where sensitive evidence made a fair trial impossible, one would expect there to have been a substantial number of applications to strike claims out on that basis, especially if the alternative was paying large amounts of taxpayers' money to undeserving claimants. In that regard, we find it striking that (as far as we are aware) there is no case involving material that is sensitive for reasons of national security in which the Government has ever sought to have the case struck out on the basis that it could not be fairly tried.

12. The one case in which the principle was established – *Carnduff v Rock* – was not a national security case. It was a case about a police informer claiming money said to be due to him from his handlers. The group of claims by former inmates at Guantanamo Bay (the *Al Rawi* litigation) did involve some evidence whose disclosure it was said by the Government would have been damaging to national security. Those cases were settled at great expense to the taxpayer, but no strike out application was made.[8] The implication must be that the Government recognised that the Court would consider that a fair trial of the issues would have remained possible, even after the application of the PII rules, and so an application to strike out the claims would not have succeeded.[9]

13. It is, therefore, right to say that there is to date no example of a case in which a fair trial has been shown to be impossible because of the application of existing rules to sensitive national security evidence. The case for this fundamental reform to our justice system therefore rests solely on what the Government says about pending cases involving sensitive national security evidence.

14. In response to a request from the JCHR, the Government has said this about pending cases:

> "*As of 31 October 2012, there were 20 live civil damages claims (including those stayed and at pre-action stage) in which sensitive national security information was centrally relevant. A number of these cases relate to several individuals.*"[10]

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[7] At §1.36 of the Green Paper, the Government said this: "The Supreme Court in *Al Rawi* did acknowledge that there could be cases that could not be tried at all consistent with the public interest. Although the approach taken in *Carnduff* remains an option that is open to the courts in England and Wales, the Government favours having as many cases as possible tried fully and fairly. To this end, the availability of a CMP in cases involving sensitive information would allow sensitive information to be considered by a court in a manner that is consistent with the public interest."

[8] Also, as we have previously noted, the Government chose to settle these claims before the Supreme Court had determined whether a CMP could be imposed under the common law, so at the time of settlement there remained a live possibility of a CMP being found to be available to the Government yet it nevertheless chose to settle the claims.

[9] The same applies to the three further cases which the Government indicates that it has settled, which are referred to in the Government's Response to the Joint Committee on Human Rights, referenced in fn 9.

[10] HM Government Response to the Joint Committee on Human Rights Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill, January 2013.

These presumably include the three cases shown to David Anderson QC, the Independent Reviewer of Terrorism Legislation.

15. We note that it is not said is that it would be impossible for any of these cases to be tried fairly using existing procedures. If it were impossible for these cases to be tried fairly, we would expect the Government to apply to strike them out. We note that no such application has in fact been made.

16. The Government has – rightly – never sought to suggest that the proposals in Part 2 of the Bill are impelled by a concern to protect sensitive information: such information is properly protected by the PII rules under the present system. The justification for the proposals is based squarely on considerations of fairness. For reasons set out above, we consider that it has not been shown in practice that the present system has led to any unfairness, as no case has been identified which could not be tried fairly under existing procedures. To the extent that there is any unfairness in principle, it is claimants, and not the Government, who bear the risks of such unfairness. It is they who risk their claims being struck out if they cannot be tried fairly under existing procedures.

17. We therefore remain of the view we previously expressed:

> "*that CMPs are inherently unfair and contrary to the common law tradition; that the Government would have to show the most compelling reasons to justify their introduction; that no such reasons have been advanced; and that, in our view, none exists*."[11]

If CMPs are introduced, they should be a last resort

18. We recognise that some eminent people, including David Anderson QC, have concluded – contrary to our own view – that there is a case for CMPs in a narrow and exceptional category of cases. We have accordingly tried to address what safeguards we think are necessary if they are to be introduced.

19. The first and most important safeguard is that CMPs should be a last resort. The power to trigger them should, in our view, be exercisable only where a fair determination of the proceedings is not possible by any other means. This would limit the use of CMPs to the exceptional cases which, in the Government's view, justify their introduction in the first place: cases where a fair determination is simply not possible using existing procedures.

20. The Government's position on this, as we understand it, is that it is not necessary to spell this out legislatively: it is sufficient to give judges a broad discretion whether to order a CMP and leave it to them whether to exercise it in a particular case.

[11] See SAs' response to the Green Paper consultation of 16.12.11 and the SAs' Memorandum to the JCHR of 14.6.12 (full references and links at footnote 2 above).

21. We disagree. If the true intention behind these reforms is to cater for the narrow and exceptional category of cases that cannot be tried using existing procedures, we can see no reason why CMPs should be available in a case which can be fairly tried under existing procedures. Moreover, we think it is essential to spell this out in terms. If it is not spelled out, there is a risk that the court will not address its mind to the question whether the case could be tried fairly under existing procedures. There is a risk that CMPs will become the default option and that what was justified as an exceptional procedure will come to be accepted as the norm.

22. The Government has suggested that spelling out that CMPs are a last resort would mean that courts would have to undertake a lengthy PII process before ordering a CMP. Again, we do not agree. Whatever procedure is adopted, courts will have to subject to careful scrutiny any material said to be sensitive on grounds of national security. Our experience of disclosure processes under statutory CMPs suggests that they are no less time consuming than PII procedures in non-statutory proceedings. The documents have to be examined anyway. There is no reason why, having examined them, the court should not be required to consider whether the claim could fairly be tried applying PII principles. In order to reach a view about this, it should not be necessary for the court to undertake a full PII exercise, in a case where the outcome of such an exercise is obvious and inevitable.

Balancing national security against fairness

23. When considering whether to uphold a claim for PII, the courts are required to balance two competing interests: on the one hand, national security and, on the other, the fair and open administration of justice. This is known as the *Wiley* balance.[12] This is a very important feature of the existing rules. When the Government assesses that disclosure of a particular piece of evidence would damage the interests of national security, judges usually accept that assessment and exclude the evidence from consideration in the proceedings. But the final decision is for the court. So, for example, if the Government tries to withhold a document which tends to show that they have been guilty of serious wrongdoing, whilst at the same time denying that very wrongdoing, the court may be sceptical. It may say that the damage to national security would be slight and the relevance of the document to the proceedings very great. Balancing these interests, the court might decide to reject the PII claim, thereby exposing wrongdoing by the Government.

24. In a CMP, as envisaged by the Bill, no such power is given to the courts. When deciding whether to order a CMP, there is no obligation on the court to consider the public interest in the fair and open administration of justice. We think this is wrong. We would favour an express requirement that, before ordering a CMP, the court should have to balance the degree of harm to national security that would be caused by disclosure of particular

[12] *R v Chief Constable of the West Midlands ex p. Wiley* [1995] 1 AC 274.

documents against the damage that a CMP would cause, in the circumstances of the case, to the public interest in the fair and open administration of justice.

25. Likewise, once a CMP is ordered, when the court decides which documents should be "open" (ie disclosed to all parties) and which "closed", we think that the court should be required to perform the *Wiley* balance between national security on the one hand and the fair and open administration of justice on the other.

26. Take a case where a solider (or his family) is suing the MOD for negligence in failing properly to equip him. The court might conclude that disclosure of documents relating to the equipment in question pose a very minor risk to national security. As the Bill stands, a judge would have no option but to order that these documents remain "closed". We think the judge should be able to consider whether the minor risk to national security was outweighed by the public interest in having the issue of the safety of the equipment determined in a fair and open way, taking into account the lives that might be saved by doing so.

A requirement to give the excluded party a gist of the case against him

27. Finally, if CMPs are considered necessary, we think that there should be requirement in all cases to give the excluded party a sufficient gist of the case against him to enable him to give effective instructions to his Special Advocate. Without such a requirement, it would remain possible for a court to decide a case entirely or mainly on the basis evidence which one of the parties has had no chance to challenge. We do not think that CMPs could be described as even tolerably fair without this gisting requirement. As explained in para. 7 above, the provisions currently in the Bill do not include such a requirement.

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