JUSTICE AND SECURITY ACT 2013

Review pursuant to section 13

Reviewer: Sir Duncan Ouseley

SPECIAL ADVOCATES' NOTE

Response to HMG submission

1. The Special Advocates (SAs) are grateful to the Reviewer for supplying the Government's submission to the Review. As set out below, we would ask for confirmation from HMG that both their submission and this response be cleared for open publication.

2. In our own submission of 8 June 2021 we stated the following at the outset:

> *4. In the interests of transparency, this submission is intended to be made open, subject to clearance, and capable of publication. …*
>
> *5. In a corresponding spirit of transparency, it is hoped that any submissions to this review on behalf of Government bodies or agencies will be published in full, and so made available for wider review and comment. In so far as the Government only publishes a redacted submission or submissions, such redactions should be strictly justified and an unredacted version should be made available to SAs for comment.*

3. HMG's response is dated 4 June 2021, but has not been published, nor made available for general comment. Through the review, as SAs we have been sent HMG's submission on terms that it is not to be shared. We repeat the invitation to the Government to make its submission public, there being no apparent sensitivity to its contents on any public interest grounds.

4. At the outset of their submission, the Government stated "HMG would welcome the opportunity to address points raised in other responses to the Call for Evidence." The SAs suggest that such an opportunity should be reciprocated.

5. There are points in HMG's response that do not specifically relate to the conduct of proceedings in CLOSED. We do not seek to respond to such points, which may better be commented on (if permitted) by open representatives and other interested bodies. This underlines the concern set out above that currently HMG's submission is not available for wider comment from interested parties.

Service of draft Closed Defence before determination of section 6 application

6. At **section C3** of our submission, at paragraph 58, we indicated our view that there should be a requirement for a draft CLOSED Defence to be served at the same time as an application under section 6. We note that HMG deprecates the practice of Courts requiring service of a CLOSED Defence before a section 6 declaration is made: see paragraph 10 of the HMG submission. The objection is on the following basis:

> "*This approach undermines the principle behind the JSA and the necessity for a section 6 declaration to be made before a CMP is in effect and the court is able to hold CLOSED material. There is a real national security risk with courts making this decision. There is, at present, a lack of clarity over the status of any CLOSED Defence filed prior to a section 6 hearing in the event that the Court declines to make a section 6 declaration. In addition, HMG considers that it is generally disproportionate to require that a CLOSED Defence be filed prior to a section 6 hearing given that HMG parties may decide not to contest a claim in the event that a section 6 application fails.*"

7. With respect, we find this reasoning hard to understand:
   (i) A draft CLOSED Defence would have the same status as other CLOSED material produced in support of the section 6 application. Only the Court and the Special Advocates are privy to this material, subject to any 'opening up' as agreed by HMG or ordered by the Court;
   (ii) It is not clear in what sense a draft CLOSED Defence could 'undermine the principle behind the JSA'. To the contrary, it promotes the principle behind the JSA. As explained in our submission, the draft pleading enables the section 6 conditions to be considered in the light of a proper understanding of the issues, based on a pleaded case. As such, the Courts are better able to give effect to Parliament's intentions in passing section 6;
   (iii) If the section 6 application is refused, then both the CLOSED Defence and other CLOSED material served in support would not thereby become openly available. If an application were made for such material to be disclosed in the proceedings (on this hypothesis, with no CMP in place and so no SAs) then it could be the subject of a public interest immunity (PII) application to protect any

public interest (not just national security). Any genuine national security (or other public interest) risk would be properly protected by the application of PII, if necessary. Thus we do not accept either that there is a "lack of clarity" in the status of a draft CLOSED Defence, nor any risk to national security arising from this practice. We are not aware of such a risk ever having been advanced on behalf of HMG in opposing a direction for the service of a draft CLOSED Defence at this stage;

(iv) We do not understand how it is said that the requirement of a CLOSED Defence is disproportionate. The reason advanced is that if a section 6 application fails, "HMG parties may decide not to contest a claim". Experience (as evidenced by the case list that we annexed to our submission) suggests that it is exceedingly rare for s.6 applications to be refused. But in any event, the theoretical possibility that HMG may decide not to contest a claim in this eventuality, is hardly a reason for depriving the Court of a proper understanding of the issues as set out in a pleading. We maintain that a CLOSED Defence cannot be sensibly characterised as disproportionate. Service of a draft CLOSED Defence should be a routine requirement before a section 6 application is determined, at least in any case in which the making of a declaration is not agreed between the parties and the SAs.

Outcomes of cases under the JSA

8. At paragraph 17 of HMG's submission it is stated that "HMG has been able to defend numerous private law clams and judicial reviews …". This is asserted in the context of the JSA having achieved its objectives. The statement is misleading. In relation to <u>private law</u> claims we refer to our response to this question of our submission (Q.11, at pages 46 to 47, and at paragraph 12 on p.9) which highlights that as far as we are aware the Government has not successfully defended at trial, rather than settled, any case in which a CMP has been imposed. We recognise that the position in relation to <u>judicial reviews</u> is different; a number of such cases have been successfully defended by HMG, but it was not this category of case that was advanced as the principal justification for extending CMPs through the s.6 procedure.

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9. At paragraph 23, HMG makes four proposals in relation to the functioning of SAs under the JSA.
   (a) Defining the role of SAs
   (b) Instruction of SAs
   (c) Communication requests – Process

(d) Communication requests – Content

(a) Defining the role of SAs

10. We do not accept the premise that there is a lack of clarity as to the scope of the role of Special Advocates. The governing provision in the JSA 2013 is s.9(1) which makes clear that the SA is appointed "to represent the interests of a party in any section 6 proceedings from which the party (and any legal representative of the party) is excluded". Specific functions are listed in CPR r.82.10.

11. We are unclear as to what is suggested by way of greater clarity in relation to the areas identified in HMG's submission (ADR, drafting pleadings, drafting open legal analysis communicated to the open representatives, or 'instruction of OPEN experts'). It would be inappropriate, if it be suggested, for the role of SAs in representing the interests of the excluded party to be restricted in any way, including by reference to the areas identified. Self-evidently, SAs are the only non-State lawyers who see the totality of the case against the excluded party. That perspective may enable SAs to make suggestions in relation to the conduct of the open case that may in theory have been known to the open representatives, but the potential advantages or disadvantages may not be clear without sight of the fuller picture available to the SAs. To restrict the role or function of SAs, whether by way of 'clarification' or otherwise, would be liable to compound the unfairness of CMPs to the excluded party.

(b) Instruction of SAs

12. We are surprised and alarmed at the suggestion that open representatives should not request specific SAs, and that the practice of them doing so should be "discouraged".

13. This proposal, at least in part, appears to be based on the view that SAs, once appointed, are "accountable to the Attorney General". That is not correct. Indeed, it would be extraordinary if we were required to account to the AG, as the Law Officer (and principal legal adviser) for the Government, in the exercise of our functions in proceedings to which the Government is generally a party. This is particularly so once it is appreciated that on occasion the AG personally may be appearing for the Government in a case involving closed proceedings – as has happened in the past (e.g. *A v SSHD* [2004] UKHL 56, [2005] 2 AC 68) – or as a party to the proceedings (e.g. cases 5 and 6 on the Case List).

14. As a matter of principle, it is hard to understand why an excluded party should not exercise a choice in the SAs to be appointed to represent their interests. Fairness and transparency are surely promoted by giving excluded parties a choice of SA from an approved panel. Such a choice was not available in earlier days of CMPs and was introduced by the Government in adopting a recommendation from the House of Commons Constitutional Affairs Committee in 2005[1]. The proposal to provide a choice of SA had been part of a range of 'improvements' to the system[2] that had been canvassed by the Government in its evidence to the Committee, following suggestions by SAs to the Committee. The present proposal seems not only regressive and unprincipled, but also to have been advanced without an appreciation of this history.

(c) Communication requests – Process

15. We are neutral in relation to the proposal that the process that has been devised in relation to clearing by HMG of communication requests made by SAs should be formalised in the rules. The difficulties encountered in the procedure are attributable to (a) delays by HMG in clearing such requests, including routine administrative requests, despite the undertaking given by the Home Office Minister, James Brokenshire MP[3]; and (b) what we have identified as a general failure on the part of Government bodies to recognise an independent duty of openness (see our primary submission at **section C1**), which necessitates an increased number of formal communication requests on the part of SAs with a view to keeping open representatives adequately informed of basic steps that do not touch on any national security sensitivity. It is not apparent to us that adoption of this proposal will, of itself, address either of these concerns.

(d) Communication Requests – Content

16. This is a proposal that "there should be reasonable limits placed on the purpose and content of communication requests". No suggestion as to how these limits should be demarcated is apparent. Nonetheless, it is said that processing requests "to open up CLOSED material, such as CLOSED pleadings or CLOSED submissions" is "onerous", and so should be limited in some way. We consider that this proposal is

[1] HCCAC, 'The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates' 22 March 2005

[2] See e.g. paragraph 78 of the HCCAC report cited above.

[3] Letter of 31.10.2012, indicating that "*HMG will use its "best endeavours" to respond to procedural type requests from the Special Advocate to communicate with the open representatives within 24 hours".*

revealing. It illustrates our concern that HMG (and those acting for them) do not appear to recognise any independent duty to maximise disclosure of closed material – including closed pleadings and submissions. If such a duty were recognised, and HMG took the initiative in making open that which was capable of being open, then the SAs would not have the burden of formulating communication requests to achieve that, and HMG would not have the burden of processing them. As a matter of principle, we would deprecate any restriction on SAs' ability to seek the opening up of closed material that may properly be openly disclosed without risk to national security. Such a restriction would be unconscionable. We highlight again **section C1** of our primary submission to this Review.

Reviewer's questions

17. Sir Duncan Ouseley has raised a series of questions of SASO and GLD on the following dates: (i) 29 July 2021; (ii) 6 August 2021; (iii) 18 August 2021; and (iv) 23 August 2021.

18. With the substantial assistance of SASO, we responded to the first series of questions in a response dated 10 August 2021, but for ease of reference repeat that response in the consolidated table which is provided separately. As it appears to us, some of those questions may more usefully be addressed by those with experience as open representatives, and others for GLD. Again, the responses we have been able to provide below are heavily reliant on SASO, and their review of their files.

19. We remain willing and keen to assist the Reviewer in any further way that we can.

30 September 2021

Approved by the same 33 SAs that subscribed to the original submission of 8.6.21