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Constitutional Affairs
Committee

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

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Summary

The Special Immigration Appeals Commission (SIAC) was created under the *Special Immigration Appeals Commission Act 1997*, and its operation was amended by the *Anti-terrorism, Crime and Security Act 2001*. This legislation introduced the use of Special Advocates—security-cleared lawyers—for cases involving security-classified materials. Under the *Prevention of Terrorism Act 2005* the use of Special Advocate procedures will be transferred to the High Court for cases involving control orders. This report considers in detail the use of Special Advocates and the lessons learned from the experience of SIAC's operation for eight years. Other aspects of the 2005 Act were beyond the scope of this inquiry.

We have concluded that there are a number of defects with the Special Advocate system as it operated through the Special Immigration Appeals Commission, particularly in relation to support provided to Special Advocates and the disclosure of exculpatory material. During the course of our inquiry, the Department for Constitutional Affairs and the Attorney General gave us assurances that both these aspects would be addressed in response to the concerns which we highlighted. The Attorney General has now given an undertaking that some support for Special Advocates will be provided (although we believe he could go further), and the Lord Chancellor brought forward an amendment to the Schedule of the *Prevention of Terrorism Act 2005* in relation to the disclosure of exculpatory material.

We have also concluded that there are a number of improvements which could be made to improve the fairness of the Special Advocate system as implemented in the 2005 Act. Among these would be the establishment of an Office of the Special Advocates, to ensure that the Special Advocates get appropriate expert support and facilities. We further believe that additional steps should be taken to ensure that Special Advocates are better able to communicate with the appellant, with special arrangements for doing so after they have seen cleared material, and that appellants are offered, where practical, a choice of Special Advocate from a security-cleared pool.

1 Introduction

Background to the inquiry

1. The Constitutional Affairs Committee decided to undertake an inquiry into the workings of the Special Immigration Appeals Tribunal (SIAC) as part of its oversight function of the Department for Constitutional Affairs. This work had begun before the presentation of the *Prevention of Terrorism Bill* (now the *Prevention of Terrorism Act 2005*) to the House of Commons. The operation of the SIAC system for the past eight years offers a number of important lessons relevant to any future provision, notably the procedures surrounding the use of Special Advocates—security-cleared lawyers appointed to represent those appearing before the Commission in cases where closed material is involved.

2. The *Prevention of Terrorism Act 2005* will extend the use of Special Advocates into the operation of the High Court, representing a substantial expansion in their role.¹ The evidence which we took in the course of our inquiry informed debate in both Houses.² The *Prevention of Terrorism Act 2005* will be subject to review of various kinds. We hope that our conclusions and recommendations about the workings of SIAC will prove of assistance in considering what procedural safeguards are necessary under the new Control Order system on the basis of the problems arising and lessons learned from SIAC, and the use of Special Advocates before it. SIAC will continue to exercise jurisdiction in certain deportation and removal of citizenship cases.

Terms of reference

3. The inquiry's terms of reference were to:

- Examine the workings of the Special Immigration Appeals Commission;
- Consider how the operation of SIAC impacts upon the legal and human rights of appellants;
- Question whether it offers appropriate safeguards against inappropriate detention or deportation;
- Investigate whether procedures established to deal with immigration rights are adequate for decisions involving lengthy periods of custody.

Scope of the inquiry

4. During our inquiry we took oral evidence from one former and two current Special Advocates, a solicitor representing some of the detainees who have appeared before SIAC and representatives of JUSTICE, Liberty and Amnesty International. We then heard from

1 The Attorney General has confirmed in a letter to us that Special Advocates will not be used in proceedings relating to breaches of control orders, see footnote to Q 251

2 For example in reply to a question posed by the Chairman of this Committee in debate, the Home Secretary said: "I can confirm, as did my noble friend the Attorney-General, that we believe that there are aspects of the procedure that need to be improved, and that is the process that he set out yesterday in his evidence to the Committee." HC Deb, 9 March 2005, col 1576

the Lord Chancellor, Rt Hon Lord Falconer of Thoroton QC and, in his first appearance before the Constitutional Affairs Select Committee, the Attorney General, Rt Hon Lord Goldsmith QC. We received a number of written submissions, including two statements signed by the majority of the Special Advocates currently acting before SIAC. We are grateful to our special advisers, Mr Nicholas Blake QC, Mr Tom de la Mare and Mr Ben Emmerson QC for their assistance in our inquiry.

2 Background to SIAC and the Prevention of Terrorism Act 2005

5. The Special Immigration Appeals Commission (SIAC) was established by the *Special Immigration Appeals Commission Act 1997* following a number of immigration appeal cases (notably *Chahal* and *Loutchansky*) which called into question the compatibility of the existing Home Office ‘Three Wise Men’ panel system with the requirements of the European Convention on Human Rights and EC Directive 64/221.³ This system was used where the Home Secretary acted under immigration powers to deport aliens on security grounds involving classified material. The Act includes provisions for use of Special Advocates (security-cleared lawyers) in SIAC hearings, who are appointed to represent those appearing before the Commission (a superior court of record presided over by a High Court Judge assisted by two other members) in cases where closed (classified) material is involved.

6. In the aftermath of the terrorist attacks on the USA on 11 September 2001, the then Home Secretary, the Rt Hon David Blunkett MP, announced (in October 2001) plans to detain indefinitely those foreign nationals who were regarded as a threat to national security and no longer recognised as refugees, but who could not be returned to their own country because they might be at risk of torture, inhuman and degrading treatment, or death. He stated that:

it seems to us that when a third safe country cannot be found, holding such people—with proper rights of appeal and the opportunity for a return to their case—is preferable to sending them back to certain death when their guilt has not been ascertained.⁴

7. Mr Blunkett said that he did not envisage withdrawing from the European Convention on Human Rights, although he expected to use Article 15 of the Convention (national emergency threatening the life of the nation) to derogate from some aspects of Article 5 (the right to liberty) in respect of the provisions. This derogation followed under the *Human Rights Act 1998 (Designated Derogation) Order 2001* on 11 November 2001.

The Anti-terrorism Crime and Security Bill

8. The *Anti-terrorism, Crime and Security Bill* was published shortly after the Home Secretary’s statement, and given its first reading on 12 November 2001. Both the Home Affairs Committee and the Joint Committee on Human Rights (JCHR) published Reports on the Bill.

9. The Home Affairs Committee recommended that: “the Government should engage in a review with our European partners, with a view to finding some acceptable solution that might avoid the need to exercise a power of indefinite detention”.⁵ It made a number of

3 We discuss the background to the establishment to SIAC in detail below in Sections 3 and 4

4 HC Deb, 15 October 2001, cols 927–28

5 Home Affairs Committee, *The Anti-terrorism, Crime and Security Bill 2001*, First Report of Session 2001–02, HC 351, para 20

other recommendations, including that “the Government conduct a review of the law and procedure relating to the admissibility of intercept evidence in court, with a view to extending the circumstances in which such evidence could be admitted”, thereby making prosecutions possible. Other recommendations related to safeguards, including the need for a review of the legislation as it proceeded, and sunset provisions. The Committee “reluctantly” accepted the need for the proposed provisions in the context of the times.

10. The Joint Committee on Human Rights signalled concern about the proposed derogation, commenting that:

even if it is accepted that there is such an emergency, the lack of safeguards built into the Bill, particularly in relation to detention powers, causes us to doubt whether the measures in the Bill can be said to be strictly required by the exigencies of the situation.⁶

The Joint Committee on Human Rights drew attention to the dangers of incorporating these provisions within asylum and immigration law, indicating that there might be a risk of discrimination on grounds of nationality. It also expressed reservations about the lack of safeguards, notably that judicial review and habeas corpus were to be excluded in favour of hearings before SIAC, where applicants would be represented by Special Advocates who would not be able to disclose ‘closed’ material to them. On appeal SIAC considers whether or not there are reasonable grounds for the Home Secretary’s belief or suspicion. There is an ‘open’ element, involving material that Home Secretary is prepared to disclose; and a ‘closed’ element involving material that he is not prepared so to do.

The Anti-terrorism Crime and Security Act 2001

11. The *Anti-terrorism, Crime and Security Bill* received Royal Assent on 14 December 2001, as the *Anti-terrorism, Crime and Security Act 2001*. Part 4 of the Act is devoted to suspected international terrorists and operates within the context of immigration and asylum law. Section 21 allows for the certification by the Home Secretary of such persons, if he reasonably believes them to be a risk to national security because they have “been concerned in the commission, preparation or instigation of acts of international terrorism,” belong to international terrorist groups, or have “links” with such groups. Section 22 deals with deportation and removal; and Section 23 authorises detention in circumstances where removal or departure is prevented either by law, or by a practical consideration. Sections 21–23 are at the heart of the controversy which surrounded the Act.

12. Suspects could be released on bail, on appeal to SIAC against certification. SIAC was obliged to hold reviews of certificates after six months, with further reviews every three months. If there were “no reasonable grounds for belief or suspicion” under Section 21, SIAC had to cancel the certificate.

13. The Act also obliged the Home Secretary to appoint someone to review the operations of Sections 21–23 (Lord Carlisle of Berriew QC was subsequently appointed). Under Section

⁶ Joint Committee on Human Rights, *Anti-terrorism, Crime and Security Bill*, Second Report of Session 2001–02, HC 372, para 30

30 of the Act, SIAC has exclusive jurisdiction in derogation matters. The legal challenge against detention, which was the subject of a recent House of Lords judgment (16 December 2004), was brought under this section.⁷

14. In attempting to respond to criticisms of a lack of safeguards, the Act also provided for the appointment of a committee of at least seven Privy Counsellors to review the whole of the Act within two years—the Newton Committee. Its report, considered below, was published on 18 December 2003. The Act allowed the Privy Counsellors to specify that any provision of the Act should cease to have effect six months from the day on which the Committee's report was laid before Parliament, unless the Report had first been debated by each House.

Litigation and Review

15. The *Anti-terrorism, Crime and Security Act 2001*—with an emphasis on Part 4—has been reviewed repeatedly by:

- the Joint Committee on Human Rights, in a report published on 24 February 2003;
- The Newton Committee report (the Privy Counsellor Review Committee), published on 18 December 2003;
- Lord Carlile of Berriew, as the Government's review of anti-terrorism legislation, in a report published on 14 February 2004;
- the Joint Committee on Human Rights, in a report published on 23 February 2004;
- a Home Office Discussion Paper issued in February 2004;
- the Joint Committee on Human Rights, in a further report published on 21 July 2004; and,
- the Northern Ireland Human Rights Commission, in a report published in September 2004.

16. Litigation proceeded in tandem with the production of these reports: a SIAC judgment that the detention of non-British nationals was discriminatory was delivered on 30 July 2002, which led to a Court of Appeal decision on 25 October 2002, and eventually to the House of Lords judgment of 16 December 2004, referred to in paragraph 13 above.

17. The Newton Report and the most recent Report of the Joint Committee on Human Rights are the most substantial and detailed analyses. They are referred to at some length by Lord Bingham (one of the Law Lords who considered the above case) in his judgment, and clearly influenced the thinking of most of the Law Lords. Together with the Lords judgment they are the most significant documents in any consideration of the legislation so far.

⁷ *A and others v Secretary of State for the Home Department* [2004] UK HL 56. See also paras 16, 17, 27 and 66

The Newton Report & Part 4 of the Anti-terrorism Crime and Security Act 2001

18. The Committee of Privy Counsellors was chaired by Rt Hon Lord Newton of Braintree.⁸ In its December 2003 report, the Newton Committee stated that it was so concerned about the speed with which the Act had been passed and the lack of coherence between the Act and other legislation in related areas that it designated the whole Act for the purpose of section 123. The Committee stressed that this was to enable Parliament to review the report and the Act as a whole.

19. The Newton Committee found a number of problems presented by Part 4. In some ways the powers, it felt, were insufficient to meet the threat of international terrorism. On the other hand, it concluded that the risks of injustice inherent in the Act were unnecessary and indefensible. The Committee believed the situation had arisen because Part 4 had its origins in SIAC's functioning and,

is an adaptation of existing immigration and asylum legislation, rather than being designed expressly for the purpose of meeting the threat from international terrorism.⁹

20. The Newton Committee considered that Part 4 was ineffective because it failed to deal with threats from British nationals with similar terrorist links, or with anyone in the UK with links to other foreign terrorist causes, noting that “we have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals”. But it also criticised the absence of any charges, and of any opportunity for the appellants to refute evidence against them. The danger of miscarriages of justice was compounded by the low standard of proof (reasonable belief and suspicion) in SIAC hearings, and the fact that the vast majority of each case was ‘closed’. The Committee “regretted” that the UK had found it necessary to derogate from the European Convention on Human Rights, especially because other countries facing similar threats had not done so, and there was no evidence that they had disregarded their international obligations. Some of these countries had reached understandings with destination countries, enabling them to deport suspected terrorists.

21. The Committee was also sceptical about the policy of deportation: “seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism”. Furthermore, there was “understandable disquiet among some parts of the Muslim population”, and this was likely to erode public acceptance. Practical difficulties of the arrangements identified by the Newton Committee included the length of the process (two years before determination of appeals), and the necessity for fresh security-cleared Special Advocates for each appeal. It also found that alternatives had not been adequately pursued; and recommended that,

Part 4 powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency. New legislation should: (a) deal with all

8 The Deputy Chairman was Rt Hon Alan Beith MP, the Chairman of this Committee

9 Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review*, HC 100 (2003–04), para 186. Also called the ‘Newton Report’

terrorism, whatever its origin or the nationality of its suspected perpetrators; and (b) not require a derogation from the European Convention on Human Rights.¹⁰

22. The Joint Committee on Human Rights, in its report of July 2004, agreed with many of the points made by the Newton Committee and concurred with the central conclusion that Part 4 should be replaced with legislation dealing with all terrorism, and not requiring a derogation from the Convention. On the derogation, the Joint Committee on Human Rights concluded that:

long-term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights on which the effective protection of all rights depends. They undermine the State's commitment to human rights and the rule of law, and diminish the State's standing in the international community [...] alternative ways of dealing with the threat from international terrorism can be found which do not involve the UK open-endedly derogating from its human rights obligations.¹¹

23. Prosecution was the Newton Committee's preferred approach. It expressed the hope that a system could be devised which met the needs of making intelligence available for prosecution, while not compromising the collection and use of intercepted communications for intelligence purposes. The Newton Committee was also interested in adopting an investigative approach to the difficulties of making evidence known to the accused without damaging intelligence sources and techniques. It suggested that making,

a security-cleared judge responsible for assembling a fair, answerable case, based on a full range of both sensitive and non-sensitive material [...] could be well-suited for use in this limited context.¹²

Where prosecution was not possible the Committee proposed a range of other measures, including: surveillance; movement restrictions; and restrictions on internet and banking access.

24. In his response to the Newton Report, the Home Secretary indicated that he was not convinced that the current threat left the Government with any option but to continue to use the powers under Part 4 of the *Anti-terrorism, Crime and Security Act 2001*. He noted in particular, that the powers were limited to the terrorist threat posed by Al Qaeda and the network of terrorist groups associated with it, stating that:

The nature of that threat means that it is right to target those powers at foreign nationals. Because of that the specific powers we introduced are only used when an individual cannot be prosecuted and cannot be removed from the UK because of our international obligations...These were not powers I assumed lightly. I have never pretended that they are ideal, but I firmly believe that they are currently the best and most workable way to address the particular problems we face. I believe that I would be failing in my duty of public protection if the Part 4 powers were removed from the

10 *ibid*, paras 200–03

11 Joint Committee on Human Rights, *Review of Counter-terrorism Powers*, Eighteenth Report of Session 2003–04, HC 713, para 5

12 *op cit*, para 224

armoury of measures available to protect the United Kingdom from specific terrorist threats. Ten of the detainees have already had their cases reviewed by the independent Special Immigration Appeals Commission (SIAC) and in each case my judgement in certifying them has been upheld. Further, the lawfulness of derogation from part of Article 5 of the ECHR was upheld before the Act was implemented by the Court of Appeal, which ruled that the detention powers in the Act are a proportionate response to the public emergency threatening the United Kingdom.¹³

13 Home Office Press Notice STATO55-2003, *Response to the Report of The Anti-Terrorism, Crime And Security Act 2001 Review*, Rt Hon David Blunkett MP, 18 December 2003, available at www.homeoffice.gov.uk. See also para 48 and HC Deb, 30 October 1997, col 1071 [Mr Mike O'Brien MP]

3 The operation of SIAC

25. The Special Immigration Appeals Commission is a statutorily created Court of Record, presided over by a High Court Judge. Specialist expertise in immigration, intelligence and security issues is also provided by up to two other members. The Government explained its composition as follows:

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 [*Nationality, Immigration and Asylum Act 2002*]:

- one member must hold or have held high judicial office
- one must be, or have been, the Chief Adjudicator or a legally qualified member of the IAT [Immigration Appeal Tribunal];

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

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.¹⁴

26. SIAC's specialist function is to consider 'closed' (or classified) material when considering immigration appeals. Before the introduction of the *Prevention of Terrorism Act 2005* it could consider three possible outcomes: exclusion; detention; and removal of citizenship. Its roles have included deciding whether:

- a) non-nationals should be excluded or deported from the United Kingdom (SIAC's original function, the 'Exclusion Function');
- b) non-nationals, who would be liable to deportation but for the likelihood of torture, inhuman, or degrading treatment in the country to which they would be returned, should be detained without trial, on the basis that the Home Secretary has reasonable grounds to suspect they are international terrorists (SIAC's function, as subsequently conferred by Part IV of *Anti-terrorism, Crime and Security Act 2001*, the 'Detention Function'); or
- c) nationals should be deprived of their British citizenship (if the grounds for such conclusion raise security issues) (the 'Citizenship Function').

27. The House of Lords declared the detention function of SIAC to be in breach of the European Convention on Human Rights in the case of *A and others v Secretary of State for the Home Department* on 16 December 2004. The *Prevention of Terrorism Act 2005* has resulted as the Government's solution to this problem. SIAC will continue to exercise its exclusion and citizenship functions, which are unaffected by the House of Lords decision.

Its role in respect of the detention function has been replaced by a new system of control orders under the *Prevention of Terrorism Act 2005*, which will be available against non-nationals and nationals alike (and so raise no special immigration issues). Hearings will be presided over by a High Court judge, who may have no specialist immigration expertise.¹⁵

Outcomes of SIAC Proceedings

28. Over the past eight years, SIAC has not dealt with a large number of deportation appeals. According to the Department for Constitutional Affairs, SIAC has only dealt with 11 deportation appeal cases. No person has been deported as a result of decisions which have been appealed to SIAC, despite the fact that the Home Office claims to have been “successful” in three appeals against deportation. The Department for Constitutional Affairs explained that two of the appellants were not removed as SIAC found that such removal would breach their rights under Article 3 of the European Convention on Human Rights, whilst one of the appellants was not removed because “he was no longer regarded as a threat to national security at the conclusion of the appeal”.¹⁶ One person is currently detained under the provisions of the *Immigration Act 1971*, pending removal.

29. Only one appeal has been received in respect of a proposed deprivation of citizenship. That case has been stayed at the appellant’s request and the appellant is currently being held in custody pending trial on criminal charges.

30. Finally, the Government has identified 17 persons who were detained pursuant to powers contained in Part 4 of the *Anti-terrorism, Crime and Security Act 2001*. Of those it indicates that as of February 2005, two had “voluntarily departed” from the United Kingdom, two had certificates against them revoked, one was released on bail by SIAC in March 2004 and one had been granted bail in principle, subject to discussion of the conditions.¹⁷ During the passage of the *Prevention of Terrorism Bill 2005* through the Houses of Parliament, 10 of the remaining detainees were released from detention on bail, and then made subject to control orders under the new Act.

31. Given the small number of cases involving deportation and deprivation of citizenship, it would be technically possible for all cases to be removed from SIAC, and dealt with through the system transposed to the High Court to allow the use of ‘controlled material’. Such a move might help to reassure those who consider that the use of ‘special courts’ should be avoided and those who feel the system tainted by the detention of individuals at Belmarsh and elsewhere.

Criticism of SIAC’s Operation

32. There has been considerable criticism of the Commission’s procedures during its eight years of operation. The UK Office of the United Nations High Commissioner for Refugees

15 Under the *Prevention of Terrorism Act 2005* there are provisions for the High Court to appoint specialists to assist them. See Q 125

16 Ev 52

17 See www.homeoffice.gov.uk/docs3/atcsa_detainees.html

questioned whether “SIAC guarantees fair and effective procedure for determining status and protection needs”.¹⁸ It had particular concerns about,

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.¹⁹

33. The Law Society pointed to the fact that SIAC was created to review deportations, but also came to be used to review the certification of detainees under Part 4 of the *Anti-terrorism, Crime and Security Act 2001* which required a careful review of how well it was carrying out these functions.²⁰ JUSTICE supported this 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.

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.²¹

JUSTICE accepted that there were circumstances in which Special Advocates might have to be appointed, but argued that they should not be used in cases where an individual’s liberty was at stake.²² Ms Gareth Peirce criticised the whole basis of the SIAC system:

I am baffled as to why it was ever considered necessary [...] 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.²³

34. Amnesty International questioned the extent to which SIAC could even be called an independent tribunal:

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).²⁴

35. In oral evidence, Mr Livio Zilli of Amnesty added,

18 Ev 41

19 Ev 41–42

20 Ev 42

21 Ev 62, paras 5 and 7

22 Ev 64, para 20

23 Q 68

24 Ev 45, para 6

The [SIAC] 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...Special Advocates and SIAC clearly do not work and cannot uphold human rights and the rule of law.²⁵

36. Lord Carlile of Berriew QC, who was the independent reviewer of Sections 21–23 of the *Anti-terrorism, Crime and Security Act 2001*, told the Committee in written evidence that,

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 [Al Qaeda] activities and related events.²⁶

He approved of the fact that SIAC hearings were chaired by senior judges but questioned whether the other two members of the panel should not include someone who was “truly a lay person”, rather than people experienced in intelligence or diplomatic service.²⁷

37. The Lord Chancellor accepted there were concerns about the fairness of the operation of SIAC, but felt the right balance had been struck:

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.²⁸

38. Lord Carlile stated that SIAC had acted with “acceptable speed in all cases”, although there was some initial delay.²⁹ On the disclosure of information, Lord Carlile stated that he was in “no doubt that national security could be at risk if certain types of evidence were revealed to the detainees”.³⁰ This is at the heart of such procedures—the balance to be struck in adapting normal legal procedures for the use of secret material.

25 Q 89

26 Ev 38, para 10. See also *M v Secretary of State for Home Department* [2004] EWCA Civ 324, para 34, per Lord Woolf of Barnes CJ

27 Ev 38 para 13

28 Q 96

29 Ev 38, para 14

30 Ev 39, para 17

39. The Law Society argued that the Home Secretary’s assessments should require a standard of proof applicable in civil proceedings and that SIAC should “take a robust approach to disclosure of material”.³¹

40. Nine of the current 13 Special Advocates stated that the system was not one that they were approving of simply by participating in it:

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 advance the interests of the appellants by doing so. 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.³²

41. One former Special Advocate, Mr Ian MacDonald QC, stated that when SIAC was first introduced (in an immigration context) it was seen as a big improvement on what had gone before, because “it introduced an element of fairness which had previously been lacking”.³³ Once its powers were extended into Part 4 powers under the *Anti-terrorism, Crime and Security Act 2001* he felt his participation gave a “fig-leaf of respectability and legitimacy to a process which [he] found odious” and following the House of Lords judgment of December 2004 he resigned.³⁴ A current Special Advocate, Mr Neil Garnham QC, also saw the SIAC system as an improvement on what had preceded it but continued to serve as a Special Advocate despite the extension of the system:

I remain content to serve as a Special Advocate in relation to [Part 4] 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.³⁵

42. The Government argued that SIAC procedures were fully compliant with the European Convention on Human Rights:

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.

31 Ev 42

32 Ev 54–55, para 7

33 Q 1

34 Q 1

35 Q 4

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.³⁶

43. Many of the most pressing issues in SIAC procedures surround the use of Special Advocates, to which we now turn.

4 The Special Advocate system as operated under SIAC

44. A Special Advocate is a specially appointed lawyer (typically, a barrister) who is instructed to represent a person's interests in relation to material that is kept secret from that person (and his ordinary lawyers) but analysed by a court or equivalent body at an adversarial hearing held in private. The Special Advocate has the advantage that he can go behind the curtain of secrecy, but also considerable disadvantages which we discuss below.

45. The Attorney General set out the system that operated before the adoption of Special Advocate procedures to us as follows:

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.³⁷

The Chahal Case

46. The adoption of the concept of Special Advocates in the United Kingdom was suggested by and in response to the decision of the European Court of Human Rights in *Chahal v United Kingdom* in November 1996. In that case, the appellant, Karamjit Singh Chahal (an Indian national and Sikh separatist), who was resident in the United Kingdom was suspected by the Home Secretary of involvement in terrorist activities in support of the separatist cause. The Home Secretary wished to deport the appellant, who claimed that if he were to be returned to India he would be tortured by the authorities because of his non-violent support for Sikh separatism. One of the appellant's complaints was that although judicial review was available to challenge the Home Secretary's decision to deport, the effective determination of his risk to national security was made by an internal Home Office advisory panel (the 'Three Wise Men') on the basis of sensitive intelligence material which he had no opportunity to challenge for two reasons: first, the evidence presented regarding his risk to national security was precluded from disclosure by public interest immunity; and secondly, he was not entitled to any form of legal representation before the panel.

47. The European Court of Human Rights agreed with the appellant that the Home Office procedure breached his rights under article 5(4) of the European Convention on Human

Rights, since the judicial review proceedings could not effectively review the grounds for his detention, and because he was not represented before the internal Home Office panel. The court was influenced by the fact that similar closed proceedings in Canada involved the use of a security-cleared counsel appointed by the court, who cross-examined the witnesses and generally assisted the court to test the strength of the State's case.

The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved [...] there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence and yet accord the individual a substantial measure of procedural justice.³⁸

a [...] Judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of the security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examine the witnesses and generally assists the court to test the strength of the State's case.³⁹

48. In response to *Chahal*,⁴⁰ the UK Government passed the *Special Immigration Appeals Commission Act 1997*. The Act provided for an independent judicial tribunal which would hear appeals against immigration decisions of the Home Office and, at section 6, for a Special Advocate to represent an appellant in cases in which there was non-disclosable security evidence in relation to the immigration decisions of the Home Secretary. When Commons debate focused on the precise nature of the Special Advocate/Appellant relationship, the Home Office Minister used the analogy of a "litigation friend" and stressed that: "the Special Advocate is there to ensure that the rights of the appellant are protected. That is what he is there for".⁴¹ During this inquiry the Government told us that,

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.⁴²

49. In oral evidence to the Committee, the Attorney General claimed that the UK was operating the Special Advocate system with international approval:

38 *Chahal v United Kingdom* (1996) 23 EHRR, para 130–131

39 *Chahal v United Kingdom* (1996) 23 EHRR, para 141

40 The judgment of the European Court of Justice in the joined cases of *Shingra and Radiom*, which was revisited in a judicial review challenge in the case of *Loutchansky*, raised similar questions about the efficacy of the 'Three Wise Men' system in an EC law context, cases C/65/95 and C/111/95 *R v Secretary of State, ex parte Shingara and Radiom* [17 June 1997]

41 HC Deb, 30 October 1997, col 1071 [Mr Mike O'Brien MP]

42 Ev 52

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.⁴³

In fact, the European Court of Human Rights has not given a ringing endorsement to the use of Special Advocates at all, but has indicated that their use is a lesser evil than some other systems, but still potentially an impermissible one. In the case of *Al Nashif v Bulgaria*, the court was non-committal on the use of Special Advocates, commenting that:

Without expressing in the present context an opinion on the conformity of the above system [i.e. the use of Special Advocates] with the Convention, the Court notes that, as in the case of *Chahal* cited above, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.⁴⁴ [Emphasis added]

Other contexts in which Special Advocates are used

50. The growth in the use of Special Advocates has not been confined to SIAC. There are three other categories of case in which the use of Special Advocates has been adopted.⁴⁵

- a) Where the use of a Special Advocate has a statutory footing, typically in specialist tribunals and courts which are given permission to use Special Advocates because of security concerns that arise. Those are:
- Under sections 90 to 92 of the *Northern Ireland Act*, which provide for the appointment of a Special Advocate in respect of appeals to a specialist security tribunal operating in the field of employment and discrimination law;
 - Under Section 5 of the *Terrorism Act 2000*, which establishes the Proscribed Organisations Appeals Commission ('POAC') for determining appeals against proscription of an organisation by the Home Secretary;
 - Under Section 70 of *Anti-terrorism, Crime and Security Act 2001* which establishes the Pathogens Access Appeal Commission, which hears appeals of people proscribed from working with certain dangerous materials;
 - Under Rules 7A and 7B of the Employment Tribunal Rules of Procedure (Scotland) which provide for the appointment of a Special Advocate in proceedings before the Employment Tribunal from which the applicant or his representative have been excluded on national security grounds; and,
 - A Special Advocate may represent the interests of a prisoner before the Northern Ireland Sentences Review Commission, and the Northern Ireland Life Sentences Review Commission where the prisoner and his legal representative are excluded from the proceedings.

43 Q 251

44 [2002] ECHR 497, 20 June 2002

45 See also Qq 230–232

In all of these contexts Special Advocates have both a disclosure and substantive function (we discuss these functions in paras 58–61 below).

- b) The use of Special Advocates in civil proceedings without statutory underpinning has been approved, for instance to deal with security issues on appeal from SIAC, or to deal with proposed judicial reviews of security service decisions.
- c) More controversially, the Court of Appeal sanctioned the use of Special Advocates in a quasi-criminal context, namely Parole Board hearings, in the case of *Roberts v Parole Board*.⁴⁶ The Home Secretary wished to rely upon secret sensitive evidence (which went to Mr Roberts' suitability for parole) in a non-authorised Parole Board hearing. The Home Secretary disclosed this evidence to the Board on condition that it was not disclosed to Mr Roberts; in response the Parole Board sought to appoint a Special Advocate in respect of that secret evidence. The High Court approved this appointment and the Court of Appeal upheld the ruling, on the basis that it was analogous to the use of Special Advocates in authorised tribunals.

51. Special Advocates can also be used by the courts in deciding claims for public interest immunity in respect of unused prosecution material in criminal trials. In this context the Special Advocate is used solely to assist the judge in determining what material should be disclosed. In the absence of the accused, no part of the incriminatory evidence relied upon by the state is deployed.⁴⁷

Restrictions on Special Advocates

52. The most important disadvantages faced by Special Advocates are that:

- i. once they have had sight of the closed material they cannot take instructions (subject to narrow exceptions) from the persons they are representing or their ordinary legal representatives;
- ii. they lack the resources of an ordinary legal team for the purpose of conducting a full defence in secret (for instance, for inquiries or research); and,
- iii. they have no power to call witnesses.

53. Under the SIAC legislation the Special Advocate is prohibited from disclosing closed information to the appellant and Section 6(4) of the 1997 Act provides that the person appointed to represent the appellant's interests "shall not be responsible to the person whose interests he is appointed to represent". This section is amplified in Part 7 of the Special Immigration Appeals Commission (Procedure) Rules 2003. In particular, SIAC Rule 35 provides that:

The functions of a special advocate are to represent the interests of the appellant by:

- (a) making submissions to the Commission at any hearings from which the appellant and his representatives are excluded;

⁴⁶ See [2004] EWCA Civ 1031, 28 July 2004. This case will be heard on appeal to the House of Lords on 20 April 2005. See also Eric Metcalfe, 'Special Advocates and Secret Evidence', *The Barrister*, 31 August 2004

⁴⁷ *R v H and C* [2004] 2 WLR 335

- (b) cross-examining witnesses at any such hearings; and
- (c) making written submissions to the Commission.

54. The wording of subsection 6(4) is important since the requirement that the Special Advocate represent the interests of—but not be responsible for—an appellant, significantly modify the ordinary lawyer/client relationship.

55. Although the use of Special Advocates is being extended in the UK, we believe that it is one which should only be operated under the most exceptional circumstances which call for material to be kept closed.

Stages in the Special Advocates role in SIAC Hearings

56. Informally, a number of Special Advocates explained to us the process of acting in SIAC hearings. The Special Advocate receives instructions not from the appellant, but from a lawyer from the Treasury Solicitor's Department who is not security-cleared. The Special Advocate also receives open materials including the relevant certificate (e.g. that someone's presence is not conducive to the public good), any open statements (which are likely to be redacted versions of fuller closed statements) and any open documents. The Special Advocate then consults with the appellant (and/or his lawyers) on whatever matters each of them considers to be relevant to the appeal. Because the Special Advocate has not seen the classified material, he is able to discuss the facts, any defences, justifications or other factual material that the appellant may wish to draw his attention. Whether an appellant seeks to use this opportunity for discussion is matter for him and his legal advisers. In practice, we have been told that many appellants consider such a meeting is pointless as the Special Advocate has not seen and will not be able to discuss the incriminatory material relied upon as part of the closed case.

57. The Special Advocate then takes delivery of the closed material. Once he has examined it, the Advocate is prohibited from communicating with the appellant without the Commission's consent, although it remains open for him to continue to receive (unsolicited) information from the appellant. Thereafter, at any closed session, neither the appellant nor his lawyers are permitted to be present and the Special Advocate takes over entirely as his representative.

58. Once in closed session the Special Advocate has two functions: a disclosure function and a representation function. The disclosure function is to test to the full the cogency of the case put forward by the Home Secretary for non-disclosure of material. The Special Advocate examines closed passages in statements and closed documents to ascertain whether, for example, no possible or no real harm could arise from disclosure, or the material in question is already in the public domain (e.g. as a result of a Governmental press release, disclosure in a foreign case, material leaked to the press etc). This stage can be extremely time-consuming, as it tends to operate by means of an iterative process using a series of exchanges between the Special Advocate and Home Secretary (usually in the form of a schedule of objections with reasons, responded to in Schedule form), culminating in points of dispute that are brought before SIAC for its adjudication. The representation function is to represent the Appellant's interests in relation to that part of the hearing held

in camera, which entails making the best case possible from all the available evidence—both open and closed—but without informed instructions from the appellant.

59. The disclosure function resembles the approach devised by the Courts to deal with Public Interest Immunity claims. However, there are some important differences. In civil or criminal proceedings disputes about disclosure are concerned with what materials should be available to a party to litigate the case. If material is not disclosed it forms no part of that case, and does not lead to a secret trial.⁴⁸ There is also no balancing test. Once the Home Secretary has decided on the classification of material because of the ‘real harm’ that would stem from its disclosure, there is no further consideration by him as to whether or not it should be disclosed due to ‘fair trial’ considerations. This is compounded by the fact that SIAC has no power to consider whether the public interest in disclosure outweighs the public interest in secrecy.⁴⁹ **To this extent, the SIAC system represents a considerable weakening of the judicial protection available under the common law Public Interest Immunity rules.**

60. Furthermore, the ‘disclosure function’ is not discharged in a classic civil disclosure fashion (i.e. a context in which the Home Secretary would have an obligation to disclose all materials undermining, as well as assisting, his case). It is instead discharged by the presentation of edited materials. If, after a SIAC Rule 39 hearing,⁵⁰ disclosure is ordered by SIAC against the Home Secretary in relation to part of the closed case, the Home Secretary can reserve the right to withdraw reliance on the material. He can do this because the material in question supports his case (and so it is only weakened by its removal).

61. This reveals the potential unfairness of the practice. It is compensated for in part by the fact that the Home Secretary has a duty to adopt a ‘cards on the table’ approach and disclose potentially exculpatory material.⁵¹ However, the Special Advocate is not given the opportunity to consider all the material held by the Home Secretary to decide whether it is potentially exculpatory. A ‘Generic Judgment’ by SIAC noted that this fell short of systematic disclosure (particularly of a criminal kind) and places considerable responsibility on one party alone.⁵² We questioned the Lord Chancellor and the Attorney General on this point (see paras 87–96 below).

The contrast with the classic lawyer/client relationship

62. There are some significant distinctions between the work of an ordinary lawyer and that of a Special Advocate. The ordinary lawyer is responsible to his client. His paramount duties are to his client and to the court (which he must not knowingly mislead). By contrast, the Special Advocate is not ‘responsible’ to the appellant. The Special Advocate is precluded from communicating highly pertinent information, namely the closed case, to the appellant and as a result, the scope of the Special Advocate to receive meaningful

48 See Court of Appeal in *Lamothe v Metropolitan Police* [25 October 1999] unreported, cited with approval in the case of *R v H and C* above

49 This position has changed with the introduction of the *Prevention of Terrorism Act 2005*, in relation to control order cases. See Section 5 below

50 Rule 39 is in SIAC Procedure Rules 2003, r 39. It relates to the provision of evidence provided by witnesses and is distinct from the civil procedure rules (CPR 31a)

51 See section on disclosure below

52 *Ajouaou and A, B, C and D (2003)*, SIAC Judgment of 29 October 2003 (hereafter the Generic Judgment)

instructions is limited. Thus, the ability of the appellant, or his solicitor, to make informed decisions as how best to proceed is constrained. A decision taken by the appellant (e.g. to withdraw from proceedings) may make sense on the open case, but not in the light of a closed case.⁵³ In addition, an ordinary lawyer works as part of a team (solicitors, barristers, experts, administrative support) and in conjunction with other parties with like interests. The Special Advocate works alone (or as part of senior/junior barrister team) with no support vis-à-vis the closed case. The Special Advocate cannot bring in experts, have the team approach witnesses, hunt for documents or liaise with others.

63. Lord Bingham has summarised the consequences of such arrangements in case of *R v H and C*:

Such an appointment [of a Special Advocate] does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to co-operate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown.

There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a Special Advocate or special counsel to represent, as an advocate in [Public Interest Immunity] matters, a defendant in an ordinary criminal trial, as distinct from proceedings of the kind just considered. But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial ...[T]he need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. In the Republic of Ireland, whose legal system is, in many respects, not unlike that of England and Wales, a principled but pragmatic approach has been adopted to questions of disclosure and it does not appear that provision has

53 This is discussed below section 5

been made for the appointment of special counsel: see *Director of Public Prosecutions v Special Criminal Court* [1999] 1 IR 60.⁵⁴

The Anti-terrorism Crime & Security Act 2001 and Special Advocates

64. Part IV of *Anti-terrorism, Crime and Security Act 2001* complicated the question. Before the 2001 Act, SIAC was concerned with immigration issues (i.e. the right to be in the UK, susceptibility to deportation, EC free movement rights etc) and the abrogation of ordinary immigration rules on national security grounds. This could be regarded as 'civil' in character. Proceedings brought before SIAC under the 2001 Act could be seen as a move towards a de facto criminal trial. Very similar legal arguments are likely to be deployed against the new control orders under the *Prevention of Terrorism Act 2005*.

65. Whether or not *Anti-terrorism, Crime and Security Act 2001* proceedings are criminal or civil in nature:

- i. had a bearing on whether or not the conducting of secret hearings, and thus the use of Special Advocates for a representative function, could ever be justified; and
- ii. if the use of secret hearings and Special Advocates is permissible in principle, impacted upon what counterbalancing procedural safeguards should be built into the Special Advocate system in order to ensure that a fair trial is provided.

66. The majority in the House of Lords judgment of December 2004 found the detention provisions of *Anti-terrorism, Crime and Security Act 2001* to be both disproportionate and discriminatory, even though the Home Secretary's assessment that there was a public emergency threatening the life of the nation (the condition precedent for a derogation under Article 15 of the European Convention on Human Rights) was upheld. The House of Lords focused exclusively upon the issue of whether or not detention without trial was justified; little or no attention was focused upon the particular means by which an individual's case was assessed by SIAC on appeal, or upon the mechanics and procedures used by SIAC to conduct secret hearings. In particular, the House of Lords declined to rule (either way) upon the arguments advanced by the appellants based upon the criminal aspects of Article 6 European Convention on Human Rights relating to fair trial provisions.

54 [2004] UKHL3, [2004] WLR 335

5 Transporting SIAC and the Special Advocate System into the High Court

67. Parliament has accepted the use of Special Advocates and the *Prevention of Terrorism Act 2005* inherits much of the SIAC system including their use. We have therefore taken this as our starting point, but the issue remains controversial. Ms Gareth Peirce, a solicitor acting for a number of the detainees who have appeared before SIAC, told the Committee that the system was:

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 [...] 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.⁵⁵

68. In addition to the issue of principle, a number of serious reservations about the practice were raised with us in evidence, including a submission from nine of the current 13 Special Advocates. Concerns raised included the question of the appointment of Special Advocates, the qualification and areas of practice of Special Advocates (who have expertise concentrated in the fields of public and immigration law, rather than criminal law), the absence of training and co-ordination and the fact that the pool of Special Advocates may become exhausted—each SIAC appeal can require a fresh security-cleared Special Advocate who has not been exposed to the closed material. Lord Carlile, who was the independent reviewer of the *Anti-terrorism, Crime and Security Act 2001*, noted that,

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.⁵⁶

The Appointment of Special Advocates

69. The appointment of Special Advocates by the Law Officers of the Government (the Attorney General and Solicitor General) has also raised comment. Not only does the subject of the hearing have no choice as to who will represent him, but the Attorney General also acts for the Government which is bringing the case against the appellant. The Attorney General told us in evidence that he had not specifically appeared in the individual (as opposed to generic) appeals.

55 Q 43

56 Ev 39, para 18

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.⁵⁷

70. The appellants can object to the named individual Special Advocate if they can cite good reason why they should not act on their behalf. In oral evidence one former and two current Special Advocates told us that in practice it did not matter to them who appointed them, but what did matter was the inability of appellants to choose their own advocate from a pool or list.⁵⁸ As nine Special Advocates put it in their joint written submission to us:

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.⁵⁹

71. To date only 16 lawyers have been appointed Special Advocates in SIAC cases and 13 are currently active. With the proposed extension of their use into anti-terrorism control orders, concerns have been expressed about the size, composition, and selection of the pool of available Special Advocates. The Department for Constitutional Affairs set out the selection process for Special Advocates as follows:

- The Attorney General maintains three civil panels of junior counsel to the Crown 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.⁶⁰

We learned that in fact not all of the lawyers appointed Special Advocates have actually been members of the civil panels of junior counsel to the Crown, as stated in the Department for Constitutional Affairs submission, with a number of leading members of the Bar considered “to have good ‘claimant’ experience and expertise”, also appointed.⁶¹

57 Q 222

58 Qq 44–49

59 Ev 57, para 21

60 Ev 49, para 19

61 Ev 81, para 7

72. The Attorney General described how the process originally evolved:

the system grew [...] 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-conductive 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 [...] it was the Solicitor General who approved the recommendations.⁶²

73. The nine current Special Advocates who jointly submitted evidence to us stated that the pool could and should be widened:

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.⁶³

Even under the current SIAC system the pool of advocates appears to have become close to being exhausted quite quickly according a number of our witnesses.⁶⁴ Mr Ian MacDonald QC explained in oral evidence that he had been appointed to represent an additional appellant in a linked case following sight of closed material in other cases and as a result of this was precluded from having any contact with that appellant—a undesirable consequence of what appears to Mr MacDonald to have been to an insufficient number of Special Advocates.⁶⁵

74. The Lord Chancellor accepted this particular criticism,

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

62 Q 222

63 Ev 57, para 22

64 Q 51

65 Q 51

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.⁶⁶

He gave an undertaking that improvements in the system would be in place within “a couple of months”.⁶⁷ **We recommend that an appropriately sized pool of Special Advocates, from which appellants can pick their representation, should be established as soon as is practical and expect the government to keep to its proposed timetable.**

Problems with the use of Special Advocates

75. Other problem areas with the Special Advocate system that were highlighted to us included the fact that Special Advocates currently lack support, since they do not benefit from a security-cleared solicitor, and are not able to call on expert evidence. Mr Neil Garnham QC and Mr Martin Chamberlain (both Special Advocates) explained that they were substantially hindered when trying to conduct factual (as opposed to legal) research.

76. As Mr Garnham put it,

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.⁶⁸

77. Mr Garnham also spelled out the extreme restrictions placed on the advocates, who were not even allowed to conduct internet searches on persons named in the controlled material, in order to find out about their background. Because there is no support network for the advocate, it is also impossible to delegate such tasks to security-cleared individuals who could have experience of that type of work. Lord Carlile supported the idea of providing greater assistance to the Special Advocates by appointing a security-cleared case assistant from the security service to assist each of them.⁶⁹ He also favoured training for Special Advocates under the supervision of the Judicial Studies Board.

78. In response, the Department for Constitutional Affairs provided us with a note on the day that the Lord Chancellor appeared before us, indicating that it was moving to improve the system. It set out what the Department later described as “principles” that will be subject to further work and covered the choice and pool of Special Advocates, as well as some support for Special Advocates. The Lord Chancellor accepted many of the criticisms that were raised with us concerning the procedures surrounding aspects of the Special Advocate system:

66 Q 101

67 Q 111

68 Q 4

69 Ev 39, para 21

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 [...] 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.⁷⁰

I think the Special Advocates need training; I think the instructing solicitor needs training [...] 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 [...] 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.⁷¹

79. When we took evidence from the Attorney General shortly after, he was specifically asked why these concerns had not been addressed before, since they had been in the public domain for some time. He replied that:

I have to say that I was not aware until I saw the memorandum of evidence that they [the Special Advocates] 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.

80. A number of the Special Advocates concerns were being publicly aired at conferences and in legal journals and more informally for some time in advance of this inquiry.⁷² As a result we are perplexed that the detail of the concerns has only just been recognised by the Attorney General. As a consequence of the evidence that has emerged during our inquiry the Attorney General also decided to meet some Special Advocates (nine out of the current

70 Q 98

71 Q 99

72 See Tom de la Mare and Ben Emmerson QC 'Closed evidence and fair proceedings: the use of Special Advocates in civil and criminal law', 15 October 2004, paper presented at conference, 6th Annual Conference on Human Rights Law, London. See also Eric Metcalfe, 'Special Advocates and Secret Evidence', *The Barrister*, 31 August 2004 and "'Representative but not responsible": the use of Special Advocates in English law', *JUSTICE*, vol 1, No 2 (2004) pp 11–34

13) for the first time—the day before he was due to give evidence to this Committee.⁷³ The Attorney General described the meeting as “an open discussion”.⁷⁴

81. We urge the Attorney General and the Lord Chancellor to act swiftly in improving the system in consultation with the Special Advocates themselves and other lawyers experienced in SIAC cases.

82. The promised improvements are welcome and will no doubt aid the Special Advocates in the execution of their work. Nonetheless, there are also issues of principle which remain controversial. These include the standard of proof to be used to impose orders, the disclosure of exculpatory evidence to appellants and the constraints on judges when considering the proportionality of orders imposed upon appellants.

Contact between appellant and Special Advocates

83. Lord Carlile felt that the Special Advocates “should have a closer relationship with those whose interest they represent” and if under appropriate regulation could “see no significant harm in developing the system”.⁷⁵ The Lord Chancellor was not so sure on this point:

[Special Advocates] 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.⁷⁶

Critically, under SIAC once the closed material had been shown to the Special Advocate they could no longer have contact with the person they were representing—a situation which will be transferred into hearings under the new control orders regime under the *Prevention of Terrorism Act 2005*:

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.⁷⁷

84. The Permanent Secretary at the Department for Constitutional Affairs, Mr Alex Allan, told the Committee that in fact contact was permitted and suggested that had occurred on a number of occasions:

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

73 Q 197

74 Q 217

75 Ev 39, para 23

76 Q 115

77 Q 123 [Lord Falconer]

SIAC and subject to any representations made by the Home Office, and that has been done on a number of occasions.⁷⁸

This was not the interpretation of the nine Special Advocates in their joint written evidence to the Committee, who pointed out the limited nature of any ‘contact’ in practice:

There is in fact no contact between the Special Advocates and the appellant’s chosen representatives in relation to the closed case [...] 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...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 (i.e. matters unrelated to the particular factual sensitivities of a case).⁷⁹

85. This matters, because in many cases only the appellant may be aware of information that may prove his innocence, but is unable to provide it because he is not able to have sight or knowledge of any allegations based solely on closed material. The Special Advocate may also wish to discuss some element of legal strategy with the appellant’s representatives.

86. We recommend that the Government reconsider its position on the question of contact between appellant and Special Advocate following the disclosure of closed material. It should not be impossible to construct appropriate safeguards to ensure national security in such circumstances and this would go a long way to improve the fairness of the Special Advocate system.

Disclosure

87. The Special Advocates also raised with us issues concerned with disclosure, the standard of proof used in SIAC cases and the approach to unproven allegations. Mr Martin Chamberlain summarised it thus,

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 [...] asked the question [...] 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 [...] 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

78 Q 105

79 Ev 55 para 9

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.⁸⁰

The third matter is deference. At the moment SIAC defers to a very great degree [...] 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.⁸¹

These concerns were echoed by the Law Society.⁸² The Lord Chancellor stated categorically that the rules prescribe that the State must not withhold any exculpatory evidence.⁸³

88. We understand that during some of the first round of individual appeals under the *Anti-terrorism, Crime and Security Act 2001*, the Home Secretary accepted the practice of reviewing material with a view to identifying exculpatory material. It is unclear whether there was any statutory ‘duty’ to do so; and, if so, where any such duty was stated. We were unable to identify any provision in the previous legislation, or the SIAC Procedure Rules, indicating such a duty.

89. Under the previous system, there was apparently no over-riding ‘interests of justice test’ available to SIAC in regulating these proceedings. Even if such a duty had been implied, it is difficult to see how it could have been 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.

90. 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 was no power to enforce such a ruling if the Home Secretary objected to it under Rule 38(7) of the SIAC 2003 Rules.

91. The previous rules appeared to mean that where the Home Secretary lost a public interest ruling at SIAC, he could continue to proceed with the certification and detention, relying on other inculpatory material. We understand that he was under no compulsion to withdraw the certificate when he was not willing to accept disclosure, which prevented SIAC from having any sanction under the Rules.

92. The Attorney General appeared to be unaware of these questions in oral evidence and did not address them in a written follow-up, although he did say:

80 Q 60

81 *ibid*

82 Ev 42

83 Q 151

[...] 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.⁸⁴

This did not deal with the problem that the Home Secretary's counsel would not necessarily approach the evidence in the same way as a defence lawyer would, seeking to identify any linkages that could prove exculpatory. Furthermore, those doing the detailed assessments of closed material would often be intelligence officers who are not trained to assess evidence with exculpation in mind but rather as part of an intelligence assessment process—very different to the construction of a legal defence. In its Generic Judgment of October 2003, SIAC highlighted some of the problems associated with the existing system of relying on Security Service 'assessments':

[...] because the Security Service deal in suspicion, belief, and risk evaluation, rather than proof as a court would normally expect, lines of inquiry had not always been pursued in a way which might confirm or compound those suspicions. At times, both [witnesses] were a little quick to attribute a conclusion or inference to "assessment", which might have implied that there was more information or analysis than we had seen, but in fact was no more than a simple judgment or inference.⁸⁵

93. The suggestion by Lord Carlile, noted above in para 77, that Special Advocates be provided with seconded and specially trained intelligence officers, is one which could offer additional safeguards as it would equip the Special Advocates with support that is currently only available to Home Secretary. The Special Advocates themselves have indicated that they need to have access to a range of independent experts, including those with specific regional or country expertise, scientific and technical experts and translators.⁸⁶

94. In oral evidence on 1 March 2005 (during Parliamentary consideration of the *Prevention of Terrorism Bill*), we raised concerns about disclosure, specifically the Home Secretary's duty to disclose closed potentially exculpatory material to the Special Advocate [see para 87]. The Lord Chancellor wrote to us on 16 March, explaining that, as a result of the Committee's intervention, a substantial amendment to the disclosure rules was included in the Schedule of the *Prevention of Terrorism Act 2005*. He explained that:

84 Ev 79

85 SIAC Generic Judgment 29 October 2003, para 280

86 Ev 57, para 18

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.⁸⁷

95. He went on to explain that he had already made the first rules in relation to England and Wales, the relevant rules on disclosure being set out in the Civil Procedure Rules, Part 76, (rules 76.27 to 76.29).

96. **We regard these changes to the rules of disclosure made in response to the Committee's concerns as a significant improvement from the previous situation, assuming that the courts give wide meaning to the term "matters under consideration" (Schedule to the *Prevention of Terrorism Act 2005* Para 4(3)(a)).**

97. **The Government could also usefully consider whether intelligence service personnel could be provided in support of Special Advocates in the handling of closed material, and whether Special Advocates could be enabled to appoint and call evidence from appropriately cleared experts.**

Withdrawal

98. Another issue that was raised was the question of withdrawal and whether Special Advocates should continue to represent people even if they have decided not to participate in the process. JUSTICE stated that it was against any system in which someone other than the defendant could decide what was and what was not in their best interests.

...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.⁸⁸

87 Ev 83

88 Ev 68, para 38

An active Special Advocate, Mr Neil Garnham QC, disagreed,

My view is [Special Advocates] 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 [...] 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.⁸⁹

This, of course, once again reveals the extent to which the Special Advocate is not a 'normal' representative of the accused. The limitations of the system are inherent in its construct.

Delays and the appeal mechanism

99. It is also notable that significant delays arose in the SIAC process, which sometimes ran to over two years. Given the experience of such delays, the value of the seven day review of non-derogating control orders made under section 3(1)(b) of the *Prevention of Terrorism Act 2005* may be limited. The Lord Chancellor admitted to us that it would prove difficult for Special Advocates to be of much assistance in those circumstances, stating that:

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 [...] 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.⁹⁰

[The Special Advocates] 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.⁹¹

100. The Lord Chancellor essentially accepted that the seven day hearing could only amount to a preliminary hearing of the case⁹² and it would therefore not be a substantial procedural safeguard for most appellants. Thus, while the court's consideration of an order made under section 3(1)(b) might commence no more than seven days after the day in which the control order was made, a period of time would then be required to instruct the Special Advocate, for the Special Advocate to obtain disclosure of the closed material,

89 Q 31

90 Q 127

91 Q 130

92 Q 129

conduct research and test the evidence. On the experience of the SIAC procedure, this could take some time.

101. One alternative to the Special Advocates System that has been proposed is an investigative magistrate system.⁹³ The Lord Chancellor stated:

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.⁹⁴

It can be argued, of course, that the entire Special Advocate procedure is not the way courts usually operate in this country. The Lord Chancellor also rejected the system operated in Irish Republic as one that “would not offer a viable alternative to the scheme of control orders [because it] applies the same rules of evidence that apply in the ordinary criminal courts [and therefore] would not solve the issues that the *Prevention of Terrorism Act 2005* is designed to meet”.⁹⁵

102. We raised concerns with the Lord Chancellor that the use of judicial review as an appeal mechanism did not offer sufficient procedural safeguards, since it is rare in such proceedings for oral evidence to be presented. This is despite the fact that the appeals would tend to focus on evidential matters which would require cross examination of witnesses. The Lord Chancellor provided some guarantees that this would not be a problem, stating that:

[...] 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.⁹⁶

This assurance was of some benefit, given the undemanding test required by the judicial review procedure, whereby the Home Secretary merely had to demonstrate that he has reasonable grounds for his relevant belief or suspicion. SIAC has commented that “it is not a demanding standard for the Secretary of State to meet”.⁹⁷

103. The nine Special Advocates who sent us a joint submission also highlighted the limitation of the judicial review procedure, indicating that:

When the matter [appeal] 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 or a

93 This was one of the recommendations of the Newton Committee

94 Q 112

95 Ev 82

96 Q 159

97 SIAC Generic Judgment, 29 October 2003, para 71

derogating [now non-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...)⁹⁸

104. Legally, it is possible that the courts could follow the approach laid down in the case of *R v Secretary of State for the Home Department, ex parte Daly*⁹⁹ and consider whether in cases engaging rights under the European Convention on Human Rights, the interference was really proportionate to the legitimate aim being pursued. A statutory amendment to the appeal standard would offer a better mechanism to ensure greater fairness. It is also unclear whether these provisions in the *Prevention of Terrorism Act 2005* will withstand any challenges brought pursuant to the European Convention on Human Rights.

105. **We are concerned that under the *Prevention of Terrorism Act 2005*, the appeal mechanism used under the *Anti-terrorism, Crime and Security Act 2001*, has been transposed into potential challenges to control orders. Under the new provisions, Parliament has accepted that the Home Secretary need only demonstrate a ‘reasonable suspicion’ that someone is engaged in prescribed activity. The judicial review then only considers whether the Home Secretary’s decision was reasonable and does not adequately test whether there was sufficient evidence to justify that suspicion. This test is one step further removed from whether there was objectively a ‘reasonable suspicion’. The Home Secretary merely has to show to a judge that he had ‘reasonable grounds to suspect’ not that such a belief was reasonable to any objective standard. We believe that this system could be made fairer through a variation of the current test, whereby the Home Secretary would have to prove that the material objectively justified his ‘reasonable suspicion’.**

Office of Special Advocates

106. The likelihood of the increased use of Special Advocates and many of the points of process and practicality raised above suggest to us that the system of Special Advocates should be formalised and regulated. JUSTICE and other witnesses have suggested that an independent ‘Office of Special Advocates’, be formed that would responsibility for the appointment of Special Advocates.¹⁰⁰ JUSTICE also noted that as currently formulated, the use of Special Advocates who are not accountable to the people whose interests they are supposed to serve means that there is no check on negligence on the part of the Special Advocates. This is something according to JUSTICE that an Office of Special Advocates could monitor.¹⁰¹

107. It would also provide opportunities for training of future Special Advocates, as well as a focus for litigation support that was not based in the Treasury Solicitor’s Department. **We have already referred to the need to gather and produce expert evidence, but the needs of Special Advocates go wider than this into general litigation support.** As Mr Neil

98 Ev 59

99 [2001] UKHL 26

100 Ev 65, para 24

101 Ev 67, para 34

Garnham QC, who, as we noted above, referred to the Special Advocates as being akin to “one man and his dog”,¹⁰² indicated,

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.¹⁰³

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.¹⁰⁴

108. The Government has proposed to establish a team of three government lawyers to form a ‘Special Advocate Support Office’ (SASO) to be located within the Treasury Solicitor’s Department.¹⁰⁵ We do not feel this goes far enough and believe that the Government should establish a more substantial facility to support adequately what appears likely to be increasing numbers of Special Advocates. We agree with those Special Advocates who said that they needed a security-cleared team which is able to conduct research (legal and otherwise) and also that they would benefit from the provision of persons with appropriate expertise to assess the controlled material. The proposed SASO will not, as we understand it, be concerned with the appointment of Special Advocates. The Attorney General told us that he is shortly to advertise openly for a new cohort of Special Advocates.

109. The Lord Chancellor, in consultation with the Attorney General, should establish an ‘Office of Special Advocates’.

102 Q 4

103 Q 39

104 Q 40

105 Ev 78

6 Conclusion

110. The Special Advocate process was introduced as a response to the European Convention on Human Rights *Chahal* judgment and other criticisms of the ‘Three Wise Men’ procedures. It introduced a measure of due process into a system of immigration decisions leading to deportation which had previously not been appropriately adjudicated upon. This process was severely tested when it was used for the detention of individuals under Part 4 of the *Anti-terrorism, Crime and Security Act 2001*. It has been subject to a large number of legitimate criticisms, both from the Special Advocates themselves and human rights bodies. Parliament has now decided to import the Special Advocate system into the High Court through the *Prevention of Terrorism Act 2005*. This system appears to be the only one on offer, although alternatives may eventually be considered. In this context we have considered how the system could be improved to make it as fair as possible.

111. **We welcome the proposed improvements suggested to us by both the Lord Chancellor and the Attorney General, notably to introduce open competition for the appointment of a pool of Special Advocates—who are to be provided with some logistical and professional support and training. All these measures appear to have been prompted largely by this inquiry. We believe that further measures are needed.**

112. **We recommend, in particular, that the Government ensures that:**

- i. **It moves from a judicial review on non-derogating control orders to an objective appeal considering whether or not there is a ‘reasonable suspicion’ that an appellant is involved in terrorist related activities;**
- ii. **Steps are taken to make it easier for Special Advocates to communicate with appellants and their legal advisers after they have seen closed material, on a basis which does not compromise national security. This is for two reasons: first, to ensure that the Special Advocate is in a position to establish whether the charges or evidence can be challenged by evidence not available to the appellant; and second, so that the Special Advocate is able to form a coherent legal strategy with the appellant’s legal team; and**
- iii. **Sufficient professional support is provided to the Special Advocates. We doubt that the proposals put forward by the Attorney General will be sufficient to meet the concerns expressed to us by the Special Advocates. The support provided should include security-cleared staff to assist in research and assessment of controlled material. These arrangements should be formalised into an ‘Office of the Special Advocate’ to allow appropriate staffing and resources to be dedicated to ensuring suspects obtain a fairer hearing.**

113. These improvements, whilst bringing a greater degree of fairness into the Special Advocate system, do not address all the criticisms directed at aspects of the *Prevention of Terrorism Act 2005*, some of which were beyond the scope of this inquiry. Parliament will have the opportunity to return to these questions.

7 Chronology of Key events

November 1996	<i>Chahal v UK</i> is heard by the European Court of Human Rights
December 1997	The Special Immigration Appeals Commission was established pursuant to the <i>Special Immigration Appeals Commission Act 1997</i> , which was brought forward in response to the cases of Chahal (and Loutchansky). The Act includes provisions for use of Special Advocates in SIAC hearings
November 1998	<i>Human Rights Act 1998</i> is given Royal Assent, effectively incorporating into English law the European Convention on Human Rights
December 2000	<i>Terrorism Act 2000</i> is given Royal Assent
September 2001	Passenger jets are hijacked and flown into the World Trade Centre in New York and the Pentagon in Washington DC
October 2001	The Patriot Act is passed by the US Senate providing broad definitions of terrorism, and increased powers to deal with terrorists in the USA
December 2001	<i>Anti-terrorism, Crime and Security Act 2001</i> is given Royal Assent. A 'technical state of emergency' is declared in the UK allowing the Act to derogate from the European Convention on Human Rights and the International Convention of Civil and Political Rights
January 2003	Lord Carlile of Berriew QC reported on the operation of the <i>Anti-terrorism, Crime and Security Act 2001</i>
December 2003	The Privy Counsellor Review Committee under Lord Newton delivers its report on <i>Anti-terrorism, Crime and Security Act 2001</i> . The committee "strongly recommends that the Part IV powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency"
February 2004	House of Commons debates the findings of the Newton Report and the Carlile Report and votes to keep the <i>Anti-terrorism, Crime and Security Act 2001</i> intact. The legislation goes to the House of Lords
March 2004	Court of Appeal upholds the SIAC ruling in the case of 'M', granting bail. The House of Lords votes to keep <i>Anti-terrorism, Crime and Security Act 2001</i> intact
April 2004	SIAC grants bail to detainee 'G'
July 2004	High Court turns down the appeals against SIAC ruling for 10 of the remaining 12 detainees

December 2004	The case of <i>A v Secretary of State for the Home Department</i> [2004] is heard by the House of Lords which rules that <i>Anti-terrorism, Crime and Security Act 2001</i> s23, and the derogation from Article 5 European Convention on Human Rights which underpins it, is discriminatory, disproportionate and therefore is incompatible with the Human Rights Act
January 2005	Home Secretary announces his intention to release the detainees from prison, and to replace current scheme with a provision for the 'house arrest' of all suspects, both national and non-national. He also details plans to introduce new legislation to cover British terrorist suspects
February 2005	One of the detainees, a man known as 'C', who had been detained for three years' was released from Woodhill prison, without any conditions, whilst the Government agreed to release a second a second detainee, Abu Rideh, subject to conditions
March 2005	Parliament passes the Prevention of Terrorism Act 2005

Conclusions and recommendations

Operation of SIAC

1. Given the small number of cases involving deportation and deprivation of citizenship, it would be technically possible for all cases to be removed from SIAC, and dealt with through the system transposed to the High Court to allow the use of 'controlled material'. Such a move might help to reassure those who consider that the use of 'special courts' should be avoided and those who feel the system tainted by the detention of individuals at Belmarsh and elsewhere. (Paragraph 31)

Special Advocate system as operated under SIAC

2. Although the use of Special Advocates is being extended in the UK, we believe that it is one which should only be operated under the most exceptional circumstances which call for material to be kept closed. (Paragraph 55)
3. The disclosure process under the SIAC system represents a considerable weakening of the judicial protection available under the common law Public Interest Immunity rules. (Paragraph 59)

Transporting SIAC and the Special Advocate system to the High Court

4. We recommend that an appropriately sized pool of Special Advocates, from which appellants can pick their representation, should be established as soon as is practical and expect the government to keep to its proposed timetable. (Paragraph 74)
5. We urge the Attorney General and the Lord Chancellor to act swiftly in improving the Special Advocate system in consultation with the Special Advocates themselves and other lawyers experienced in SIAC cases. (Paragraph 81)
6. We recommend that the Government reconsider its position on the question of contact between appellant and Special Advocate following the disclosure of closed material. It should not be impossible to construct appropriate safeguards to ensure national security in such circumstances and this would go a long way to improve the fairness of the Special Advocate system. (Paragraph 86)
7. We regard these changes to the rules of disclosure made in response to the Committee's concerns as a significant improvement from the previous situation, assuming that the courts give wide meaning to the term "matters under consideration" (Schedule to the Prevention of Terrorism Act 2005 Para 4(3)(a)). (Paragraph 96)
8. The Government could also usefully consider whether intelligence service personnel could be provided in support of Special Advocates in the handling of closed material, and whether Special Advocates could be enabled to appoint and call evidence from appropriately cleared experts. (Paragraph 97)

9. We are concerned that under the *Prevention of Terrorism Act 2005*, the appeal mechanism used under the *Anti-terrorism, Crime and Security Act 2001*, has been transposed into potential challenges to control orders. Under the new provisions, Parliament has accepted that the Home Secretary need only demonstrate a 'reasonable suspicion' that someone is engaged in prescribed activity. The judicial review then only considers whether the Home Secretary's decision was reasonable and does not adequately test whether there was sufficient evidence to justify that suspicion. This test is one step further removed from whether there was objectively a 'reasonable suspicion'. The Home Secretary merely has to show to a judge that he had 'reasonable grounds to suspect' not that such a belief was reasonable to any objective standard. We believe that this system could be made fairer through a variation of the current test, whereby the Home Secretary would have to prove that the material objectively justified his 'reasonable suspicion'. (Paragraph 105)
10. We have already referred to the need to gather and produce expert evidence, but the needs of Special Advocates go wider than this into general litigation support. (Paragraph 107)
11. The Government has proposed to establish a team of three government lawyers to form a 'Special Advocate Support Office' (SASO) to be located within the Treasury Solicitor's Department. We do not feel this goes far enough and believe that the Government should establish a more substantial facility to support adequately what appears likely to be increasing numbers of Special Advocates. We agree with those Special Advocates who said that they needed a security-cleared team which is able to conduct research (legal and otherwise) and also that they would benefit from the provision of persons with appropriate expertise to assess the controlled material. (Paragraph 108)
12. The Lord Chancellor, in consultation with the Attorney General, should establish an 'Office of Special Advocates'. (Paragraph 109)

Conclusion

13. We welcome the proposed improvements suggested to us by both the Lord Chancellor and the Attorney General, notably to introduce open competition for the appointment of a pool of Special Advocates—who are to be provided with some logistical and professional support and training. All these measures appear to have been prompted largely by this inquiry. We believe that further measures are needed. (Paragraph 111)
14. We recommend, in particular, that the Government ensures that:
 - i. It moves from a judicial review on non-derogating control orders to an objective appeal considering whether or not there is a 'reasonable suspicion' that an appellant is involved in terrorist related activities;
 - ii. Steps are taken to make it easier for Special Advocates to communicate with appellants and their legal advisers after they have seen closed material, on a basis which does not compromise national security. This is for two reasons: first, to ensure that the Special Advocate is in a position to establish whether the charges or

evidence can be challenged by evidence not available to the appellant; and second, so that the Special Advocate is able to form a coherent legal strategy with the appellant's legal team; and

- iii. Sufficient professional support is provided to the Special Advocates. We doubt that the proposals put forward by the Attorney General will be sufficient to meet the concerns expressed to us by the Special Advocates. The support provided should include security-cleared staff to assist in research and assessment of controlled material. These arrangements should be formalised into an 'Office of the Special Advocate' to allow appropriate staffing and resources to be dedicated to ensuring suspects obtain a fairer hearing. (Paragraph 112)

Formal minutes

Tuesday 22 March 2005

Members present:

Mr A J Beith, in the Chair

Ross Cranston
Mrs Ann Cryer
Mr Clive Soley

Keith Vaz
Dr Alan Whitehead

The Committee deliberated.

Draft Report [The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 113 read and agreed to.

Summary read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report be the Seventh Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned to a day and time to be fixed by the Chairman]

Witnesses

(See Volume II)

Tuesday 22 February 2005

Neil Garnham QC, Special Advocate
Martin Chamberlain, Special Advocate
Gareth Peirce, Civil Rights Solicitor
Ian MacDonald QC

Ev 1

Dr Eric Metcalfe, JUSTICE
Gareth Crossman, Liberty
Livio Zilli, Amnesty International

Ev 12

Tuesday 1 March 2005

Rt Hon Lord Falconer of Thoroton QC, Secretary of State for Constitutional
Affairs and Lord Chancellor
Alex Allan, Permanent Secretary, Department for Constitutional Affairs

Ev 18

Tuesday 8 March 2005

Rt Hon Lord Goldsmith QC, Attorney General

Ev 30

List of written evidence

(See Volume II)

Lord Carlile of Berriew QC	Ev 38
Anver Jeevanjee	Ev 40
UK Office of the United Nations High Commissioner for Refugees (UNHCR)	Ev 41
The Law Society	Ev 42
Amnesty International	Ev 44
Department for Constitutional Affairs	Ev 47
A number of Special Advocates	Ev 53
JUSTICE	Ev 61
Sir Brian Barder KCMG	Ev 71
Liberty	Ev 74
Rt Hon Lord Goldsmith QC	Ev 77
Rt Hon Lord Falconer of Thoroton QC	Ev 82

Reports from the Constitutional Affairs Committee

Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
First Report	Judicial appointments and a Supreme Court (court of final appeal) <i>Government response</i>	HC 48 <i>Cm 6150</i>
Second Special Report	Government Response to the Fourth Report on Immigration and Asylum: the Government’s proposed changes to publicly funded immigration and asylum work	HC 299
Second Report	Asylum and Immigration Appeals <i>Government response</i>	HC 211 <i>Cm 6236</i>
Third Report	Work of the Committee 2003	HC 410
Fourth Report	Civil Legal Aid: adequacy of provision <i>Government response</i>	HC 391 <i>Cm 6367</i>
Third Special Report	Further Government Response to the Second Report on Asylum and Immigration Appeals	HC 868
Fifth Report	Draft Criminal Defence Service Bill <i>Government response</i>	HC 746 <i>Cm 6410</i>

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [<i>Lords</i>]: the Government’s proposals <i>Government response</i>	HC 275 <i>Cm 6488</i>
Fourth Report	Family Justice: the operation of the family courts <i>Government response</i>	HC 116 <i>Cm 6507</i>
Fifth Report	Legal aid: asylum appeals	HC 276
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing, Planning, Local Government and the Regions Committee)	HC 243