SC/36/2005
SC/15/2005

Date of Judgment 12th July 2006

SPECIAL IMMIGRATION APPEAL COMMISSION

Before:

The Honourable Mr Justice Ouseley, Chairman
Mr C M G Ockelton
Mr J Mitchell

Y and OTHMAN	**APPELLANTS**
and	
Secretary of State for the Home Department	**RESPONDENT**

For the Appellant - Y	Mr B Emmerson QC Mr R Hussein Mr D Friedman
Instructed by:	Birnberg Peirce & Partners
For the Appellant: Othman:	Mr E Fitzgerald QC Mr R Hussein Birnberg Peirce & Partners
Instructed by:	
For the Respondent :	Mr I Burnett QC Mr R Tam
Instructed by:	Treasury Solicitor

Introduction

1. This interlocutory application for directions would normally give rise to issues dealt with wholly in closed session. The Appellant Y wished to raise issues of principle and of general application about the disclosure process under Rule 38 of the SIAC Procedure Rules. We heard submissions in open about them in the course of our consideration of disclosure issues before the substantive appeal. We also heard an additional submission in closed session from the Special Advocate, which we deal with in open because it raises nothing which cannot be dealt with in open. Submissions in support of those made on behalf of Y, were also made on behalf of O, in whose appeal Rule 38 hearings have been held, the rulings in which were to be subject to whatever might eventuate from this particular hearing. We gave our decision shortly afterwards and now provide our reasons.

2. The submissions with which we are concerned relate to evidence said to go not to the national security interests of the United Kingdom but to the safety of each Appellant if returned to his own country. It is that feature of the evidence which is said on behalf of the Appellants to require different treatment from that applied to national security evidence. The principal submissions on the Appellant's behalf are, firstly, that given the fundamental principles of human rights involved in the assessment of evidence going to the safety of return, Parliament did not intend that any such evidence be heard in closed session; alternatively that if there is any scope for such evidence to be heard in closed session then, firstly, no deference attaches to the Secretary of State's assessment of whether non-disclosure is in the public interest, and the Commission must balance the strength of the Respondent's claimed non-disclosure on public interest grounds against the strength of the Appellant's claim to have full knowledge of the relevant material.

3. The term "disclosure" was used in the submissions to cover two distinct processes, without the necessary close attention always being paid to the important distinctions between them. First, "disclosure" in the Commission's proceedings is the word routinely used to describe the Commission's decision whether or not to uphold the Secretary of State's objection to the disclosure to the Appellant, as distinct from the Special Advocate, of material upon which he relies. This process is governed by Rule 4 of the SIAC Procedure Rules which, in summary, requires SIAC to uphold the objection where disclosure would be contrary to various public interests including national security and international relations. SIAC has made it clear that in dealing with a national security objection to disclosure, it does not strike a balance between the degree of harm which disclosure would do to national security and fairness to the Appellant in his knowing what that undisclosed material contains.

4. Disclosure" has also been used in a second sense, to cover the production by the Secretary of State, whether to the Appellant or to the Special Advocate, of material which the Appellant or Special Advocate considers ought to be made available, whether by way of documents, or answers to questions, following if necessary the making of enquiries of other domestic or foreign officials. This resembles but can be broader than CPR "Disclosure". It may be a matter for debate as to how far such a process is contemplated by the Procedure Rules.

The Legislation

5. The Commission derives its jurisdiction from the 1997 Act, in particular section 2(1):

> "2 Jurisdiction: appeals
> 1. A person may appeal to the Special Immigration Appeals Commission against a decision if-
> (a) he would be able to appeal against the decision under section 82(1) or 83(2) of the Nationality, Immigration and Asylum Act 2002 but for a certificate of the Secretary of State under section 97 of that Act (national security etc), or
> (b) an appeal against the decision under section 82(1) or 83(2) of that Act lapsed under section 99 of that Act by virtue of a certificate of the Secretary of State under section 97 of that Act."

6. Section 97 of the Nationality, Immigration and Asylum Act 2002 is as follows:

> "97. National Security etc
> (1) An appeal under section 82(1) or 83(2) against a decision in respect of a person may not be brought or continued if the Secretary of State certifies that the decision is or was taken-
> (a) by the Secretary of State wholly or partly on a ground listed in subsection (2), or
> (b) in accordance with a direction of the Secretary of State which identifies the person to whom the decision relates and which is given wholly or partly on a ground listed in subsection (2).
>
> (2) The grounds mentioned in subsection (1) are that the person's exclusion or removal from the United Kingdom is-
>
> (a) in the interests of national security, or
> (b) in the interests of the relationship between the United Kingdom and another country.

(3) An appeal under section 82(1) or 83(2) against a decision may not be brought or continued if the Secretary of State certifies that the decision is or was taken wholly or partly in reliance on information which in his opinion should not be made public-

a. in the interests of national security,
b. the interests of the relationship between the United Kingdom and another country, or
c. otherwise in the public interest.

(4) In subsections (1)(a) and (b) and (3) a reference to the Secretary of State is to the Secretary of State acting in person."

7. Procedure in the Commission is governed by the 1997 Act and by Rules. The rule-making power is in section 5 of the Act, which enables the Lord Chancellor to make rules prescribing the practice and procedure in the Commission, by statutory instrument enacted by affirmative resolution of each House of Parliament. The following subsections of section 5 are relevant:

"(3) Rules under this section may, in particular-
(a) make provision enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,
(b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,
(c) make provision about the functions in proceedings before the Commission of persons appointed under section 6 below, and
(d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence.

(6) In making rules under this section, the Lord Chancellor shall have regard, in particular, to-

(a) the need to secure that decisions which are the subject of appeals are properly reviewed, and
(b) the need to secure that information is not disclosed contrary to the public interest."

8. The current Rules are the Special Immigration Appeals Commission Procedure) Rules (SI 2003/1034). Rule 4 is headed "*General duty of Commission*" and is as follows:

"4(1) 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.

(2) Where these Rules require information not to be disclosed contrary to the public interest, that requirement is to be interpreted in accordance with paragraph (1).

(3) Subject to paragraphs (1) and (2), the commission must satisfy itself that the material available to it enables it properly to determine proceedings."

9. Rule 39(5) permits the commission to give directions requiring any party "*to file and serve – (i) further details of his case, or any other information which appears to be necessary for the determination of the appeal or application*". Rule 44 provides that the Commission may receive evidence that would not be admissible in a court of law and that no person shall be compelled to give evidence or produce a document which he could not be compelled to give or produce in a civil cause in the relevant part of the United Kingdom. Rule 45 enables the Commission to issue witness summonses. (It may be observed that Rules 44 and 45 are, mutatis mutandis, in similar terms to those of Rules 51 and 50 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, which regulate proceedings in immigration appeals that are not before the Commission because section 2 of the 1997 Act does not apply to them.)

Submissions

10. The primary submission made on behalf of the Appellants is that in matters relating to the safety on return, as distinct from the national security of the United Kingdom, there is no scope for the Commission's bifurcated procedure with disclosure of secret and sensitive material only to the Special Advocates. Mr Emmerson QC for Y and Mr Fitzgerald QC for O put their argument in a variety of ways. The more fundamental argument drew on the principle of legality.

11. The argument started from the premise that the use of closed evidence, made available only to the Special Advocate, was unfair, and was only justified by the need to protect national security. Although the Commission and its processes were introduced following the decision of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413, and although the procedure of protecting the Appellant's interests by the use of a Special Advocate making representations in opposition to the Secretary of State's case but not sharing information with the Appellant himself was suggested by the

Court in that case, apparently on the basis of the Court's understanding of procedure in Canada, that aspect of the case was concerned with national security evidence. Although Article 3 ECHR was very much to the fore, the case did not raise issues of any closed evidence in relation to safety on return.

12. The issue of safety on return involved fundamental rights under Articles 2 and 3 ECHR, and potentially flagrant denials of rights under Articles 5 and 6. These considerations required anxious scrutiny, and the highest degree of procedural fairness, as Bingham LJ had said in *R v SSHD ex p Thirukumar* [1989] Imm AR 402 at 414. They submitted that there was nothing in the Act or the Rules that required or permitted non-disclosure to the ordinary advocate of secret or sensitive material going only to safety on return. Such an interpretation, they argued, would be consistent with general and fundamental principles of justice and of access to the courts. A number of authorities on the application of the principle of legality in statutory interpretation were cited but one extract suffices: Lord Hoffmann said in *R v SSHD ex parte Simms* [2000] 2 AC 115, at 131:

> "Parliament can, if it chooses, legislate contrary to fundamental principles of human rights... But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of expressed language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

13. Hence, it was submitted that unless primary legislation showed that Parliament had confronted and resolved the issue of whether someone should be put at risk of a fundamental breach of human rights on return to his country of origin, on the basis of evidence disclosed only to his Special Advocate, the Act and Rules should be read as precluding such restricted disclosure in relation to safety on return. Parliament, it was submitted, had not contemplated non-disclosure of safety on return evidence.

14. The House of Lords in *A and Other v SSHD (No 2)* UKHL 71, [2005] 3 WLR 1249 had pointed out that SIAC Procedure Rule 44(3), which permitted SIAC to receive evidence not admissible in a court of law, should not be regarded as displacing the normal exclusionary rule applied in courts for evidence obtained by torture. It was only a short step to say that evidence relevant to whether someone would be at risk of torture should not be considered if not disclosed to the person potentially at risk.

15. Another formulation to the same end was that the language of s5(6)(b) of the 1997 Act, carried forward into Rule 4, could and should be interpreted so that the "public interest" included the interest of ensuring that no one was returned to a country where they might face a real risk of death or torture or other flagrant denial of human rights,

without having had the fullest opportunity to deal with relevant material. It would never be contrary to that "public interest" to disclose material relevant to safety on return.

16. It was submitted that an Appellant before SIAC should not be worse off than if he were appearing before the AIT contesting an intended deportation order on "conducive" but not national security grounds.

17. The Appellants' alternative submission was that those arguments all led to the conclusion that SIAC had a power and duty under Rule 4 to balance the public interest in non-disclosure against the public and private interest in disclosure.

18. They also submitted that the Commission should not defer to the assessment of the Secretary of Sate in considering whether the Rule 4(1) criteria for withholding information on the Appellants were met; and, secondly, that as soon as the Commission reached a view that undisclosed material may be of assistance to the Appellants, the balancing exercise fell to be resolved "*resoundingly*" in favour of the Appellants.

19. Mr Garnham QC, as Special Advocate, submitted that there was a balance inherent in the Act which was not reflected in the language of Rule 4. The principle of legality therefore required s5(6)(b) to be interpreted, as a fall back, as containing the obligation to perform a balancing exercise.

20. In order to understand the full effect of those submissions as to the Appellants, it is necessary to set out the Appellants' and Special Advocates' submissions as to the scope of the material which they say that the SSHD is obliged to produce to them and to the Commission, whether under Rule 4(3) or not. All of this would have to be produced in open, or as a fall back be produced subject to a balancing exercise.

21. The Appellants sought production and disclosure of:

    i. Internal government and security service opinion on the published 'country material', ie. on the published reports of non-governmental organisations or of other states as to the human rights situation in the proposed receiving States (ie. Algeria and Jordan), tending to undermine the Secretary of State's case that a safe return may be effected and/or tending to support the Appellants' case that it may not;
    ii. Internal government and bilateral government material concerning MOUs and their associated monitoring arrangements, and concerning past dealings with the proposed receiving State and its representatives, tending to undermine the Secretary of State's case that diplomatic assurances (1) are trustworthy, (2) are provided in good

faith and (3) are an effective, reliable and achievable means of protecting against ill-treatment, and/or tending to support the Appellants' case that they are none of these things.

22. This was elaborated so that amongst other matters the material sought would include "*a detailed history (with underlying documentation) of the advice sought by the respondent and the opinions given by government and non-government personnel as to why it was previously not possible to remove the appellants...*", all the correspondence and draft memoranda between the UK and the receiving state, together with all internal government documents dealing with or commenting on negotiations or assurances. O sought additionally a similar range of material, including liaison material between Jordan and the USA in relation to "suspected rendition practices", other violations of international human rights law, a history of all communications about torture.

23. In a considered request by a number of Special Advocates for information dated 1st December 2005, and made open, the Special Advocates raised a number of generally pertinent questions about safety on return, and sought disclosure i.e. production of "all relevant documents" (in open, or closed if necessary) including:

    (a) UK Government internal and/or external communications, minutes, submissions, briefings, minutes of meetings and/or assessments;

    (b) telegrams and/or other communications emanating from or passing through British posts in Jordan and Algeria (including those from any Secret Intelligence Service personnel operating from or through those posts); and

    (c) communications passing between the UK Government and any foreign Government; and

    (d) all relevant correspondence passing between the UK Government and the bodies or organisations selected as possible candidates for the monitoring role. (References to the UK or foreign Governments include all government departments, ministries, Secret Intelligence Service, Security Service, agencies and officials.)

24. As did the open advocates, Mr Garnham put weight on the nature of the material disclosed in *Youssef v SSHD* [2004] EWHC 1884 QB, Field J. This was an action for damages for unlawful detention. The Government had detained him whilst, ultimately unsuccessfully, it sought assurances from Egypt about his treatment were he returned there. *Youssef* alleged that the SSHD ought to have realised earlier that his removal was impossible, hence his detention was unlawful. Field J held that only the last fourteen days of detention was unlawful.

25. There was a wealth of material available to the judge, apparently disclosed by the Respondent without a judicial ruling. Mr Garnham, without making any reference to material that might have been disclosed to him in these proceedings, said that *Youssef* showed that material under a number of headings was available to the government, and had been disclosed in that case. The categories he identified were as follows:

> Correspondence within a government department;
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> Correspondence between government departments;
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> Correspondence between official and Ministers;
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> Correspondence between Ministers;
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> Correspondence between the Foreign and Commonwealth Office and the Egyptian Embassy.
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> Correspondence relevant to arrangements between the Egyptian government and an organisation which might have been able to monitor any inter-governmental agreement;
>
> Other documents generated during the course of the negotiations with Egypt.

26. Mr Garnham pointed out that, as the judgment itself recognises at paragraph 24, much of the material disclosed in *Youssef* was regarded as secret and highly sensitive. Indeed, it had not been disclosed in earlier habeas corpus proceedings. It had nevertheless been made available to the claimant. The extent of disclosure in the CPR sense in that case, also showed what in reality was not to be regarded as disclosure harmful to international relations.

27. The extent of disclosure in that case showed the extent of material which probably existed, and which ought to be produced to the Appellants or, as a fallback, to the Special Advocates alone.

28. The open and Special Advocates submitted that this material should also be produced i.e. "disclosed" in the CPR sense to the parties. It was suggested that in reality the Commission needed all this material and that its production would be the result of the actual or potential exercise of its Rule4(3) powers.

29. There was also considerable debate over whether such material produced by the SSHD to the Special Advocates in that way, upon which the SSHD did not himself rely to advance his case, was covered by Rule 38(7) which provides:

> "(7) Where the Commission overrules the Secretary of State's objection or directs him to serve any material on the appellant, the Secretary of State shall not be required to serve the material if he chooses not to reply upon it in the proceedings."

30. There was understandable concern that the SSHD, if his objections to disclosure to an Appellant under Rule 4 were not upheld, could use that provision to deprive an Appellant of material which was helpful to him.

Discussion and Conclusions

31. We propose to deal first with the submissions on production or disclosure in the CPR sense, whether that is to the Appellant directly or only to the Special Advocate, subject to the Rule 38/Rule 4 procedure.

32. This aspect is principally concerned with what was has come to be termed "exculpatory" material. That word may be apt in dealing with the national security part of the case but is less apt for safety on return material. It is better described as material which may advance the Appellant's case or undermine the SSHD's. As a result of Special Advocate and SIAC interventions in the Part 4 ATCSA appeals, as recorded by SIAC at paras 52-54 of its open generic judgment in *Ajouaou and Others v SSHD* 29 October 2003, the SSHD accepted an obligation to undertake a review of his files for "exculpatory" material.

33. There was some uncertainty on the Appellants' and Special Advocates' part as to how far if at all that approach applied, varied as appropriate, to safety on return material. The SSHD, through Mr Burnett QC, repeatedly made it clear that he would produce material which advanced an Appellant's case or undermined his own, in relation to safety on return as well as in relation to national security. We record that here. We also record that for those purposes the SSHD will in each case as, by the time of writing, experience confirms, produce an open and closed statement setting out the scope of the searches undertaken for such material. The searches go wider than the Home Office's own files.

34. Mr Burnett went further than to say that this obligation arose only at the state of what has become known as "the exculpatory review" – the SSHD's review of the files, after receipt of the Appellant's evidence, for material advancing the Appellant's case or undermining his own. He said that the SSHD sought to produce a fair and balanced picture from the outset and relied on the material he produced, whether it advanced his case or not. This he saw as reflecting the obligations of a public body facing judicial renew proceedings, an analogy made by the Appellants, and as an obligation also necessitated by the breadth of paragraph 364 of the Immigration Rules, dealing with deportation.

35. In that context, the SSHD accepted that the broad categories of material identified by the Appellant in this case (paragraph 21 above) were relevant and covered by the obligation which he had undertaken, subject to a reservation about the scope of those past dealings which could be relevant to a foreign state's trustworthiness on deportation related assurances. There were also reservations about the width of the Appellants' elaboration of those points and about the full availability of all the other material referred to and other caveats besides, but in

principle the SSHD accepted that the material related to areas relevant for examination.

36. The broad areas of material identified by Mr Garnham from *Youssef* were accepted as relevant for production but with real reservations about the width of the language used by the conjoined Special Advocates' submission, as cited above to describe the extent of documentation required (paragraph 23) and other caveats.

37. We make those points in order to record the SSHD's approach to the production of material which does not assist him, an approach which he accepts is generally to be adopted by him. It is also relevant to the effect of success for the Appellants' arguments as to what should be disclosed to them in open, under Rules 4 and 38.

38. This judgment does not deal with the detail of the various requests for the production of material, which were pursued further on other occasions.

39. There is a question as to whether all of that material would be material which SIAC would be obliged to obtain for itself under Rule 4(3) in order properly to determine proceedings. Mr Burnett submitted that, if it ever did become a live issue, Rule 4(3) would not cover precisely the same territory as that covered by the SSHD's stance on production; it would cover a lesser area of more precisely identified material.

40. Without reaching a final conclusion on that point, we are of the view that Rule 4(3) is not a general disclosure or production rule, akin to CPR Part 31, and does not cover all the material which the SSHD has publicly stated he is willing to produce. The application of Rule 4(3) depends on particular material or a particular area for investigation being identified. Its contested application should await an instance where the debate has a concrete focus.

41. On the main issue, we do not accept that there is an obligation to disclose in open to an Appellant all material relevant to the issue of safety on return which the SSHD may produce, whether he specifically relies on it or produces it because it may assist an Appellant.

42. The SIAC procedures were introduced to provide an appeal mechanism in national security immigration cases where none had existed before and to provide a fair balance between the legitimate need to protect the public interest and the need to provide a fair hearing for the Appellant. Part of that balance includes the procedure whereby a Special Advocate is appointed to represent the Appellant in relation to material which is not disclosed to the Appellant, including arguing that it can be disclosed without damage to the particular interest prayed in aid to justify its non-disclosure. The balance was envisaged in principle by the ECtHR and was enacted by Parliament. It includes an appeal on a point of law. There is no such inherent unfairness in that system that it requires adjustment to conform to principles of legality. The particular language in *Thirukumar* relating to the obligations of fairness reflected

a time when there was no appeal against the relevant immigration decision and only judicial review with its procedural emphasis could provide redress for error, substantive or otherwise.

43. The relevant statutory provisions are subsections 3 and 5 of section 5 of the SIAC Act. They show quite clearly that Parliament has grappled with the question of whether an Appellant should be told the whole case against him or should attend the whole hearing and has concluded that Rules could preclude that degree of knowledge or attendance. Subsection 5 required the Lord Chancellor in making Rules to have regard to two specific relevant factors, of which one is "*the need to secure that information is not disclosed contrary to the public interest*". In so far as the application of the principle of legality rests on the need for Parliament to grapple with the asserted unfairness and to express a clear conclusion on it, it has done so. The statutory provisions are in primary legislation and specifically address the issue of disclosure, recognising the need to prevent certain forms of damaging disclosure.

44. We do not see anything in the argument that disclosure should be approached differently according to whether the issue relates to risk to national security or to safety or risk on return. No such distinction is drawn in the Act or Rules. The Act uses the broad term "*the public interest*". It is striking that the language used in the Act to describe the interests to be protected is broad, the "*public interest*", and not a more circumscribed subset of that, namely "*national security*". Rule 4, as was so in the 1998 Rules, recognises that the international relations of the UK are a relevant public interest, is to be protected just as much as the interest of national security. No principle of legality argued before us warrants a distinction between those two areas of public interest.

45. The protection of the UK's international relations is the public interest most generally engaged in the objections to disclosure related to safety on return. To draw a distinction between classes of evidence by reference to the issue to which evidence goes is not warranted by statute, the Rules or any principle of legality. Indeed, there may well be items of evidence which relate to both aspects of an appeal: the nature of the security risk could affect the risk on return. Safety on return is also a compendious expression for issues which arise under both the ECHR and the Refugee Convention, but does not cover exclusion from the protection of the Refugee Convention. There is a large distance between saying that a general procedure Rule admitting evidence, which would not be admissible in a Court, could not override the normal requirement that evidence obtained by torture should not be admitted, and saying that the Rule, which specifically precludes certain evidence being disclosed to an Appellant with the clear authority of Parliament, should not apply to that evidence if it is being deployed in relation to a particular issue.

46. The current provisions governing the appeals which go to SIAC and not to the AIT support our view that the asserted distinction in terms of

disclosure between evidence going to national security and evidence going to safety on return or damaging to international relations is not correct. There never has been a split jurisdiction with some issues in a single appeal going to SIAC and others to the IAT/AIT. It would have been evident when SIAC was set up, because of *Chahal*, and is clear now that the appeal would involve safety on return issues, and no distinction was drawn between one type of issue and another, or one class of protected interest and another when it came to the drafting of the Act or the Rules.

47. S97 of the 2002 NIAA Act narrowed the IAT/AIT jurisdiction and widened that of SIAC in a way which illustrates our point. Subsections (1) and (2) of section 97 deal with cases where the Appellant's removal is itself said to be in the interest of national security or international relations. Subsection (3) applies where the Secretary of State certifies that "*the decision is or was taken wholly or partly in reliance on information which in his opinion should not be made public*" in the interests of national security, international relations or other public interest. Evidently in an individual case, the information on the basis of which a decision is taken can be wider than considerations merely of whether the individual should be removed from or required to leave the United Kingdom. We offer the following examples: (a) a decision that removal to a named country would lawful on the basis of the Secretary of State's view about conditions there; (b) a decision that a person with dual nationality should or could be removed to one country rather than another; (c) a decision that a person claiming to have no nationality should be removed to a particular named country (it is easily possible to see how such a decision might be based firmly on diplomatically-obtained information about the individual and his true nationality or identity); (d) a decision that a person ought to be removed as having obtained entry unlawfully where (although it cannot be said that his presence itself is a threat to national security) the means by which the unlawfulness is detected should not be made public. In our judgement the present legislative scheme clearly does envisage the Commission dealing, through its particular process, with information covered by section 97(3) and going beyond a national security risk to the United Kingdom arising solely from the Appellant's presence in the United Kingdom.

48. When the Commission's jurisdiction, as it now is, is examined as a whole, we can see no basis in principle for treating differently cases where the certification is under section 97(2) from the cases where the certification is under section 97(3). We can see further no basis in principle for separating in any particular case considerations which would have applied under section 97(2) from those which would have applied under section 97(3). Once an appeal is properly within the jurisdiction of the Commission, it is, as a whole, subject to the Commission's procedures. There can be no proper ground for an argument that that is not the effective and intended statutory scheme.

49. If the Appellants' argument that the approach to evidence on safety on return would be very different in the AIT were correct, that would be a potent demonstration of their argument. It would be unfair for someone whose case is in SIAC for national security reasons to have a less open analysis of safety on return evidence than someone facing deportation on other conducive grounds. But the argument is wrong. S97 shows that an appeal can be moved from the AIT to SIAC if the decision was taken on grounds which include the interests of the UK's international relations. S97(3) enables an appeal to be transferred if the decision was taken in part in reliance on information which should not be made public in the interests of international relations. Although this latter provision does not apply directly to this case because the decision had already been taken on national security grounds, SIAC does have jurisdiction to deal with cases where the removal is not on national security grounds, and is not concerned with national security evidence but only with international relations. So the legislative structure provides for SIAC and its procedures to apply to protect that interest. It follows that the argument put forward does not draw support from the statutory framework or some Parliamentary acknowledgment of a distinction between the two interests.

50. The reality is that in an IAT/AIT appeal, issues of this sort of wide-ranging production and disclosure have not arisen. Were it to do so, were transfer under s97 not to be possible and <u>if</u> the AIT had the power to order production of the type of material sought here, a balance would have to be struck between the public interest being protected and the interest of the Appellant. Subject to the specific arguments about balance to which we turn later, that balance is not struck in SIAC. The competing issues are dealt with in a different way. The wide range of materials is produced without any balance having to be struck between the public and individual interests, because its production is restricted to the Special Advocate where disclosure would be damaging. It might be that some of that material would be disclosed pursuant to a balancing process in an ordinary Court or in the AIT, a disclosure counterbalanced by the fact that other material would never see the light of day in anyone's hands. The SIAC procedures strike the balance a different way: full production and restricted disclosure as opposed to partial production, and unrestricted disclosure of that partial production. The SIAC process is not demonstrably less fair than would normally be the case in a Court, and certainly not to a degree which would support the argument that nothing in the Act or Rules prevented disclosure of that which would be harmful to international relations, if it were relevant to safety on return. National security evidence which might go to that issue was not said to be subject to a similar lack of protection, which illustrates that misapplication of the distinction between issues and interests upon which the Appellants' arguments rest.

51. We did not find <u>*Youssef*</u> of assistance on this point. It is clear that no objection was taken at trial to the disclosure of certain material which the SSHD had contended on earlier habeas corpus applications should

not be disclosed because its disclosure would be damaging to international relations. It seems to us probable that a judgment was reached about where the balance would be drawn in the application of public interest immunity in relation to an action for damages for unlawful imprisonment. But, as we have said in relation to removal cases, there was no equivalent to the SIAC process for Special Advocate and contested disclosure, which strikes a balance between the competing interests in a different way, but nonetheless strikes a balance between them. *Youssef* certainly does not establish a benchmark for the construction of the Rules nor for the decision on whether disclosure of material would be damaging to a protected interest.

52. It is a real distortion of the wording of s5 (6)(b) of the SIAC Act to read the rule-making power , and the Rules, as relating to a public interest that someone should not be returned to face torture. The provisions deal with preventing disclosure in the public interest, not ordering disclosure to advance a different interest. By that very nature, the interests thus to be protected by preventing disclosure, do not include the interest which an individual or the public may have in obtaining disclosure. The interests to be protected do not include those which an Appellant could have, and his are not allied or similar to those which are expressly protected by s5 and the Rules; his interests are protected by the totality of the procedures of SIAC.

53. We heard no convincing answer from the Appellants to the question whether they accepted that the implication of their argument was that they could require information, however damaging it was to the public interest, to be produced to them, using the approach to production adopted by the SSHD, and thus drive the SSHD either to withdraw the deportation notice or to damage the public interest. In reality, there is no sound answer to our question. The very range of material which it was said had to be produced shows the frailty of the Appellants' argument. Far from illustrating the implicit or imputed intention of Parliament that non-disclosure should not apply to safety on return material, their arguments are more supportive of production being restricted to that which the SSHD actually relies on to support his case. Parliament cannot have intended that there should be the wide-ranging production for which the Appellants contend, arguably not clearly founded in the Rules, and that there should then be unlimited disclosure of that wide-ranging production. If their arguments were correct, the specific function of the Special Advocate is set at naught on many relevant issues; the SSHD would have to face the prospect of withdrawing the notice or damaging international relations if, among the sensibly wide range of material produced by him, some would be damaging to international relations if disclosed to the public. The Appellants would rapidly be able to hamstring the whole process by seeking a relevant document disclosure of which to them would be damaging to a protected interest. The Appellants also argued that the SSHD would have no right to rely upon Rule 38 (7) where that material assisted the Appellants, which rather emphasises the problem. Indeed,

Mr Fitzgerald in reply very quickly and inevitably retreated to his fallback position that a balance would have to be struck between the competing interests.

54. On the second main issue, we reject the notion that Rule 4 embodies some balancing exercise between the risk to the protected interest and the need of an Appellant to know some aspect of the case relied on against him, or indeed which might be helpful to him. That is not the approach which we have adopted in relation to national security; it has not been suggested that that approach is wrong. We see no reason to adopt a different approach to international relations evidence or safety on return evidence. Such a balance is not envisaged by the Act or the Rules. Indeed, it is not possible to read the requirement that material contrary to an identified interest be not disclosed, as envisaging that it should be disclosed if some other interest outweighed it. The balance which might be called for were this a public interest immunity issue in a civil case in the High Court is met in the different way which we have already described: full production but limited to the Special Advocate who can argue for further disclosure.

55. The Special Advocates cannot call evidence although they can and do undertake certain researches. So if a point arises only in closed material the Special Advocates are not able to rebut it by directly calling evidence. The Appellant may not be in a better position in reality in relation to some of that evidence. However, the answer to that point of disadvantage is not damaging disclosure but the use by the Commission of its powers under Rule 4(3) if the area is identified. The Commission could also summon witnesses to assist it.

56. The Special Advocate's role also includes making submissions about what material should be produced to the Special Advocate. That advocate is entitled to make closed submissions in the light of the knowledge obtained of the whole case and there has an advantage not available to the Appellant's open advocates.

57. We do not resolve at this juncture the question of whether Rule 38(7), which permits the SSHD to withdraw material in respect of which his objection to open disclosure has been overruled by SIAC, permits him to withdraw material which is actually helpful to the Appellant. It is not clear that the SSHD does "rely" on it. Of course, this procedure could be used to harm the Appellant but whether or not there is a power to act in that way is not a matter which we propose to resolve until it actually arises. There are bound to be strong concerns by SIAC; adverse inferences can be drawn. The Commission would be surprised to see its judgment as to what did not constitute a risk to a protected interest overridden, where there is no balance to be struck, particularly over material helpful to an Appellant.

58. Nonetheless, we wish to make one point clear, which emerged more clearly during the substantive appeals. It is our view that the SSHD cannot rely on any substantive assurance unless it is put into the open.

It may be the case that encouraging or supportive comments, even if described as assurances by the Government's interlocutors, should remain in closed if for example they are steps en route to an agreement. But the key documents or conversations relied on to show that an Appellant's return would not breach the UK's international obligations or put him at risk of a death sentence or death penalty have to be in the open evidence. SIAC could not put weight on assurances which the giver was not prepared to make public; they would otherwise be deniable, or open to later misunderstanding; the fact of a breach would not be known to the public and the pressure which that might yield would be reduced. They must be available to be tested and recorded.

59. In considering objections to disclosure on national security grounds, the Commission has not adopted a deferential approach, treating the SSHD as having a constitutionally allocated function or role, which requires us to defer to him. There may be times when deference has been urged upon us by him, more as a backstop than as a major plank in his case, but it has not been our approach. We do not deny that the Security Service has an expertise which we have to take into account but that is different from constitutional deference or respect for differently allocated roles. The same applies in relation to international relations. Deference is not required in relation to disclosure, nor recognition of a particular role which should be left to the SSHD or FCO. That is because of the role which SIAC is required by statute to perform. The expertise and the quality of explanation dictate the outcome of the objection but we have to be persuaded to uphold the objections, reaching our own view on the material before us. Mr Burnett accepted that he was concerned only that the Commission accept the SSHD's or FCO's expertise rather than according to them deference in disclosure decisions because of their role.

60. There is no closed judgment.

MR JUSTICE OUSELEY

CHAIRMAN