Government Response to the Constitutional Affairs Select Committee's Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates

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Government Response to the Constitutional Affairs Select Committee's Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates

Presented to Parliament by the
Secretary of State for Constitutional Affairs and Lord Chancellor

by Command of Her Majesty
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Introduction

The Government is grateful to the Constitutional Affairs Select Committee for its report. The Committee has made a number of recommendations, particularly in relation to the use of Special Advocates in appeal proceedings before the Special Immigration Appeals Commission (SIAC) and the High Court. The Government is in the process of taking forward some of these recommendations and further details are provided in the next section.

In deciding whether recommendations should be implemented, the Government has to balance the need to protect the interests of national security and an individual's right to a fair trial. The Government believes that it has struck a fair and reasonable balance in devising the judicial procedure for dealing with closed material and acknowledges the Committee’s role in securing important changes to the rules of disclosure. The Government will continue to keep the Special Advocate system under review.

Response to Recommendations

The Committee's recommendations may be divided into three broad areas:

- the operation of SIAC;
- the use of Special Advocates and the disclosure of closed material; and
- the judicial tests for control orders.

The Government's response considers the Committee's recommendations as they fall under these categories.

The Operation of SIAC

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

The Government acknowledges that numbers of cases involving deportation and deprivation of citizenship are likely to be relatively small. However, it takes the view that there is no advantage in moving these cases from SIAC to the High Court. SIAC was established in 1997 to deal with appeals of this nature. The judicial bench comprises Senior Immigration Judges from the Asylum and Immigration Tribunal (AIT) who are experts in this narrow and specialised area of law. It also has lay members with similar experience, including national security expertise. Consequently, the Government has concluded that SIAC should be retained in its present form.

The Use of Special Advocates and the Disclosure of Closed Material

Recommendation 2 - Although the use of Special Advocates is being extended in the UK, we believe that it is one which should only be operated under the most exceptional circumstances which call for material to be kept closed. (Paragraph 55)

The Government agrees that Special Advocates should only be used in exceptional circumstances.

Recommendation 3 - The disclosure process under the SIAC system represents a considerable weakening of the judicial protection available under the common law Public Interest Immunity rules. (Paragraph 59)

It is neither appropriate nor helpful to compare the SIAC system of disclosure with that which pertains in Public Interest Immunity (PII) cases. In the latter cases, if the Court orders disclosure in circumstances where the Government considers that disclosure would cause real harm to the public interest, it remains open to the Government to withdraw that material from the case. Often the effect of that is that the case has to be abandoned.

In cases under the SIAC scheme, the whole purpose of the open and closed hearing model is to enable the risk which the appellant is considered to represent to be fully considered by the Commission. If the Government and subsequently the Commission were forced to subject the closed material to the sort of balancing exercise which applies in PII cases, it is quite likely that most of the material ordered to be disclosed would have to be withdrawn from the case and the appeal might well have to be abandoned, with the consequent risk to national security of that outcome.

It is more appropriate to compare the system with that which it replaced. Prior to the enactment of the SIAC Act, the procedure used in SIAC cases was an advisory panel known as the "Three Wise Men". The panel saw the classified material to which the Secretary of State had regard when making his decision to deport. The panel could then advise the Secretary of State of their view of the material and the decision. Such advice was not binding. Furthermore, neither the appellant nor anyone on his behalf was shown the classified material and had no opportunity at all to challenge it. The Government recognises that the current system is not ideal but this is the best system which can be devised to strike a fair balance between the interests of justice and the interests of national security, bearing in mind the risk posed to national security by the appellant and the risk to national security which

would undoubtedly arise (as Lord Carlile has acknowledged) if the closed material were revealed to the appellant.

<u>Recommendation 4</u> - We recommend that an appropriately sized pool of Special Advocates, from which appellants can pick their representation, should be established as soon as is practical and expect the Government to keep to its proposed timetable. (Paragraph 74)

Advertisements for Special Advocates were placed in the professional journals, *"Counsel"* and the *"Law Society Gazette"*, for barristers and solicitors at the beginning of April 2005. Details of the competition and the application pack were posted on the Attorney General's Office website. The competition closed on 9 May 2005 and attracted 33 applications. The selection process began in early June in line with the Government's proposed timetable.

The intention is to appoint Advocates with a wider range of experience, including experience of criminal law and procedure, cross-examination and the handling of large volumes of evidence, including those with public law experience.

The resulting increase in the panel of Special Advocates will allow an appellant greater choice in selecting his preferred Special Advocate, subject to the following provisos which the Government mentioned in evidence:

(a) there must be no conflict with any other appeal in which that Special Advocate is acting or has previously acted; and

(b) the Special Advocate must not have had prior access to relevant closed material, as otherwise he would not be in a position to speak to the appellant or his legal representative.

When the first control orders were made in March 2005, the controlled individuals were offered the option of having input into the choice of Special Advocate, which most of them declined. In future cases, a list of security-vetted counsel will be provided to an appellant. Subject to the advocate's availability and the provisos as mentioned above, the appellant will be able to choose from the list.

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<u>Recommendation 5</u> - We urge the Attorney General and the Lord Chancellor to act swiftly in improving the Special Advocate system in consultation with the Special Advocates themselves and other lawyers experienced in SIAC cases. (Paragraph 81)

The Government has consulted a delegation of Special Advocates over implementing a package of improved measures. It has established a 'Special Advocates Support Office' ('SASO') (see recommendations 11 & 12 below) and produced a comprehensive written training pack and database of case law and rulings for the Special Advocates as follows:

<u>Training and Database</u> - A comprehensive written training pack, comprising both an open and a closed manual, has been completed. The open manual sets out the origin of the role of Special Advocates, the legal frameworks underpinning it, the duties and responsibilities of the Special Advocate and practical guidance on the procedures applying to proceedings involving Special Advocates. The pack will be provided to the Special Advocate when he is instructed. All existing Special Advocates have been sent a copy of the open manual for comments and feedback. Copies have also been placed on the website of the Attorney General's Office (www.lslo.gov.uk).

The closed part of the training pack contains sensitive material and is only available to those who have been security vetted to the required level. The closed part of the training pack will be maintained by SASO.

A comprehensive database of relevant judgments, rulings, skeleton arguments and similar material – again comprising open and closed material – is being prepared and will also be provided to the Special Advocates.

These measures will provide significantly enhanced support to those appointed as Special Advocates.

<u>Recommendation 6</u> - We recommend that the Government reconsider its position on the question of contact between appellant and special advocate following the disclosure of closed material. It should not be impossible to construct appropriate safeguards to ensure national security in such circumstances and this would go a long way to improve the fairness of the Special Advocate system. (Paragraph 86).[1]

Under the current system, the Special Advocate is able to communicate fully with the appellant and his legal advisers throughout the initial stages of the process. He is provided with the Secretary of State's open evidence, the appellant's evidence in response and the Secretary of State's open reply to that response. Insofar as is possible without compromising national security, the open case will contain specific allegations or, at least, the generality of his case. The Special Advocate will be able to discuss with the appellant's legal advisers the way in which they intend to argue the case and their tactics.

The point at which the Special Advocate becomes unable to communicate to the appellant and his legal advisers is when the closed material is served on him. That is not done until the Special Advocate confirms that he is ready to receive it. Even after this, the appellant and his legal advisers can communicate to the Special Advocate without any constraint - it is communication from the Special Advocate that is restricted.

Moreover, this restriction is not an absolute prohibition. The Special Advocate can communicate with the appellant and his legal advisers provided he obtains the permission of the Commission, the High Court, and the Secretary of State to do so. This is not just a theoretical possibility. The Special Advocate has obtained permission in a number of cases to communicate legal points and factual matters that have emerged from cross-examination in a closed hearing but which can be disclosed without damaging national security. Whilst this process is open to the objection that, in some cases, it might require the Special Advocate to disclose his thinking to the Secretary of State, it is a process which could be relied on more widely if the Special Advocate wished to seek specific instructions, so long as the questions were framed in such a way that it did not compromise national security.

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[1] The Government's response to this recommendation also covers recommendation 14 (ii) (paragraph 112).

Some of the difficulties which the Special Advocates experience in being able to argue the appellant's case have emerged because the appellants have declined to discuss the case with their Special Advocate when they are able to, and because they have refused to engage with the open appeal process with the result that the Special Advocate is completely in the dark about the nature of the appellant's defence. As was said by SIAC in one of the open Anti-terrorism, Crime and Security Act 2001 appeals:

> "We recognise that K's unwillingness to participate in the hearing placed the Special Advocates in an invidious position. Had K presented an effective challenge to any part of the open material, the Special Advocates could have pursued that challenge in closed session, to ascertain whether, and if so to what extent, that part of the open material was supported, or negated, by any of the closed material. In a case such as this, absent any challenge to the open material by an appellant it will be difficult (though not always impossible,...) for the Special Advocate to make any effective challenge to the closed material." [2]

<u>Recommendation 7</u> - We regard these changes to the rules of disclosure made in response to the Committee's concerns as a significant improvement from the previous situation, assuming that the courts give wide meaning to the term "matters under consideration" (Schedule to the Prevention of Terrorism Act 2005 Para4(3)(a)). (Paragraph 96)

The Government welcomes the Committee's comments.

<u>Recommendation 8</u> - The Government could also usefully consider whether intelligence service personnel could be provided in support of Special Advocates in the handling of closed material, and whether Special Advocates could be enabled to appoint and call evidence from appropriately cleared experts. (Paragraph 97).

This recommendation falls into two parts:-

(a) the availability of intelligence expertise in a support function; and

(b) the calling of expert evidence in other areas in closed session

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[2] www.hmcourts-service.gov.uk/legalprof/judgments/siac/outcomes/sc272003k.htm

In relation to the former, the Government is unable to identify persons who could appropriately be asked to fulfil that function. Those serving members of the Security and Intelligence Agencies who would be best placed to do so owe duties of confidence and loyalty to the Agencies by whom they are employed. It is, in any event, unlikely that the Special Advocates would consider them sufficiently impartial. Even if, for example, a member of the Security Service were willing personally to undertake the role (which is highly unlikely), to ask such a person to provide arguments to the Special Advocate to undermine an assessment made by one of his colleagues - in effect to act against the interests of national security - would place that employee in an invidious position. It is difficult to see how he could perform this role consistent with his duties of confidence and loyalty. The same is true of retired members of the Agencies, with the additional difficulty that, after a period of time, their expertise in intelligence work is likely to become outdated.

The Government is, however, able to confirm that employees of the Security Service remain willing (as they have been in the past) to assist the Special Advocates with specific enquiries or, even more generally, to understand the nature of intelligence material. This includes the provision of secure internet facilities for the purposes of conducting searches of material in the public domain. The Special Advocates are being provided with a training pack which includes, in classified form, explanations of closed material to assist with that understanding. The provision of security cleared instructing solicitors will further assist. The Security Service is considering whether there is any further assistance which can be given, possibly in the form of a short induction into intelligence assessments. However, the feasibility of that remains under consideration and no firm commitment can be given at this time.

As regards expert evidence more generally, in principle it is open to Special Advocates, in an appropriate case, to seek the assistance of experts and to call expert evidence (subject to the agreement of the Commission). Whilst it is not possible to give an unlimited commitment to the funding of such expert evidence, this will be considered on a case-by-case basis should the situation arise. Security clearance of the particular expert would also, of course, be required.

Recommendation 11 - The Government has proposed to establish a team of three Government lawyers to form a 'Special Advocate Support Office (SASO) to be located within the Treasury Solicitor's Department. We do not feel this goes far enough and believe that the Government should establish a more substantial facility to support adequately what appears likely to be increasing numbers of Special Advocates. We agree with those Special Advocates who said that they needed a security-cleared team which is able to conduct research (legal and otherwise) and also that they would benefit from the provision of persons with appropriate expertise to assess the controlled material. (Paragraph 108)

Recommendation 12 - The Lord Chancellor, in consultation with the Attorney General, should establish an 'Office of Special Advocates'. (Paragraph 109) [3]

A new office, the Special Advocates Support Office (SASO) was created at the end of May. The Office consists of three government lawyers who are all security-vetted to a level at which they will be able to access and handle sensitive material as well as providing a substantive instructing solicitor role for the Special Advocates. The size of SASO will be kept under review in the light of demand.

The Government believes that these arrangements will provide a much-enhanced level of support to the Special Advocates. As a result, there will be two solicitors acting as a Special Advocate's instructing solicitor: the substantive instructing solicitor who works in the SASO and a procedural instructing solicitor.

The procedural instructing solicitor may or may not be security-cleared but will deliver the initial brief to the Special Advocate with any open material, as well as engaging in correspondence with the parties and, for example, attending directions hearing and liaising in relation to listing.

The SASO substantive instructing solicitor is security-vetted and thus will be able to see the closed material, engage with the substance of the case and provide administrative support to the Special Advocate. SASO is located in the Treasury Solicitor's Department, but will operate entirely independently of the immigration team, which act for the Secretary of State for the Home Department.

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[3] This response also covers recommendations 10 (paragraph 107), 13 (paragraph 111) & 14 (iii) (paragraph 112).

Establishing an Office of Special Advocates – The Government believes that the arrangements as described above will adequately address the Special Advocates' legitimate concerns without the need to establish a wholly separate "Office of Special Advocates". Such a body would involve unnecessary bureaucracy and incur disproportionate public expenditure.

The Judicial Tests for Control Orders

Recommendation 14 (i) – We recommend, in particular, that the Government ensures that it moves from judicial review on non-derogating control orders to an objective appeal considering whether or not there is 'reasonable suspicion' that an appellant is involved in terrorist-related activities. (Paragraph 111)[4]

The Government does not accept that the appeal mechanism is inappropriate, given the preventative measures that control orders seek to impose and the circumstances in which they arise, i.e. an assessment of intelligence material. It is important to bear in mind that non-derogating control orders cannot impose obligations which amount to a deprivation of liberty engaging Article 5 ECHR: rather they involve the imposition of obligations that will interfere with, at most, the individual's Convention rights under, for example, Articles 8, 9 and 10. Curtailments by public authorities of these Convention rights occur routinely under numerous statutory regimes, with no judicial oversight other than judicial review, and there is no suggestion that such arrangements are incompatible with the ECHR. In the non-derogating control order context, the judicial review principles being applied are consistent with these other regimes, with the added safeguard that judicial involvement is automatic in each case, whether or not the individual chooses to challenge the control order. The Government believes that this is a sufficient level of judicial scrutiny.

The Government considers that judicial review allows the court to consider objectively the reasonableness of the grounds which gave rise to the Home Secretary's suspicion. For this reason, the Government does not consider it necessary to adopt the Committee's proposal in paragraph 112 (i), that the court should assess whether there is a reasonable suspicion. This would effectively make the court the primary decision-maker on this matter of fact. The Government

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[4] The Government's response to this recommendation also covers recommendation 9 (Paragraph 105)

does not consider this to be appropriate, given the intelligence nature of the material being assessed and the fact that the Home Secretary, with advice from the Security Service with its special competence in this area, is best placed to take such decisions. This was accepted in the context of the Part 4 cases which involved detention: even more so therefore in the case of non-derogating control orders whose obligations fall short of detention.

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Conclusion

The Government is grateful to the Constitutional Affairs Select Committee for its findings which have served to secure important changes both in the support provided to Special Advocates and in the judicial process relating to appeals with national security implications. The Government acknowledges that there are continuing concerns over the Special Advocate system and the need to maintain secrecy over confidential and sensitive intelligence material. However, whilst the system may not appear to provide the perfect judicial blueprint, it does go a long way towards ensuring that conflicting needs of national security and access to justice are met in a fair and rational manner.

The Government is committed to introducing further legislative measures to counter acts of terrorism and this report will continue to inform Government deliberations in developing new proposals.

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