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# Foreword by the Attorney General

The first edition of this manual was published in November 2006, since which time there have been considerable changes in the law and procedures governing when CLOSED material procedures may be adopted, not least the introduction of the Justice and Security Act 2013, which in certain circumstances allows material to be withheld from disclosure in civil proceedings. Special Advocates have played and, I am certain, will continue to play an important role both in individual cases when they are appointed and more generally in the development of this area of the law.

For a variety of reasons, for instance on grounds of national security, it is sometimes necessary to depart from the fundamental principle of open justice and permit sensitive material to be relied on in legal proceedings but not to be disclosed to all of the parties to those proceedings. Special Advocates, supported by the Special Advocates’ Support Office, play a unique and vital role in ensuring that this can be achieved in a manner which maintains the fairness of proceedings to those excluded from seeing such material.

I hope you will find the contents of this manual useful in terms of giving an insight into the important role of Special Advocates and the Special Advocates’ Support Office, and also how the law and procedures have developed and are currently applied in proceedings involving sensitive information.

**The Rt Hon Victoria Prentis QC MP**

Attorney General for England and Wales

Advocate General for Northern Ireland

# PART I – Introduction

1. This manual is intended as a guide to the Special Advocate system, and that of CLOSED material proceedings. It aims to set out some of the legal framework within which this system operates and also to deal with some of the practical considerations which underpin the system. It does not purport to cover every area, to examine case law in depth, or to answer all of the many questions that may arise in this context.
2. The Special Advocate system has existed since 1997 and is constantly evolving. This means that it often gives rise to novel issues.
3. This manual is intended to provide guidance on civil proceedings involving a Special Advocate. It does not deal with the appointment of Special Counsel in criminal cases[[1]](#footnote-1).
4. The content of this manual is the responsibility of the Special Advocates’ Support Office (“SASO”) which acts independently of Government. Accordingly, the content of this manual should not be taken as representing the view of Government on any particular issue.
5. SASO is always willing to provide further information and assistance when it is appropriate to do so, and any comments or feedback on the content of this manual will be gratefully received.

## Glossary

The Special Advocate system has developed its own terminology. Some of the more frequently used terms are set out below:

|  |  |
| --- | --- |
| Appointment | The process whereby the Attorney General appoints a Special Advocate to act in a case. |
| CLOSED judgment | A judicial determination which refers to CLOSED material and is only available to certain parties. |
| CLOSED material | Classified or otherwise sensitive material which the Information Owner wishes to rely on in proceedings but objects to disclosing to an excluded party.[[2]](#footnote-2) |
| CLOSED Material Proceedings (“CMPs”) | Proceedings where material is relied on by one party but withheld from the excluded party, and in which a Special Advocate is appointed. |
| Communication Request | The process whereby a Special Advocate in CLOSED can make a request to communicate information to an Excluded Party and their OPEN Representative. |
| Confidential judgment | A judgment which is confidential to only certain parties to proceedings and is not made public. |
| Excluded Party | The individual or body (whether claimant, appellant, applicant, plaintiff, defendant or respondent in a claim) who is not permitted to see CLOSED material. |
| In CAMERA | Proceedings which are permitted to take place in private, with any related judgment usually being confidential to the parties in attendance. |
| In CLOSED | A Special Advocate is said to be “in CLOSED” when they have been provided with the CLOSED material in a case. |
| In OPEN | A Special Advocate is said to be “in OPEN” when they have been appointed in a case, but have not viewed any of the CLOSED material. |
| Information Owner | The party who has possession and/or control of CLOSED (or other sensitive) material. |
| JSA 2013 | The Justice and Security Act 2013 |
| Nomination | The process whereby OPEN Representatives express a preference for the Special Advocate(s) that they would like to act in their case. |
| OPEN judgment | A judicial determination which does not refer to CLOSED or otherwise protected material and is available to the OPEN parties and publically. |
| OPEN material | Material which is in the public domain and which can be disclosed publicly without giving rise to any risk to national security or the public interest. |
| OPEN Representatives | The solicitors acting for the excluded party. |
| PII | Public Interest Immunity |
| SASO | The Special Advocates’ Support Office. |
| SASO CLOSED | Members of SASO who hold higher level security clearance. |
| SASO OPEN | Members of SASO who do not hold higher level security clearance. |
| The 1997 Act | Special Immigration Appeals Act 1997 |
| SIAC | Special Immigration Appeals Commission |
| Security Checking | The process undertaken by an Information Owner in relation to an OPEN judgment or Communication Request to ensure national security is protected. |
| Special Advocate | An independent barrister with higher level security clearance, appointed to the panel of Special Advocates. |
| SSFCA | The Secretary of State for Foreign & Commonwealth Affairs. |
| SSHD | The Secretary of State for the Home Department. |
| SVAP | The Security Vetting Appeals Panel |
| Tainted | Where a Special Advocate has seen CLOSED material in one matter which is considered to be relevant to another matter. |
| Tainting check | Where, prior to nominating a Special Advocate to the Attorney General, SASO asks the Information Owner to confirm whether the Special Advocate is considered by them to be tainted. |
| TPIM | Measures and/or restrictions imposed on a person under the Terrorism Prevention and Investigation Measures Act 2011. |

*A note on drafting: (1) No gender preference is intended by the use of words anywhere in this manual; (2) The term “court” is used to refer to SIAC, courts (including appellate courts), Tribunals and all other forums in which CLOSED proceedings take place.*

# PART II – A Brief History and Overview

## The creation of the role of Special Advocate

1. The role of Special Advocate did not exist in England and Wales prior to 1997. It was first introduced in an immigration context in cases where individuals were threatened with deportation on grounds of national security. The role has since been expanded to cover a wide range of cases as set out at Part VI of this manual.
2. At that time the SSHD’s decision to deport an individual on national security grounds was reviewed by a panel of three Home Office advisors. The panel would make recommendations as to whether the decision should stand, although the panel’s recommendation was purely advisory. As now, classified material was not shown to the Appellant or their legal advisors.
3. Mr Chahal was an Indian national with indefinite leave to remain in the UK. The SSHD issued a notice of intention to deport him in 1990, on the grounds that his presence in the UK was not conducive to national security. His asylum appeal failed and the Home Office Advisory Panel, after considering the sensitive material, recommended to the SSHD that he be deported.
4. Mr Chahal then took his case to the European Court of Human Rights (“ECtHR”). One of his arguments was that the system operated by the UK denied him the opportunity to have the lawfulness of his detention decided by a national court, in breach of Article 5(4) of the European Convention on Human Rights (“ECHR”).[[3]](#footnote-3)
5. The court held (paras 124-133[[4]](#footnote-4)) that the existing arrangements in the UK breached Article 5(4) ECHR in national security cases where the subject was held in detention pending deportation. This was because the domestic courts were not in a position to review whether the decisions to detain the subjects, and keep them in detention, were justified on national security grounds.
6. Whilst the ECtHR found that the advisory panel provided “*some degree of control*”[[5]](#footnote-5), it could not be considered a court within the meaning of Article 5(4) because:

* Subjects were not entitled to legal representation before the panel;
* Subjects were only given an outline of the grounds for the notice of intention to deport;
* The panel had no power of decision and its advice to the SSHD was not binding; and
* The advice of the panel was not disclosed.

1. The ECtHR accepted that the use of confidential material might be unavoidable where national security was at stake. It cited with approval, however, a system believed to be employed in Canada[[6]](#footnote-6) under which security-cleared lawyers were appointed to test the strength of the state’s CLOSED case:

“[131]… there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantive measure of procedural justice.”

1. The ECtHR did not specifically recommend that the UK adopt the Canadian system, but the above was a relatively strong indication that the court was of the view that the current system was inadequate and changes needed to be made.

## Post-1997: the Special Immigration Appeals Commission

1. In response to *Chahal*, Parliament passed the Special Immigration Appeals Act 1997 Act (“the 1997 Act”). It replaced the Home Office Advisory Panel system with a new body, the Special Immigration Appeals Commission (“SIAC”). SIAC’s role is to consider asylum and immigration related appeals in cases where the grounds for the decision were based on national security, international relations or other considerations held to be in the public interest.
2. SIAC is a Superior Court of Record, chaired by a High Court Judge with many of the powers of the High Court in addition to its appellate function in respect of specified immigration decisions. An appeal from any final determination of SIAC is to the Court of Appeal (or, as applicable, to the Court of Session or the Court of Appeal in Northern Ireland) on a point of law.
3. SIAC has its own system of governing rules and procedures. The SIAC (Procedure) Rules 2003 set out some key features of the Special Advocate system, most of which are replicated in other areas where Closed Material Proceedings are found. The SIAC (Procedure) Rules 2013 (“the SIAC Procedure Rules”) are available [online](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/421503/Consolidated_text_of_SIAC_Rules_2003.pdf). Part VII of this manual considers proceedings before SIAC, which has also issued its own Practice Note, available [online](https://www.judiciary.uk/publications/practice-note-for-proceedings-before-siac/). The content of the SIAC Practice Note is recognised in other courts in which CLOSED proceedings take place.

## Post-1997: the use of Special Advocates outside of SIAC

1. SIAC pioneered the law and practice in relation to CLOSED proceedings, and its experience has subsequently been applied elsewhere. Following their introduction in 1997, the use of Special Advocates has increased in connection with the enactment of further legislation. The Prevention of Terrorism Act 2005, Terrorism Prevention and Investigation Measures Act 2011 (“the TPIM Act”) and the Justice and Security Act 2013 (“JSA 2013”) (with corresponding Civil Procedure Rules) all extended the ability of the courts to hear CLOSED proceedings.
2. Part VI of this manual covers proceedings conducted under the JSA 2013 and Part VIII considers other areas of law and jurisdictions.

# Part III – Special Advocates and CLOSED material

## Recruitment of Special Advocates

1. The Attorney General maintains a panel of Special Advocates in England and Wales, and a panel in Northern Ireland, who are appointed following fair and open competition. The competitions are designed to select counsel or solicitor advocates with a broad range of experience and at differing levels of seniority.
2. Recruitment competitions are held as the need arises and are advertised in the legal press. Please do not hesitate to contact the Attorney General's Office (see details at paragraph 213) for more information.
3. In order to practise as a Special Advocate a successful candidate must undergo and obtain Developed Vetting (the highest level of HM Government security clearance) prior to their appointment.
4. A Special Advocate is typically appointed for an initial ten-year period, with the possibility of renewal, upon application to the Attorney General.

## Selection and nomination of a Special Advocate

1. An Information Owner intending to rely on CLOSED material in litigation has to give notice to the Law Officers[[7]](#footnote-7). This will be:
   1. the Attorney General, in proceedings before courts in England and Wales;
   2. the Advocate General for Scotland, in relation to Scottish proceedings; and
   3. the Advocate General for Northern Ireland, in respect of proceedings in Northern Ireland.
2. The Law Officers exercise their discretion in relation to such appointments in the public interest. The relevant Law Officer will always take into account the preferences of the OPEN Representatives prior to appointing a Special Advocate but there is no absolute right on the part of the excluded party to a Special Advocate of their choice.
3. Factors that the Law Officers may take into account include the nature and complexity of the proceedings, the level of expertise required and the level of counsel instructed by the opposing side. In cases in Northern Ireland the Law Officers will expect to appoint Special Advocates from the Northern Irish panel.
4. It is important to note that, although appointed by one of the Law Officers, a Special Advocate is not *instructed* by them and acts entirely independently. It was recognised in *R v H & C* [2004] UKHL 3[[8]](#footnote-8) that when appointing a Special Advocate (albeit in the context of criminal proceedings) the Attorney General was acting:

“…*not as a Minister of the Crown…but as an independent, unpartisan guardian of the public interest in the administration of justice...It is in that capacity alone that he approves the list of counsel judged suitable to act as Special Advocates… Counsel roundly acknowledged the complete integrity shown by successive holders of the office in exercising this role...*” [46]

1. SASO OPEN support the Law Officers, by consulting the OPEN Representatives, liaising with potential Special Advocates and providing the OPEN representatives’ nominations for formal appointment. No instructions will pass from the Law Officers to a Special Advocate and they are not privy to the work of any Special Advocate.
2. SASO may consult the Law Officers from time to time on general matters of principle relevant to the effective operation of the Special Advocate system. The role of the Law Officers in relation to the appointment of a Special Advocate, as set out in *R v H & C,* was cited with approval by the Court of Appeal in *Home Office v Tariq* [2010] EWCA Civ 462 at [27][[9]](#footnote-9).

## OPEN and CLOSED Material

1. Fundamental to the effectiveness of the Special Advocate system is the distinction between OPEN and CLOSED material. These are not HM Government security classifications, but they are a useful means of distinguishing the two fundamental aspects to CLOSED Material Proceedings.
2. OPEN material is that which is in the public domain, or which could be disclosed publicly without giving rise to any risk to the public interest. OPEN material is subject to the same disclosure requirements as in any other civil litigation.
3. CLOSED material is classified or otherwise sensitive material which the Information Owner wishes to rely on in proceedings but objects to disclosing to an excluded party on the basis of national security or for some other public interest reason.
4. Whilst CLOSED material normally attracts a HM Government classification of “SECRET” or higher[[10]](#footnote-10), such a classification is not a pre-requisite, for example, CLOSED material in family cases may be withheld from one party for reasons of personal safety or confidentiality.
5. There is a third category of material, sometimes found in CLOSED Proceedings, known as “In CAMERA”. This has occurred when the Appellant was the subject of prior criminal proceedings, in which the OPEN Representatives were given sight of the CLOSED material. In “In CAMERA” proceedings, the OPEN Representatives are required to give solicitors’ undertakings of non-disclosure but are otherwise permitted to take part in the proceedings.

## Confidentiality rings and W (Algeria) Orders

1. It is not always the case that CLOSED material (or sensitive or confidential material) cannot be shared with the excluded party and/or the OPEN Representatives, or that the State alone seeks to rely on such material. On occasions, it may be possible for such material to be shared with the excluded party and/or OPEN Representatives. The court considered the use of confidentiality rings in *R (Mohammed) v Secretary of State for Defence* [2012] EWHC 3454 (Admin)[[11]](#footnote-11), *AHK & Ors v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin).
2. Alternately the excluded party may seek to rely on what has sometimes been referred to as “reverse CLOSED material”, to withhold information from the government and the public. This unusual situation was considered in *W (Algeria)(FC) and BB (Algeria)(FC) v SSHD* [2012] UKSC 8[[12]](#footnote-12), and *J1 v Secretary of State for the Home Department* (SC/98/2010) [[13]](#footnote-13).

## The Special Advocates’ Support Office (“SASO”)

1. The Government Legal Department (“GLD”) acts for most government departments, including the Attorney General, in litigation matters. SASO is located within the GLD offices, but acts independently in supporting the Special Advocates.
2. SASO was established in May 2005[[14]](#footnote-14) in response to the recommendations of the Constitutional Affairs Select Committee in its report on the operation of SIAC and the use of Special Advocates.[[15]](#footnote-15) The Committee correctly predicted that the use of Special Advocates would increase and that a need therefore existed for the system to be formalised and regulated.
3. SASO lawyers are divided into OPEN and CLOSED teams. The SASO OPEN team liaises with the Attorney General’s Office and OPEN Representatives regarding the selection and nomination of a Special Advocate. It also supports the Special Advocate(s) whilst they remain in OPEN, for example, preparing OPEN papers and attending OPEN conferences and hearings.
4. SASO CLOSED lawyers have security clearance. They have access to the CLOSED material and are therefore able to consider and discuss that with a Special Advocate in CLOSED, and also to attend CLOSED hearings.
5. As a general rule, to avoid inadvertent disclosure of CLOSED information, only SASO OPEN lawyers will communicate with the excluded party or the OPEN Representatives. This prohibition does not apply to the lawyers who represent the Information Owners, who are permitted to communicate with an excluded party and/or their OPEN Representatives notwithstanding that they too will have viewed CLOSED material.
6. Lawyers representing the government are also located within the Government Legal Department, and an information barrier and other measures exist to ensure that SASO is independent. The Supreme Court scrutinised SASO’s role in some detail in *Home Office v Tariq* [2011] UKSC 35[[16]](#footnote-16), at paragraphs 48-54. The decision endorsed the arrangements put in place to ensure a separation between SASO and other government legal teams.

### SASO’s Role

1. The Special Advocate takes the substantive case related and tactical decisions in a case (see 43 below). Once appointed, a Special Advocate may request whatever assistance they require from SASO, much as they would from an instructing solicitor. The support services provided by SASO include the following:
   1. providing an initial briefing, collating the OPEN papers and legal materials;
   2. corresponding with the excluded party, the OPEN Representatives and the Information Owners’ representatives about case management directions, conferences, evidence, and preparation for hearings;
   3. attending hearings and corresponding with courts in relation to directions and other procedural matters;
   4. corresponding with Information Owners and courts regarding communication requests;
   5. preparing CLOSED materials, and filing and serving on various parties;
   6. arranging and hosting meetings for Special Advocates to discuss matters relevant to their work, including developments in the law; and
   7. assisting the wider legal and academic community with matters relating to CLOSED material proceedings (including court working groups, academics, research, and discussions) and lawyers from overseas jurisdictions.

## The role of a Special Advocate

1. The role of a Special Advocate is different to that of ordinary counsel. By virtue of section 9(1) of the JSA 2013, a Special Advocate is appointed to represent the *interests* of the excluded party, but pursuant to section 9(4) is not *accountable* to them. As the status of Special Advocate is conferred by appointment, a Special Advocate does not “take instructions” in the traditional sense, either from the Attorney General, SASO or the excluded party. The Special Advocate thus has the discretion to take any decisions that they consider to be in the excluded party’s best interests.
2. In *Kamoka & Ors v Security Service & Ors* [2016] EWHC 769 (QB) Irwin J (as he was then), at paragraph 32, identified that a Special Advocate was “…*confined by statute; that although Special Advocates act in the interests of the party concerned, he or she is not “responsible to the person whose interests he is appointed to represent*”…”.
3. Thus, the Special Advocate did not represent the appellant or have a lawyer/client relationship in the usual sense and so no concomitant professional obligations arose. Furthermore, the court recognised that once a Special Advocate had seen CLOSED material they could not communicate with the party whose interests they represented, save with the consent of the Information Owner or the court.
4. Given those limitations of the role, the court found that there could be no question of the Special Advocates having been proxies of the appellant in their conduct of the CLOSED proceedings, or for that matter of being agents for the appellants.
5. A Special Advocate generally performs their task in three distinct ways:
   1. Attempting to open up parts of the CLOSED material by:
      1. Firstly, establishing what material should properly be provided to the Special Advocate, and reviewing that CLOSED material.
      2. Secondly, by negotiating with the Information Owner and/or making submissions to the court as to which elements of the material should properly be disclosed to the excluded party and therefore form part of the OPEN case.
      3. As an alternative to disclosure, the Special Advocate can request or agree that the excluded party be provided with a summary or “gist” of the CLOSED material in accordance with the relevant legal test (see Part V – Disclosure).
   2. Representing the excluded party’s interests in the CLOSED proceedings (e.g. by challenging the CLOSED case and testing the CLOSED evidence).
   3. Potentially saying nothing at all or declining to take part in proceedings. This may appear surprising and suggest a failure to perform their role, but circumstances have arisen where this has been considered to be in the excluded party’s interest.[[17]](#footnote-17)

## Tainting

1. Tainting is a consideration that is unique to CLOSED proceedings. Tainting (or being “Tainted”) describes the risk that a Special Advocate with knowledge of certain CLOSED information derived from reading into one case might inadvertently disclose it to the excluded party or the OPEN Representatives in another case.
2. To prevent this from occurring, when the excluded party or his OPEN representative request a particular Special Advocate, SASO will ask the Information Owner to perform a ‘tainting check’ before the appointment is sought from the Law Officers.
3. Where an Information Owner asserts that a Special Advocate is tainted, they will inform SASO and provide reasons. SASO will then check the basis for the assertion to ensure that no administrative error has occurred.
4. Where SASO and/or the Special Advocate do not accept the Information Owner’s assertion, SASO will request a review. To the extent that it is possible to do so, an indication of the reasons that a Special Advocate is considered to be tainted will be shared with the Special Advocate, the excluded party and the OPEN Representatives.
5. If an internal review does not resolve the question of tainting, disputed cases can ultimately be escalated to the Attorney General’s Office. The Attorney General will then make a final determination on the tainting issue and notify the interested parties accordingly. Ultimately, the Attorney General has the final say, as with appointments more generally.
6. The fact that a Special Advocate is considered to be tainted for a particular case does not prevent them from being appointed. The consequence of being tainted is that that the Special Advocate cannot meet the excluded party, and effectively has to move straight into CLOSED. If this does not present a problem for the excluded party and the OPEN Representatives then there will normally be no objection to the appointment.
7. This position can be managed in cases where there are two Special Advocates, since at least one is usually not tainted at the outset of a case and therefore is able to communicate freely with the excluded party and OPEN Representatives.

## Conflicts of interest

1. Where an Information Owner asserts that a Special Advocate cannot be considered for nomination due to a conflict of interest, they will provide reasons for reaching this decision. The Special Advocate will then take a view bearing in mind their professional duties and obligations more generally.
2. If the Special Advocate believes that there is no conflict of interest then the Information Owner may raise the issue with the Bar Council[[18]](#footnote-18) for determination.

# 

# Part IV - The Typical Format of CLOSED proceedings

## Conference with the Excluded Party and the OPEN Representatives

1. Once a Special Advocate is appointed, and has reviewed the OPEN material, a Special Advocate and a member of SASO OPEN will usually have a conference with the excluded party and/or OPEN Representatives. It is not unheard of for the OPEN conference to be held abroad.

## Service of OPEN material

1. Depending on the procedural requirements which apply to the case, there will then be an exchange of OPEN evidence and witness statements between the excluded party and the Information Owner.

## Service of CLOSED material

1. The Information Owner will serve CLOSED material on SASO, which will hold it until the Special Advocate is ready to “go into CLOSED”.
2. Once the Special Advocate is ready to go into CLOSED they will ask SASO to deliver the CLOSED material. It should be remembered that, because the OPEN Representatives do not instruct the Special Advocate, the Special Advocate will decide when to accept the CLOSED material, although they will try to accommodate the OPEN Representatives’ wishes as far as possible.
3. In cases involving two Special Advocates it is not always necessary for them both to go into CLOSED at the same time. This may mean that one Special Advocate stays in OPEN for longer to enable them to communicate freely with the OPEN Representatives (e.g. to discuss any material disclosed after the first round of disclosure). Once both Special Advocates are in CLOSED, they are then able to discuss CLOSED matters between themselves.

## Communication Requests

1. Once a Special Advocate is in receipt of any CLOSED material, a fundamental feature of the system is that all direct communication between them and the OPEN Representatives in the ordinary way must cease.
2. According to the strict application of the court rules, although the OPEN Representatives may continue to send written communications to the Special Advocates (via SASO), there is a blanket ban on communication from the Special Advocates to the Excluded Party, including to the OPEN Representatives, without the permission of the Court.[[19]](#footnote-19) The principle underlying these rules is the protection of national security, by avoiding the inadvertent disclosure of CLOSED material.
3. For this reason, a Special Advocate who has gone into CLOSED may also not communicate with their leader (or junior) who remains in OPEN.
4. If a Special Advocate in CLOSED wants to communicate with the OPEN Representatives, then they must put their communication in writing and obtain approval from the Information Owner. This is known as a Communication Request and is handled via SASO.
5. The vast majority of Communication Requests are not contentious and, instead of sending every request to the court, the practice has evolved that SASO will pass the Communication Request to the Information Owner (via their lawyers). The Information Owner will review (and normally consent) to the content in the majority of cases, obviating the need for court involvement. The content of a communication request can only be objected to by the Information Owner on the grounds of national security alone.
6. Special consideration is also given to the protection of Legal Professional Privilege (“LPP”).[[20]](#footnote-20) An agreed process has been put in place between SASO and government lawyers acting for the Information Owners to ensure that communications which attract LPP are transmitted by administrative staff, and are not seen by the lawyers acting on behalf of the Information Owner in the case. This ensures that the Information Owner does not obtain an unfair advantage in the litigation through having read the communication request.
7. Communication Requests can still be brought to the court’s attention where agreement cannot be reached. The Court will then adjudicate on the dispute.

## Disclosure

1. As noted above, one of the major functions of a Special Advocate is to deal with disclosure and to challenge the basis upon which material is kept in CLOSED.
2. When the Information Owner first serves the CLOSED material, the division between what is OPEN and what is CLOSED is set by the Information Owner. However, the overarching principle of fairness at Common Law is that cases should be litigated as far as is possible on the basis of OPEN material.
3. Following receipt of the CLOSED material, the first role of the Special Advocate is to prepare disclosure submissions addressing whether any of the CLOSED material should be made OPEN (and therefore disclosed to the Excluded Party and OPEN Representatives).
4. As such, the basis on which a Special Advocate argues that material should be disclosed from CLOSED to OPEN is that to do so would not harm national security[[21]](#footnote-21), or the public interest, for example, because:

* the material is already in the public domain; or
* the material could not be regarded as damaging to national security or other public interests.

1. Sometimes a Special Advocate will accept that certain CLOSED material cannot be disclosed in its original form, but will instead propose that the material could be disclosed to the OPEN Representatives without damaging national security by way of redactions, or by way of a summary or gist.
2. In SIAC, a Special Advocate’s submissions will be balanced against SIAC’s duty under rule 4 of the SIAC Procedure Rules. This states:

“When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.”

1. The directions should provide a Special Advocate with a period of time after service of the CLOSED material in which to consider and prepare written submissions on what, if any, of the CLOSED material should become OPEN. In statutory cases this step is often built into the process.[[22]](#footnote-22)
2. A Special Advocate’s disclosure submissions may also include requests to the Information Owner for further information or documents to be provided in CLOSED (or indeed, in OPEN). In SIAC proceedings, for example, this ensures that the material available to SIAC enables it properly to determine proceedings[[23]](#footnote-23).
3. Once a Special Advocate has prepared the CLOSED disclosure submissions, SASO lodges them with the court and serves them on the Information Owner.
4. The Information Owner will usually lodge a written reply, following which counsel for the Information Owner and the Special Advocates may meet, in an attempt to reach agreement about what material should be disclosed into OPEN. If there is no agreement, then there will be a CLOSED disclosure hearing at which the court will adjudicate on any outstanding issues.
5. If the court does order that material be disclosed, but the Information Owner nevertheless maintains that to do so would damage national security, then the Information Owner is “put to their election”. They may withdraw the material in question from the case entirely and cease to rely on it.
6. Following completion of the initial disclosure process the Information Owner will usually require time in which to make amendments to the OPEN statements to add in any material which is to be made OPEN. Thereafter, the amended OPEN statements will be served on the Excluded Party.
7. There may then be an opportunity for the Excluded Party to file amended OPEN grounds before the parties file respective skeleton arguments and bundles.
8. At that stage, and subject to the ongoing duty of disclosure in relation to both inculpatory and exculpatory material, the substantive hearing will usually then take place.
9. A consideration of recent case law as at the date of writing is included at Part V.

## The substantive hearing

1. Substantive hearings will be conducted in two parts; OPEN and CLOSED. Usually the OPEN hearing will take place first and, although they will not usually contribute substantively, a Special Advocate will attend. It is helpful for them to see how the excluded party puts his case as they can be guided on possible cross-examination topics from the lines of questioning pursued by the excluded party’s OPEN counsel.
2. At the OPEN stage, the Information Owners’ witnesses will normally be screened from public view to preserve their anonymity. They will only answer questions in cross-examination to the extent that they are able to do so in OPEN. Should the answer to a question be that it is based on CLOSED material, the Special Advocates will have the option to follow up such questions in the CLOSED part of the hearing.
3. For the CLOSED part of the hearing the excluded party and OPEN Representatives will withdraw. The Special Advocate will then represent the interests of the excluded party and will have an opportunity to cross-examine the witness called by the Information Owner.
4. A Special Advocate may call witnesses or experts,[[24]](#footnote-24) and that has happened in more than one case.
5. The Court will re-convene for OPEN closing submissions and then conclude with CLOSED closing submissions, although both can be dealt with in writing. In Judicial Review proceedings or, where the court must apply the principles which would be applied in Judicial Review proceedings, the standard procedure does not always apply and the OPEN case may be concluded in its entirety before the CLOSED case begins.

## Ancillary hearings

1. The standard procedure above deals with the stages leading to the substantive hearing of an appeal. Much the same process will be adopted in relation to ancillary hearings such as bail hearings before SIAC and modification appeals in TPIM cases.

## Judgment and security checking

1. In a case involving a Special Advocate it is likely that the court will produce two judgments; one in OPEN and the other in CLOSED. However, it does not follow that in all CLOSED proceedings a CLOSED judgment will be produced. Courts are mindful of the need to keep in CLOSED only that which can harm the national interest and to give OPEN reasons so far as possible.
2. The Information Owner and the Special Advocate(s) are provided with the draft OPEN judgment before it is made available to the OPEN Representatives. This enables the Information Owner to ensure that the judgment does not inadvertently reveal CLOSED matters. SIAC’s practice is also to provide the draft CLOSED judgment to the Information Owner and the Special Advocate(s) at the same time[[25]](#footnote-25).
3. A Special Advocate has the opportunity to object to any application made by the Information Owner to move part of the OPEN judgment into CLOSED. Equally, the Special Advocate(s) may apply to the Court to move a part of the CLOSED judgment into OPEN[[26]](#footnote-26). Ultimately, the court is the final arbiter on what is to be made OPEN and what is to remain in CLOSED.
4. An OPEN judgment and CLOSED judgment produced in the same case are usually formally handed down at the same time. The CLOSED judgment will only be provided to the Information Owner and its lawyers, the Special Advocate(s) and SASO CLOSED.

## Appeals

1. There are two routes by which a Special Advocate may come to take part in an appeal against a judgment or court order. Firstly, a Special Advocate may identify CLOSED grounds of appeal. In which case, because a Special Advocate is not a party to proceedings, they must rely on the OPEN Representatives to lodge the appeal in order that the Special Advocate can then file grounds of appeal in CLOSED.
2. If the OPEN Representatives do not intend to appeal the OPEN judgment, then the Special Advocate must inform the OPEN Representatives (by way of a Communication Request) that there are CLOSED grounds of appeal so as to require them to lodge an appeal.
3. Secondly, although a Special Advocate may have no CLOSED grounds of appeal, the Information Owner may wish to rely on CLOSED material to bring its own appeal or to resist an appeal advanced by the OPEN Representatives. In that situation a Special Advocate will need to consider the CLOSED material and act accordingly.

## Costs

1. The general rule is that the Information Owner should pay the costs of a Special Advocate (and SASO).
2. When the House of Lords debated the Justice and Security Bill on, 17th July 2012, Lord Wallace of Tankerness (then Advocate General For Scotland) said:

*“My noble friend Lord Thomas of Gresford, on a point picked up by the noble Lord, Lord Beecham, asked about who pays for the special advocates. The Government pay for them. Decisions with regard to the costs of a case overall are determined by the judge in the normal way, but the Government always meet the costs of the special advocates because it is the Government who wish to see the closed material proceedings”.*[[27]](#footnote-27)

1. In a situation where the Information Owner disputes the responsibility to meet the costs of the Special Advocates and SASO, it may become a decision for the court as to who will have to pay. It should be noted that the Attorney General does not pay such costs.[[28]](#footnote-28)
2. In In re R (Closed Material Procedure: Special Advocates Funding) [2017] EWHC 1793 (Fam)[[29]](#footnote-29), Cobb J considered the question of Special Advocates’ costs in the Family court and reached the following conclusions:
   1. the Attorney General had no budget to fund Special Advocates [27]; and
   2. there was no statutory duty on the Legal Aid Agency under LAPSO to fund a Special Advocate [27].
3. The judge went on to conclude at [29] that the Police, as the Information Owners:

*“…should be required to broaden its obligations to ensure that those who are most affected by the information are given the fullest and fairest opportunity to have the case for non-disclosure tested.”*

1. Finally, the judge concluded that there should be no costs cap.
2. This decision reinforces the principle that the party seeking to depart from the normal procedures of open justice should pay the costs of the Special Advocates and SASO.

# Part V – Disclosure

## Case law

1. Certain important decisions have been handed down regarding disclosure in CLOSED proceedings. These include:
   1. *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28[[30]](#footnote-30);
   2. *A v United Kingdom* (3455/05) [2009] ECHR 301[[31]](#footnote-31); and
   3. *ZZ v SSHD* [2011] EWCA Civ 440; *ZZ (France) v SSHD* [2013] EUECJ C-300/11[[32]](#footnote-32); and *ZZ (France) v SSHD* (No 2) [2014] EWCA Civ 7[[33]](#footnote-33).
2. In *AF (No 3)*, a case under the (now defunct) Control Order regime, the House of Lords considered the test for disclosure and the level that was required in order to meet the minimum requirements of Article 6. The House of Lords (Lord Phillips at paragraph 59) held that Article 6 required that:

“…the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the OPEN material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.”

1. At paragraph 83 Lord Hope referred to Lord Scott in *A v SSHD*[[34]](#footnote-34),saying:

“…a denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour. The fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him.”

1. Importantly, Lord Hope went on to state at paragraph 85 that:

“…there is no room for an exception where it is thought that the controlled person has no conceivable case to answer. The judge must insist in every case that the controlled person is given sufficient information to enable his special advocate effectively to challenge the case that is brought against him. That is the core principle.”

1. At paragraph 96 Lord Scott said:

“An essential requirement of a fair hearing is that a party against whom relevant allegations are made is given the opportunity to rebut the allegations. That opportunity is absent if the party does not know what the allegations are. The degree of detail necessary to be given must, in my opinion, be sufficient to enable the opportunity to be a real one”

1. And in conclusion at paragraph 116 Lord Brown summed up the principle as:

“In short, Strasbourg has decided that the suspect must always be told sufficient of the case against him to enable him to give “effective instructions” to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk.”

1. In cases where the disclosure requirements of *AF (No 3)* apply, the Special Advocate’s submissions will also address what further disclosure is required in OPEN in order to satisfy Article 6 ECHR. These submissions will not take into account the risk of disclosure of the material, but are limited to what the Special Advocates believe is necessary for the purposes of Article 6.
2. In *A v United Kingdom*, eleven applicants were detained as suspected international terrorists under the Anti-Terrorism Crime and Security Act 2001 (”the 2001 Act”). They appealed to SIAC against their detention and, in responding to the appeals, the Secretary of State filed both OPEN and CLOSED statements. Before the ECtHR the applicants alleged that the Special Advocate procedure did not comply with the requirements of Article 5(4) ECHR, namely: “*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful*.”
3. The ECtHR found that there had been a breach of Article 5(4) in relation to some of the applicants, as they had not been given sufficient disclosure of the allegations against them in order to effectively challenge them. The ECtHR stated that where full disclosure was not possible, and therefore CLOSED material was relied upon, Article 5(4) required that the difficulties this caused be counterbalanced in such a way that each applicant still had the possibility to effectively challenge the allegations against him. Expanding on the requirements of Article 5(4) the ECHR stated:

“220. [T]he special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations...Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.”

1. In *ZZ v SSHD*, the appellant was an EU citizen, a dual French-Algerian national, who had been lawfully resident in the UK for 15 years up to 2005, and had a right of permanent residence in the UK. He was refused re-admission on his return from a visit to Algeria, and was deported from the UK on the grounds of national security pursuant to Article 27 of EU Directive 2004/38. He challenged this decision, and SIAC upheld the SSHD’s decision on appeal.
2. ZZ then appealed to the Court of Appeal. The court dismissed his appeal on domestic law grounds but referred to the CJEU the question of whether article 30(2) of Directive 2004/38 required the individual to have been given the essence of the grounds on which a decision was made, even if the domestic court considered that it would be contrary to the interests of national security to do so. On the reference, the CJEU held at [65] that:

“…first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective.”

1. The matter was heard by the Court of Appeal a second time in *ZZ (No 2).* ZZ argued that there was a core minimum level of disclosure that might even involve disclosure of material harmful to national security. In discussing the meaning of the CJEU’s judgment, Richards LJ stated at paragraph 25:

“This leads the court to state in para 68 that the national court must "ensure that the person concerned is informed of the essence of the grounds … in a manner which takes due account of the necessary confidentiality of the evidence". That still makes clear that the essence of the grounds must be disclosed but provides that the manner of disclosure must take "due account" of the necessary confidentiality of the evidence, that is to say it must protect the confidentiality of evidence disclosure of which would be contrary to national security. The court does not state in terms what is to happen if the essence of the grounds cannot be disclosed without at the same time disclosing such confidential evidence. To my mind, however, the position in that event is clear from what the court does say: the essence of the grounds must still be disclosed. The qualifying words relate to the manner of disclosure of the essence of the grounds; they do not affect the extent to which the grounds must be disclosed.”

1. Thus, the Court of Appeal held that the evidence underpinning the decision may be withheld, but that the essence of the grounds still had to be disclosed.
2. In *Bank Mellat v HM Treasury* [2010] EWHC 350 (QB), Mitting J held that Article 6 applied to financial restrictions proceedings challenging a direction made under Schedule 7 CTA 2008. Although the terms of the Order were directed, not to Bank Mellat, but to credit or financial institutions in the UK who were prohibited from dealing with the bank, the Court found that the target of the Order was the bank and, in reality, directly affected the bank’s civil rights (at [9] and [10]).
3. In turn, Mitting J found that Article 6(1) applied to the case and the principle upon which further disclosure should be ordered were those set out in *AF (No 3)*, namely, that sufficient information about the essential allegations made had to be given to the Bank to ensure it had the opportunity of giving effective instructions about them (at [12] and [13]).
4. Mitting J’s ruling, and the reasons for it, were upheld by the Court of Appeal in *Bank Mellat v HM Treasury* [2010] EWCA Civ 483[[35]](#footnote-35) at [19]. The Court went on to add two further points:
   1. “*…the requirements of art 6(1) are such that the information to be provided by the Treasury must not merely be sufficient to enable the Bank to deny what is said against it. The Bank must be given sufficient information to enable it actually to refute, in so far as that is possible, the case made out against it.*” [21]
   2. “*…if a party is dissatisfied with a decision as to what information should be disclosed in a case such as this, an appeal would, at least in principle, represent an uphill task. An appellate court would normally be reluctant to interfere with a first instance judge's determination of what has to be disclosed to satisfy the requirements of art 6(1), although it would, of course, do so if satisfied that the judge had gone wrong in principle. If an appeal is to be mounted against such a decision, it would be sensible to ensure that the judge is given the opportunity to give a brief judgment explaining why he reached the conclusion that he did on the specific issue or issues which are sought to be appealed.*” [22].
5. In *R (SSHD) v SIAC [2015] EWHC 681 (Admin*)[[36]](#footnote-36), however, the Divisional Court was asked to review a decision of SIAC on the extent of disclosure to be made in naturalisation cases. Irwin J had made a ruling that was interpreted as potentially requiring the disclosure of all material looked at in order to make an assessment for the SSHD. A more narrow interpretation was preferred by the Divisional Court. At paragraphs 34-35 Sir Brian Leveson stated that the disclosure to the Special Advocates had to be sufficient to permit challenge, if appropriate, to the underlying rationality of any part of the decision and its reasoning. This included disclosure of the underlying material relied on by the summary writer in identifying facts or reaching a conclusion.

## Employment Tribunal Proceedings

1. In the case of *Tariq v Home Office* [2011] UKSC 35[[37]](#footnote-37), the Applicant and his representatives were excluded from certain aspects of employment tribunal proceedings on the grounds of national security. The court held that the claimant had chosen employment which carried with it the requirement of national security vetting and was not the victim of state action depriving him of his fundamental rights, whereas the state sought to defend itself from the claim and could not do so unless it deployed the national security material:

“…the balancing exercise called for in para 217 of the judgment in A v United Kingdom depends on the nature and weight of the circumstances on each side, and cases where the state is seeking to impose on the individual actual or virtual imprisonment are in a different category to the present, where an individual is seeking to pursue a civil claim for discrimination against the state which is seeking to defend itself.” [27]

1. At paragraph 158 Lord Dyson set out the principle that:

“In my judgment, these decisions show that there is a clear line of authority to support the proposition that, in surveillance and security vetting cases, an individual is not entitled to full article 6 rights if to accord him such rights would jeopardise the efficacy of the surveillance or security vetting regime itself…The cases show, in particular, that there is no right to be given the gist of relevant information if and to the extent that this would jeopardise the efficacy of the surveillance or security vetting regime.”

1. Crucially Lord Dyson went on at paragraph 159:

“…in all cases where security clearance is sought, it is because the individual has volunteered to undergo the clearance process for the purpose of doing (or continuing to do) the job that he is employed to do. He must be taken to know that checks will be made that may produce material that cannot be shown to him. As Lord Hope points out, he is a volunteer.”

1. Accordingly, the balance was properly struck in favour of the CLOSED material procedure, and its use was compatible with both Article 6 of the ECHR and European Union law.
2. The court thus held that, having regard to Strasbourg jurisprudence, there was no absolute requirement that the details of allegations, which would be disclosed in normal litigation, should be disclosed where the interests of national security required secrecy. The disadvantage to the claimant had to be balanced against the paramount need to protect the integrity of the security vetting process, and that disadvantage would to some extent be mitigated by the procedure adopted, namely, that the statutory scheme enabled the employment tribunal in the exercise of its discretion to use the process flexibly. Assistance was afforded to the claimant by the Special Advocate, and the CLOSED process would be kept under review throughout the proceedings.
3. In *Kiani v SSHD* [2015] EWCA Civ 776[[38]](#footnote-38), the Court of Appeal found that EU law did not require that an Excluded Party always had to be provided with a core minimum of relevant information about secret material (‘gisting’) where the vindication of EU rights was sought. The Court held that the tribunal had not erred in refusing gisting.
4. At paragraph 33 Lord Dyson, quoting ZZ, expressed the view that:

“It is common ground that, in a case where state security considerations are invoked as a ground for withholding information from an excluded person, the court must strike:

“an appropriate balance between the requirements flowing from state security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary”: see ZZ (CJEU) [2013] QB 1136, para 64.”

1. The court concluded that the Tribunal had taken account of the CLOSED material sufficiently to enable it to reach the conclusion that it had formed the very essence of the case.

# Part VI – Proceedings under the JSA 2013

## Section 6 applications and the initial stages

1. Prior to the JSA 2013, there was no formal mechanism for CLOSED proceedings to be used in the civil courts where the law did not expressly permit them. There were occasions, however, where the parties had consented to such proceedings. In *Al Rawi & Others v The Security Service & Others* [2011] UKSC 34[[39]](#footnote-39), the claimants, former detainees at Guantanamo Bay, had issued civil claims for damages against various organs of the UK Government alleging that they had caused or contributed towards their alleged detention, rendition and ill-treatment.
2. The defendants indicated that they would like to rely on CLOSED material in defending the claims and proposed that the claimants' interests in relation to any CLOSED material be represented by a Special Advocate. The claimants objected to the adoption of CLOSED proceedings and the use of a Special Advocate. They argued that the court should follow the normal Public Interest Immunity (“PII”) procedure.[[40]](#footnote-40)
3. The Supreme Court held that adopting CLOSED proceedings would undermine one of the fundamental principles of the common law, namely the right of a litigant to know the case against him and to know the reasons for the court's decision. It declined to use common law principles to create closed justice and held that it was for Parliament, not the court, to decide whether or not to make CLOSED proceedings available.[[41]](#footnote-41)
4. When the JSA 2013 came into force it enabled parties in civil litigation to rely on CLOSED material.
5. Section 6 of the JSA 2013 enables an Information Owner, or any other party to the proceedings, or the court of its own motion, to apply for a declaration permitting CLOSED material applications in the proceedings. A section 6 declaration is permitted if the Court is satisfied:
   1. that a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings); and
   2. that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.
6. Section 6(7) of the JSA 2013 provides that the court must not consider an application by the Secretary of State unless it is satisfied that the Secretary of State has, before making the application, considered whether a claim for PII could be made in relation to the material. However, there is no obligation to embark on a PII process prior to making an application for a declaration.[[42]](#footnote-42)
7. A declaration under section 6 of the JSA 2013 has been described as a gateway, which enables the court to engage with the CLOSED material in a way that is not possible under the PII process. It should be noted that a successful PII application would exclude the material from the court’s consideration and might therefore result in injustice.
8. A declaration made under section 6 of the JSA remains subject to review (section 7). CPR Part 82 contains the applicable court rules which govern the operation of such CLOSED proceedings. These allow for a modification of the overriding objective, the exclusion of parties from hearings, and other provisions analogous to SIAC procedure, such as the restriction on a Special Advocate communicating without the permission of the Information Owner or the court.
9. When applications in section 6 proceedings are determined by the court any CLOSED material will be disclosed only to the court and the Special Advocate (section 8).

## Case law on section 6 of the JSA 2013

1. In the distinct but similarly handled cases of *Sarkandi* [2015] EWCA Civ 687[[43]](#footnote-43) and *McGartland* [2015] EWCA Civ 686the Court of Appeal accepted that CLOSED proceedings were a serious departure from the fundamental principles of open justice and natural justice. The court noted that the JSA 2013 represented Parliament’s assessment of how, in civil proceedings, the balance was to be struck between the competing interests of open and natural justice on the one hand and the protection of national security on the other.
2. This was coupled with express provision to secure compliance with the right to a fair trial under Article 6 of the ECHR. It was also said to be an exceptional procedure, which the court expected to be used only rarely. The court went on to uphold each of the decisions of the High Court, that the two conditions contained within section 6 were met.
3. In *XH v SSHD* [2015] EWHC 2932 (Admin)[[44]](#footnote-44), the Secretary of State applied for a section 6 declaration in Judicial Review proceedings (commenced by the Appellant after the Secretary of State had removed his passport using the Royal Prerogative). An appeal against the section 6 declaration failed. The court confirmed that the proper approach to section 6 was that set out in *McGartland* and *Sarkandi*.

## Standard of Disclosure in JSA proceedings

1. In *CF v Ministry of Defence* [2014] EWHC 3171 (QB), the Claimant brought a private law damages claim, alleging that the SSHD and others had been complicit in his unlawful detention, torture and mistreatment during a period of detention in Somaliland. The SSHD was successful in its application under section 6 and the Claimant argued that he should be provided with a gist under Article 6 ECHR.
2. In considering the issues, Irwin J stated at paragraph 29:

“I take as my approach the starting point that, in a case which does not directly affect the liberty of the subject, there is no irreducible minimum of disclosure, or necessary minimum revelation by summary or gist of the Defendants' case, obligatory despite the consequences for national security. This case is a claim for compensation, albeit with potentially important issues of high public interest. It is in a category where I must conduct a balancing exercise, bearing in mind the competing principles of maximising the fairness of the trial and protecting the public through the preservation of national security. Any compromise of fairness must be thoroughly justified. Every possible effort must be made to mitigate the effect of CLOSED material procedures and limited disclosure. The twin evils of injustice to a Claimant and injustice to the State are to be avoided: the latter arising if and when the disclosure (in whatever form) of the detailed case would so compromise national security that the State is compelled to settle what may be an unjust and unmeritorious claim.”

1. The court went on to hold that, in a case against the State which did not directly affect the liberty of the subject, there was no irreducible minimum of disclosure of the State’s case which the court would require.
2. In parallel proceedings in the Court of Appeal related to Control Orders (now TPIMs), *SSHD v CC & CF* [2014] EWCA Civ 559[[45]](#footnote-45), the court held that once it was accepted that there was an abuse of process jurisdiction in Control Order and TPIM cases, it attracted the principles expounded in *AF (No.3)*.
3. It followed that the appellants’ principal ground of appeal was made out. Where the statute did not delineate the boundaries of open justice, it was for the court to do so, and the court did not consider that the appellants or public should be denied all knowledge of the extent to which their factual and/or legal case on collusion and mistreatment was accepted or rejected (at [10]-[20]).
4. In *R (on the application of K, A and B) v Secretary of State for Defence* [2016] EWHC 1261 (Admin)[[46]](#footnote-46), three Afghan nationals, who had allegedly assisted the UK government in Afghanistan, brought a number of claims, including Judicial Review and private law claims for damages. In respect of the Judicial Review claims, the High Court rejected a common law duty of fairness requiring further disclosure akin to that required by Article 6. In the Court of Appeal, it was found that the resolution of the public law claims was the determination of a civil right and accordingly attracted Article 6 rights. Further disclosure was required.
5. In *S1 and others v SSHD* [2016] EWCA Civ 560[[47]](#footnote-47), the Court of Appeal held that, even where EU law applicable to deprivation decisions and the disclosure identified in the *ZZ* (see paragraphs 113-115 above) case applied without modification, on the facts of the case, the appellants would not have had a valid complaint of inadequate disclosure of the essence of the grounds of the decisions. The court considered only the OPEN material, whereas it recognised that if SIAC were approaching the same question it would have sight of all the material.

## Norwich Pharmacal and similar jurisdictions

1. Section 17 of the JSA 2013 prohibits a Court ordering disclosure of sensitive material under the *Norwich Pharmacal* residual disclosure jurisdiction. In the pre-JSA 2013 case of *R (on the application of Omar) v SSFCA [2013] EWCA 118[[48]](#footnote-48),* theAppellants sought material for use in foreign criminal proceedings where there was an existing statutory regime in place for such requests. The Court held that to relegate national security to a factor to be weighed up on a case-by-case basis would subvert the existing statutory scheme.

## Royal Prerogative Cases

1. In *MR v SSHD* [2016] EWHC 1622 (Admin)[[49]](#footnote-49), the court held that once Articles 4 and 27 of the Directive 2004/38 were engaged, and the derogations in Articles 30(2) and 31 averred by the State, there was no context-specific spectrum of disclosure within Article 27. If breached, Article 27, read with *ZZ v UK*, required nothing less than the essence of the case to be provided to the appellant. There was no in-between level of disclosure:

“To my mind, accepting though I do that there is a spectrum of decisions which may involve art.27, there is no spectrum of disclosure. It is the essence of the allegations which must be disclosed, despite harm to national security, neither more nor less. There is no scope in the light of ZZ and Kiani for holding that there should be no disclosure which risked national security.” [27]

1. The court did, however, accept that whether or not Article 27 was engaged in any given case may depend on the seriousness of the type of challenge brought by the Appellant. The court accepted that there was a difference in the approach in the types of cases such as *Bank* *Mellat* and *ZZ* as compared to *Tariq* and *Kiani*:

“Mr Eadie is right that context affects the disclosure required. That is why the disclosure required in Tariq and Kiani differed from that required in Bank Mellat and AF (No 3). They differed not just because of the degree of restrictions but because of the procedures available or not to protect the subject of the order, and the extent to which such restrictions were imposed or part of the background in which employment was accepted and undertaken. I would also accept that the effect of exclusion on ZZ was, at least on the face of it, much more severe than the effect of the cancellation of MR’s passport.” [24]

1. The cases of *XH* and *AI* were the first to be determined in the High Court.[[50]](#footnote-50) The High Court found, firstly that Parliament did not intend to abrogate the Royal Prerogative powers regarding terrorism when it passed the TPIM Act and secondly, while certain EU law principles were engaged, they had not been breached. The Applicants were unsuccessful in their appeal to the Court of Appeal.

## Judicial Review claims

1. Since the advent of the JSA 2013, the use of CLOSED proceedings in Judicial Review claims has been governed by the statutory scheme. There remains a role for a Special Advocate outside the statutory scheme to act as a PII Advocate, where an Information Owner choses to make a PII application in parallel with, or instead of, an application for a section 6 declaration under the JSA 2013. The court took this approach in the 2018 case of *Horeau & Bancoult* (unreported)*.*
2. There are two key differences between Special Advocates and PII Advocates. The first is in their role in the litigation. A Special Advocate makes submissions on behalf of the Excluded Party at the disclosure stage, and then again, assuming some material remains in CLOSED, at the substantive stage. A PII Advocate makes submissions on behalf of the excluded party in relation to the Information Owner’s PII application, and has no ongoing role in the proceedings once that discrete application is determined.
3. The second difference is that whilst a Special Advocate must necessarily hold the required level of security clearance to perform their role, a PII Advocate might not need such clearance; the level of clearance required is determined by the classification of the material subject to the PII application.

## Terrorism Prevention and Investigation Measures (“TPIMs”)

1. The 2001 Act was passed by Parliament in response to the terrorist attacks of 11 September 2001. Part IV of the 2001 Act permitted the Secretary of State to certify individuals whom he reasonably believed were a threat to national security and suspected of being international terrorists.
2. Part IV of the 2001 Act was repealed by the Prevention of Terrorism Act 2005 with effect from 14 March 2005. It replaced the detention of suspected terrorists with the imposition of Control Orders.
3. Control Orders were then replaced by Terrorism Prevention and Investigations Measures, under the TPIM Act, as subsequently amended by Part 2 of the Counter Terrorism and Security Act 2015. Under the TPIM Act the Secretary of State may, pursuant to a notice, impose specified terrorism prevention and investigation measures on an individual in the form of a TPIM Notice, provided that certain conditions are met. The restrictions placed on individuals under the 2011 Act were considered to be less stringent than those under the Prevention of Terrorism Act 2005 and less intrusive on their human rights, whilst maintaining safeguards.
4. Part 2 of the Counter Terrorism and Security Act 2015 introduced key changes to the TPIM regime. This included amending the requirement for the SSHD to be satisfied of involvement in terrorism from “reasonably believes” to “on the balance of probabilities”.
5. A TPIM Notice is initially valid for a year but may be extended for a further year. No new TPIM Notice may be imposed on an individual after this time unless the Secretary of State reasonably believes that the individual has engaged in further terrorism-related activity. Breach of a TPIM Notice without a reasonable excuse is a criminal offence punishable by imprisonment.
6. TPIM proceedings take place in the Administrative Court. There may have been earlier criminal proceedings where the Appellant will have had access to some CLOSED material in those proceedings. Consequently, it may be necessary to have an IN CAMERA regime in the TPIM proceedings, with proceedings then falling into three elements: OPEN, IN CAMERA and CLOSED.
7. A TPIM Working Group drafted standard directions for use in these types of cases. The aim of this was to ensure that cases were heard within 6 months i.e. as expeditiously as possible, given that TPIMs are limited in duration to two years.

## Asset-freezing designations

1. A Special Advocate has been appointed in cases where an individual has sought to challenge a designation under the Terrorist Asset-Freezing etc. Act 2010 (the “2010 Act”).
2. Under s2 of the 2010 Act, the Treasury may make a final designation of a person if they reasonably believe that:
   1. the person is or has been involved in terrorist activity;
   2. the person is owned or controlled by the person who has been involved in terrorist activity; or
   3. the person is acting on behalf of or at the direction of a person who has been involved in terrorist activity,

and the Treasury considers that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to that person.

1. The designation initially lasts for one year unless renewed under section 4 of the 2010 Act. Under section 26 of the 2010 Act a person may appeal against the designation.
2. In *C v HMT [2016] EWHC 2039 (Admin)[[51]](#footnote-51),* the excluded party was designated under section 2 of the 2010 Act, and the designation was then renewed. The Excluded Party appealed against both decisions. The Treasury made an application under section 6 of the JSA 2013 to rely on CLOSED material. A Special Advocate was appointed to represent the excluded party’s interests.
3. The court found that different chapters of the evidence, in combination, had given the Treasury a firm foundation for a reasonable belief that the Excluded Party was involved in terrorist activity in the broad and preventive way defined in section 2(2) of the 2010 Act. The court considered whether or not the second condition (whether financial restrictions necessary for protecting the public from terrorism) had been met. The court found that there was just enough evidence in February 2015 for the Treasury to have concluded that this threshold was met. It held that Article 8 and Article 1 Protocol 1 rights under the ECHR are qualified rights and the public interest in curbing the radicalisation of potential terrorists was a more than counterbalancing factor.
4. The court found, however, that by the time of the renewed designation there was no longer a basis to consider that the continued designation was necessary and allowed the appeal against the renewed designation.

# Part VII – Proceedings before SIAC

## Immigration and asylum cases

1. Section 2(1) of the 1997 Act gives SIAC jurisdiction to hear those immigration and asylum appeals in which the Secretary of State has certified, under section 97 of the Nationality, Immigration and Asylum Act 2002, that a decision has been taken “*in the interests of national security or in the interests of the relationship between the UK or another country*”, or wholly or partly in reliance on information which should not be made public:
   1. in the interests of national security;
   2. in the interests of the relationship between the United Kingdom and another country; or
   3. otherwise in the public interest.[[52]](#footnote-52)
2. Once an immigration or asylum decision is so certified the normal immigration appeals system no longer applies. Instead an appeal lies only to SIAC and from there on a point of law to the Court of Appeal (and beyond).[[53]](#footnote-53)

## Exclusion / deportation

1. Immigration and asylum claims often take the form of exclusion cases (where the Appellant is outside the UK, having been excluded from the country) and deportation cases (where the Appellant is within the UK and the SSHD proposes to deport him). *ZZ* is one of the most significant and widely known of these cases, and is examined in detail in Part V of this manual.

## Bail

1. An Appellant may be detained pending deportation, on the grounds of national security. When an appellant is so detained SIAC has jurisdiction to grant bail.[[54]](#footnote-54)
2. Bail hearings are likely to address whether or not the Appellant should be released as well as the conditions upon which release on bail should take place. When bail is granted, it is usually on conditions similar to typical TPIM obligations. Very often the SSHD will rely on CLOSED material to support her position. Representing the interests of Appellants in CLOSED in bail proceedings is an important function of a Special Advocate.
3. Part 6 of the SIAC Procedure Rules deals with the issue of bail but does not contain an obligation to ensure that an Appellant has disclosed to him a minimum standard of information about the grounds on which the SSHD opposes the grant of bail, will consent to bail being granted on particular conditions, or has sought its revocation. As such, SIAC has been prepared to make bail decisions solely in reliance on CLOSED material.
4. In *Cart, U and XC v Upper Tribunal & SIAC (Child Maintenance and Enforcement Commission intervening)* [2009] EWHC 3052[[55]](#footnote-55) the Divisional Court held that making bail decisions solely in relation to CLOSED material was a breach of Article 5(4) EHRC. The court held that the same minimum standard of procedural fairness applies in the case of SIAC bail proceedings as applies in the case of Control Orders (now TPIMs), as set down by the House of Lords in *AF (No 3).*[[56]](#footnote-56)
5. A decision of SIAC to refuse or revoke bail is not an appealable decision under the 1997 Act. However, in *Cart*, the Court held that SIAC is amenable to Judicial Review for any excess of jurisdiction both in terms of transgressing beyond the boundaries of its permitted subject matter and in terms of making an error of law.[[57]](#footnote-57)

## Deprivation of citizenship

1. Section 40(2) of the British Nationality Act 1981 provides that a person may, by order, be deprived of their citizenship status if the Secretary of State is satisfied that to do so would be conducive to the public good.
2. Section 40(A)(1) removes an Appellant’s right of appeal to the First-tier Tribunal if the SSHD certifies that the decision to make the order was:

“…taken wholly or partly in reliance on information which in his opinion should not be made public –

* 1. in the interests of national security,
  2. in the interests of the relationship between the United Kingdom and another country, or
  3. otherwise in the public interest.”

1. Where the decision is so certified, section 2B of the 1997 Act provides an Appellant with a right of appeal to SIAC:

“A person may appeal to the Special Immigration Appeals Commission against a decision to make an order under section 40 of the British Nationality Act 1981 (c 61) (deprivation of citizenship) if he is not entitled to appeal under section 40A(1) of that Act because of a certificate under section 40A(2) [(and section 40A(3)(a) shall have effect in relation to appeals under this section)].”

1. An appeal to SIAC against a deprivation order is “*a challenge to the merits of the decision itself, not to the exercise of a discretion to make it.*”[[58]](#footnote-58)
2. Citizenship cases before SIAC follow broadly the same pattern as the immigration and asylum cases. One difference is that there may be scope to split the proceedings so as not to require a Special Advocate. SIAC may wish to consider, as a preliminary OPEN issue, whether the excluded party would be rendered stateless by being deprived of their citizenship. If they would, the SSHD cannot deprive them of their citizenship and the proceedings will come to an end without the need for a Special Advocate.[[59]](#footnote-59)

## Naturalisation

1. Under section 6 and 18 of the British Nationality Act 1981, on an application by an individual, the SSHD may issue (or refuse to issue) a certificate of naturalisation or grant (or refuse to grant) an application made under section 41A.
2. Under section 2D of the 1997 Act,[[60]](#footnote-60) SIAC may review the refusal decision where the decision was one which was made wholly or partly in reliance on information which, in the opinion of the SSHD, should not be made public in the interests of national security, in the interests of the relationship between the UK and another country or otherwise in the public interest.
3. Section 2D(3) specifies that SIAC must apply the principles that would be applied in judicial review proceedings in determining an application for a refusal of naturalisation to be set aside
4. Section 2D(4) provides that SIAC may make any such order, or grant any such relief, as would be available in judicial review proceedings.
5. The procedure to be followed in these types of cases is set out in Part 7 of the SIAC Procedure Rules.
6. In the majority of cases seen by SASO, the SSHD’s stated reason for refusing naturalisation is that the applicant fails to meet the good character requirement at Schedule 1, Paragraph (1)(b) of the British Nationality Act 1981. Typically, the detailed reasons why the SSHD has reached this conclusion are withheld on the ground that disclosure in OPEN would be contrary to the public interest.
7. ‘Good character’ does not have statutory definition. The Home Office Guidance on the good character requirement is published as “Nationality: good character requirement”[[61]](#footnote-61). Knowing association or involvement with individuals whose views or activities are a source of concern to the SSHD is likely to be viewed as indicative of a lack of good character.
8. A consequence of section 2D(3) & (4) is that a successful application to SIAC is likely to result in an order quashing the refusal, and referring it back to the SSHD for a fresh decision.

# Part VIII – The use of special advocates in other jurisdictions and contexts

## Proceedings in Northern Ireland

### Closed Material Proceedings in Northern Irish civil proceedings

1. In Northern Ireland, the guiding procedural rule is Order 126 of the Rules of the Court of Judicature (Northern Ireland) 1980, which broadly reflects the provisions of CPR 82.
2. The relevant Law Officer for proceedings in Northern Ireland is the Advocate General for Northern Ireland. This office is, in fact, held by the Attorney General for England and Wales. As mentioned above, the Attorney General maintains a separate panel of Special Advocates for Northern Ireland. SASO also supports these Special Advocates in their roles.

### The Parole Commissioners for Northern Ireland

1. Special Advocates are routinely instructed in cases before the Parole Commissioners for Northern Ireland (“PCNI”), where the Secretary of State for Northern Ireland wishes to rely on CLOSED material to oppose the granting of parole to a prisoner.
2. Although proceedings before the PCNI are less formal than proceedings under the JSA 2013, the Parole Commissioners' Rules 2009 govern the use of CLOSED material and disclosure.
3. The PCNI has replaced the Life Sentence Review Commissioners.

## Employment Tribunal proceedings

1. The procedure for CLOSED proceedings within the employment tribunal is contained within Schedules 1 and 2 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (2013/1237).
2. Appeals from the employment tribunal lie to the Employment Appeals Tribunal (”EAT”). The EAT is governed by the Employment Appeal Tribunal Rules 1993 (as amended). The rules relating to cases concerning national security and the use of a Special Advocate are contained in Rule 30A.
3. Where an excluded party appeals to the Security Vetting Appeals Panel (“SVAP”) (as to which see paragraphs 205-207 below) and also makes an employment tribunal claim, the vetting appeal will usually be heard first.

## Family proceedings

1. The Family Division of the High Court is accustomed to dealing with private hearings. This is an inroad into open justice, but is justified by reference to the court’s concern to protect the interests of children, other family members, and to restrict the reporting of certain information. Such action is taken under the High Court’s inherent jurisdiction, following a line of authorities.
2. On occasion, the Family Court will approach the Attorney General or SASO regarding the appointment of a Special Advocate in family proceedings. This typically arises “*because a public body that is party to the litigation, often a local authority or the police, resist disclosure of sensitive documents*.”[[62]](#footnote-62)
3. In the same way as noted below in respect of the Parole Board, acting outside a statutory framework presents challenges for a Special Advocate but, broadly speaking, the same procedures as for other CLOSED proceedings will be followed.

## Other non-statutory proceedings

1. There are a number of other areas of law where Special Advocates can be appointed, some of which have grown steadily in recent years, including:
   1. The Parole Board in England and Wales.
   2. SVAP in both England and Wales and Northern Ireland.
   3. The Proscribed Organisations Appeal Commission and Pathogens Access Appeals Commission.
   4. Freedom of Information and Data Protection matters.
2. The key areas in this list are dealt with in more detail below.

### The Parole Board (England & Wales)

1. The use of a Special Advocate in the Parole Board jurisdiction derives from the case of *Roberts v Parole Board* *[2004] EWHC 3120 (Admin); [2004] EWCA Civ 1031[[63]](#footnote-63); [2005] UKHL 45[[64]](#footnote-64)*. The House of Lords held by a majority of 3:2 (Lords Bingham and Steyn dissenting) that the Parole Board had the power to withhold material relevant to a parole review from the Appellant and his legal representatives, and was able to appoint a 'Specially Appointed Advocate' to represent the Appellant at a CLOSED hearing.
2. The duty to appoint a Specially Appointed Advocate was implied from the implicit duty of the board, under section 28 of the Crime (Sentences) Act 1997, to conduct its decision-making process in a manner which was practical and appropriate in the circumstances to ensure that the prisoner was fairly treated (see Lord Woolf LCJ's speech at para 65). The House held that the question of whether the decision to withhold information and/or appoint a Specially Appointed Advocate in any individual review is compliant with Article 5(4) of the ECHR depends on all the circumstances of the case, and cannot be determined in advance.
3. The lack of any rules providing a procedural framework for the Specially Appointed Advocate in this case presented its own difficulties; however the fundamental features of the statutory system were retained – providing that there should be no contact between the advocate and the prisoner after the advocate had seen the withheld material, allowing the advocate to make submissions on whether what was kept from the prisoner should be disclosed to him in some form, and allowing the advocate to make substantive submissions on the CLOSED material.

### The Security Vetting Appeals Panel (“SVAP”)

1. SVAP is an independent non-Departmental public body sponsored by the Intelligence and Security Secretariat (Security Policy Division) of the Cabinet Office, supported by a small secretariat. It provides an independent avenue of appeal against decisions to refuse or withdraw security clearance. It hears appeals from staff or contractors in Government Departments, the Armed Forces and other organisations, where they have exhausted the internal appeals process.
2. SVAP sits as a panel, chaired by a retired or current High Court judge who sits with two other members. The panel’s role is to review the reasonableness of the vetting decision, typically by applying Judicial Review principles (although there is no formal constraint on the panel to that effect).
3. SVAP does not issue “decisions” in the judicial sense, but instead makes non-binding recommendations to the employing organisation.

### The Proscribed Organisations Appeal Commission (“POAC”) and Pathogens Access Appeals Commission.

1. Proscribed organisations are those listed in Schedule 2 to the Terrorism Act 2000. In order to be added to the schedule, an organisation must be “concerned in terrorism”, which is defined by section 3(5) of that act as:
   1. commits or participates in acts of terrorism,
   2. prepares for terrorism,
   3. promotes or encourages terrorism, or
   4. is otherwise concerned in terrorism.
2. POAC exists by virtue of section 5(1) of and Schedule 3 to the Terrorism Act 2000. Its role is to hear applications for de-proscription when an appeal directly to the Secretary of State has failed.
3. POAC and the Pathogens Commission are rarely used and very few applications have been made.

## Contact Details

1. Should you require any further assistance or have any feedback on the contents of this manual, do not hesitate to contact SASO.
2. Correspondence can be sent to the following addresses:

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Government Legal Department

102 Petty France

London

SW1H 9GL

DX 123243 Westminster 12

[SASO.OPEN@Governmentlegal.gov.uk](mailto:SASO.OPEN@Governmentlegal.gov.uk)

1. For information regarding Special Advocate recruitment, please contact the Attorney General’s Office:

Attorney General's Office

102 Petty France

London

SW1H 9EA

[correspondence@attorneygeneral.gov.uk](mailto:correspondence@attorneygeneral.gov.uk)

**Special Advocates’ Support Office**

**January 2023**

1. [AGO text re Special Counsel to be added here.] [↑](#footnote-ref-1)
2. See, for example, rule 37(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003, which defines CLOSED material in the SIAC context. [↑](#footnote-ref-2)
3. Article 5(4) provides: “*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful*.” [↑](#footnote-ref-3)
4. *Chahal v The United Kingdom* - 22414/93 - Grand Chamber Judgment [1996] ECHR 54 (15 November 1996), 23 EHRR 413 [↑](#footnote-ref-4)
5. *Chahal v The United Kingdom* at paragraph 130 [↑](#footnote-ref-5)
6. Although, in hindsight, this appears to have been a misconception on the part of the ECtHR. [↑](#footnote-ref-6)
7. See for example CPR 82.9, R34(1) SIAC Procedure Rules 2003, Rule 8 of Order 126 in Northern Ireland or Rule 4 of The Employment Tribunals (National Security) Rules of Procedure. [↑](#footnote-ref-7)
8. [2004] 2 AC 134 [↑](#footnote-ref-8)
9. [2010] ICR 1034. The Supreme Court subsequently upheld this element of the decision, quoting paragraphs 30–32 of the Court of Appeal judgment. See further at paragraph 41 of this manual. [↑](#footnote-ref-9)
10. See the published policy [Government Security Classifications](https://www.gov.uk/government/publications/government-security-classifications) [↑](#footnote-ref-10)
11. [2014] 1 WLR 1071, [2013] 2 All ER 897 [↑](#footnote-ref-11)
12. [2012] 2 AC 115 [↑](#footnote-ref-12)
13. SIAC decisions of 14th January 2014 and 8th May 2014 [↑](#footnote-ref-13)
14. HMG response to the Constitutional Affairs Select Committee Report – June 2005 Cm 6596 [↑](#footnote-ref-14)
15. Seventh Report, Session 2004-5, 3rd April 2005 [↑](#footnote-ref-15)
16. [2012] AC 452 [↑](#footnote-ref-16)
17. See, for example, *Abu Qatada v Secretary of State for the Home Department* SC/15/2002, 8th March 2004*.* [↑](#footnote-ref-17)
18. Or the Bar of Northern Ireland. [↑](#footnote-ref-18)
19. See the SIAC Procedures Rules 2003 R36(2), also CPR 76.25 (Prevention of Terrorism Act 2005) and CPR 82.11 (Justice and Security Act 2013). [↑](#footnote-ref-19)
20. Whilst a normal lawyer-client relationship does not exist between a Special Advocate and an Excluded Party, those concerned with the communication process agree that some confidentiality principle akin to LPP must exist to protect certain communications originating from a Special Advocate to those whose interests they represent. [↑](#footnote-ref-20)
21. See s6(11) JSA 2013 [↑](#footnote-ref-21)
22. See rule 38 of the SIAC Procedure Rules, also CPR 76.29 (for TPIMs) and CPR 82.14 (JSA matters). [↑](#footnote-ref-22)
23. A duty imposed on SIAC by rule 4(3) of the SIAC Procedure Rules 2003. [↑](#footnote-ref-23)
24. Rule 35(b) of the SIAC rules and CPR 80.20(b) & 82.10(b) refer to Special Advocates “adducing evidence”. [↑](#footnote-ref-24)
25. See paragraph 26 of the SIAC Practice Note of 5 October 2016. It is considered that practice in other forums should mirror this. [↑](#footnote-ref-25)
26. See for instance rules 48(3) and 47(5) of the SIAC Procedure Rules 2003 SI 2003/1034 [↑](#footnote-ref-26)
27. Hansard HL Deb Vol 739 Col 155 17 July 2012 [[Online](https://hansard.parliament.uk/Lords/2012-07-17/debates/12071775000563/JusticeAndSecurityBill(HL))] [Accessed 19th March 2019] Available from: <https://www.parliament.uk/> [↑](#footnote-ref-27)
28. E.g. in the Family Court see the President’s Guidance dated 26th March 2015, *The Role of the Attorney General in Appointing Advocates to the Court or Special Advocates in Family Cases.* This states that the Attorney General will not fund a Special Advocate and that the paying party should be identified before an appointment is requested. [↑](#footnote-ref-28)
29. [2018] 1 WLR 163 [↑](#footnote-ref-29)
30. [2010] 2 AC 269 [↑](#footnote-ref-30)
31. 26 BHRC 1, (2009) 49 EHRR 29, [2009] ECHR 301 [↑](#footnote-ref-31)
32. EU:C:2013:363, [2013] QB 1136 [↑](#footnote-ref-32)
33. [2014] QB 820 [↑](#footnote-ref-33)
34. [2005] 2 AC 68, para 155 [↑](#footnote-ref-34)
35. [2012] QB 91 [↑](#footnote-ref-35)
36. [2015] 1 WLR 4799 [↑](#footnote-ref-36)
37. [2011] ICR 938 [↑](#footnote-ref-37)
38. [2016] QB 595 , [2015] ICR 1179 [↑](#footnote-ref-38)
39. [2012] 1 AC 531 [↑](#footnote-ref-39)
40. This manual is not intended to provide a detailed summary of PII. PII is a legal principle whereby a court order can be made in civil or criminal proceedings allowing one party to refrain from disclosing evidence to the other party or parties where disclosure would be damaging to the public interest. Therefore, in contrast to CMPs, if the court issues a PII order then that material is neither disclosed nor considered by the court when it determines the underlying matter. See paras 134-135 and 152-154 for further information in respect of PII in the context of CMPs. [↑](#footnote-ref-40)
41. See Lord Dyson at [69] [↑](#footnote-ref-41)
42. See the judgment of Richards LJ at [47-48] in *McGartland v SSHD* [2015] EWCA Civ 686 [↑](#footnote-ref-42)
43. [2016] 3 All ER 837 [↑](#footnote-ref-43)
44. [2016] A.C.D. 5 [↑](#footnote-ref-44)
45. [2014] 1 WLR 4240 [↑](#footnote-ref-45)
46. [2016] A.C.D. 74 [↑](#footnote-ref-46)
47. [2016] 3 C.M.L.R. 37 [↑](#footnote-ref-47)
48. [2014] QB 112 [↑](#footnote-ref-48)
49. [2016] 3 C.M.L.R. 42 [↑](#footnote-ref-49)
50. *R(XH and AI) v SSHD* [2016] EWHC 1898 (Admin), [2016] ACD 117 and in the Court of Appeal at [2017] EWCA Civ 41, [2018] QB 355. [↑](#footnote-ref-50)
51. [2016] ACD 114 [↑](#footnote-ref-51)
52. Section 3 of the Nationality, Immigration and Asylum Act 2002 [↑](#footnote-ref-52)
53. Section 7 the 1997 Act. [↑](#footnote-ref-53)
54. Section 3 of and Schedule 3 to the 1997 Act. [↑](#footnote-ref-54)
55. [2010] 2 WLR 1012 [↑](#footnote-ref-55)
56. See Laws LJ at paragraph 112 [↑](#footnote-ref-56)
57. See Laws LJ at paragraphs 82 and 83 [↑](#footnote-ref-57)
58. *Al Jedda v Secretary of State for the Home Department* SC/66/2008 at [7]. [↑](#footnote-ref-58)
59. See s40(4) British Nationality Act 1981 which requires statelessness to be considered by the SSHD in making the decision. [↑](#footnote-ref-59)
60. as inserted by section 15 of the JSA 2013 [↑](#footnote-ref-60)
61. <https://www.gov.uk/government/publications/good-character-nationality-policy-guidance> [↑](#footnote-ref-61)
62. See President’s Guidance 26 March 2015 - *The Role of the Attorney General in Appointing Advocates to the Court or Special Advocates in Family Cases*. [↑](#footnote-ref-62)
63. [2005] QB 410 [↑](#footnote-ref-63)
64. [2005] 2 AC 738 [↑](#footnote-ref-64)