Appeal No: SC/39/2005
Date of Hearing: 23 October 2006
Date of Judgment: 14 November 2006

SPECIAL IMMIGRATION APPEALS COMMISSSION

Before:

THE HONOURABLE MR JUSTICE OUSELEY (Chairman)
MR J H E LATTER (Senior Immigration Judge)
MR S PARKER

'BB'

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant	Mr H Southey Instructed by Messrs Fisher Meredith
For the Respondent	Mr R Tam QC Instructed by the Treasury Solicitor for the Secretary of State
Special Advocate:	Mr N Blake QC, Mr M Chamberlain Instructed by the Treasury Solicitor For the Special Advocates

OPEN INTERLOCUTORY JUDGMENT

1. This is a further interlocutory application which raises issues about the way in which closed material might be made open. The application, made by Mr Blake QC as Special Advocate, was heard in open with a short closed session in order to obtain some feel for how the parties might see their contentions working out in practice. It was supported by Mr Southey the appellant's Open Advocate, but the burden of the argument was borne by Mr Blake from whose fertile mind the inspiration for it sprang. He did not seek to take issue with the conclusions of the Commission in its interlocutory ruling on disclosure and production issues in Y and Othman 12 July 2006 but instead developed different arguments.

2. Mr Blake, for these purposes, accepted that the SIAC Act and Procedure Rules imposed a duty on SIAC to prevent the disclosure of material contrary to the interests protected by Rule 4 of the Procedure Rules. His contention was that it was not always necessary to exclude the appellant or his representative or both in order for SIAC to fulfil that duty. The Rules, in principle, permitted lesser measures to be taken which could properly achieve the requisite protection. For example, the press and public could be excluded but not the appellant or his representative; or, if the appellant were willing, and his representative were prepared to give appropriate undertakings to the Commission, the representative alone might be permitted to stay to hear, cross-examine on and make submissions on what might be called for these purposes restricted open material. There could be variations such as not permitting an appellant to see a document even though it might be discussed in his presence. These steps would be fairer for the appellant and if not excluded by the Rules, should be available in principle for assessment against Rule 4 in practice in relation to any particular piece of evidence. Mr Blake recognised that this proposal would be likelier, if permitted, to be of practical application to evidence broadly on safety on return than to national security risk evidence.

3. Mr Tam QC for the SSHD submitted that the Rules, read as a whole with the Act, did not permit such solutions to be adopted in deciding whether material should be disclosed to an appellant or his representative. They formed a complete code for dealing with such material and contained a clear division between open and closed material, which permitted no blurring of the edges and no intermediate categories of what we have termed restricted open material. The Rules are in the process of being renovated but changes to make express provision for what Mr Blake proposes have not been suggested, so far.

4. We turn to the Act and Rules. The rule-making power is contained in s5 of the SIAC Act 1997 as amended. The relevant parts are as follows:

> "(2A) Rules under this section may, in particular, do anything which may be done by rules under section 106 of the Nationality, Immigration and Asylum Act 2002.
> (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."

S6 provides for the appointment of the Special Advocate who is declared not to be responsible to the appellant.

5. The Rules are subject to positive approval by Parliament. Rule 4 of the SIAC Procedure Rules 2003 provides:

"(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.

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

6. Rule 35 describes the functions of the Special Advocate as being to represent the interests of the appellant at any hearing from which the appellant and his representatives are excluded. Rule 36 regulates the relationship between the appellant and the Special Advocate: they can communicate freely before but not after service of the closed material on the Special Advocate This is subject to certain exceptions, namely where SIAC specifically so directs, or where the appellant communicates with the Special Advocate in writing through his legal representative.

7. The procedure for the disclosure to an appellant of material which the SSHD objects to him seeing is governed by Rules 37 and 38. "Closed material" is

that which the SSHD relies on but which he objects to disclosing "to the appellant or his representative." By Rule 38(1):

"(1) Where the Secretary of State makes an objection under rule 36(5) (b) or rule 37, the Commission must decide in accordance with this rule whether to uphold the objection."

8. By Rule 38(6) (a) and (b):

"(6) The Commission may-

(a) uphold or overrule the Secretary of State's objection; and

(b) where the Secretary of State has made an objection under rule 37(3), direct him to serve on the appellant all or part of the material which he has filed with the Commission but not served on the appellant, either in the form in which it was filed or in a different form."

Rule 38(7) permits the Secretary of State to withdraw reliance on material he has been ordered to disclose.

9. Hearings are governed by Rule 43:

"(1) If the Commission considers it necessary for the appellant and his representative to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, it must-

(a) direct accordingly; and

(b) conduct the hearing, or that part of it from which the appellant and his representative are excluded, in private.

(2) The commission may conduct a hearing or part of a hearing in private for any other good reason."

10. Rule 39(1) contains a general power to give directions as to the conduct of hearings, subject to Rules 4 and 38(6). Those directions which are particularised but which are not exhaustive do not include any power in relation to who may attend hearings.

11. S 5(2A) of the Act was said to be relevant because of the AIT Rules made under s106 of the Nationality Immigration and Asylum Act 2002, which was also an empowering provision for the SIAC Rules. It only illustrates the scope of the rule-making power. The AIT Rules are not part of the SIAC Rules. Rule 54 of the AIT Rules provides:

"(1) Subject to the following provisions of this rule, every hearing before the Tribunal must be held in public.

(3) The Tribunal may exclude any or all members of the public from any hearing or part of a hearing if it is necessary-

(a) in the interests of public order or national security; or

(b) to protect the private life of a part or the interests of a minor."

12. Accepting, as he had to, that the Rules made no express provision for the procedures for which he was contending, Mr Blake submitted that they were not excluded by the Rules and that the general powers which SIAC had were sufficient to permit them, subject to the ever present trump card in Rule 4.

13. He sought to provide a principled context for his submissions. R v Shayler [2002]UKHL 11 [2003] 1AC 247 showed that the various ECtHR decisions recognising the need to preserve secrecy in certain cases also held that there had to be adequate safeguards to ensure that the restriction did not exceed what was necessary in the circumstances to achieve the end in question. We note in passing, the decision in SSHD v MB [2006] EWCA Civ 1140, on the compatibility of the Control Order appeal or review regime with Article 6 ECHR. This has similar provision for the deployment of special advocates and the exclusion of an appellant and his representatives where there would otherwise be a risk to national security or other protected interests.

14. Mr Blake pointed to R v H [2004] UKHL 3, [2004] 2 AC 134, in which the various procedural steps which could be taken to deal with PII claims in a criminal trial were considered, so as to emphasise that the use of Special Advocates was seen in those circumstances as the last resort, one not to be used if other means were available adequately to meet the overriding requirement of fairness to the defendant. But these general points do not advance matters; the structure of Act and Rules spells out where Special Advocates are to be used and unequivocally protects the Rule 4 interests.

15. SIAC is declared by the Act to be a superior court of record, a phrase which is not defined and the import of which may be uncertain. Mr Blake used it to suggest that as a court, SIAC had an implied jurisdiction to do that which enabled it to maintain its character as a court of justice, or had those powers which were necessary to enable it to act effectively within its particular statutory jurisdiction. For this he drew on Taylor v Lawrence [2002] EWCA Civ 90 [2003] QB 528.

16. Mr Blake also relied on R (Roberts) v Parole Board [2005] UKHL 45. [2005] 3 WLR 152. The Parole Board Rules made provision for the exclusion of the applicant in certain circumstances and for the restriction of disclosure of material to his representative rather than to him. There were also general powers to control proceedings. There were no explicit powers for the appointment of a special advocate to deal with material which the Board needed to consider but which was too sensitive to be revealed to the applicant or his representative. The majority held that such powers were implicit in the nature of the Board's tasks as laid down in primary legislation and did not need to be spelt out. The power should only be used to increase the fairness of the

procedure which would otherwise be followed and not to exclude the applicant when he otherwise would be able to hear the evidence. As Lord Woolf CJ said at paragraph 44, it is a characteristic of courts and tribunals, whether created at common law or by statute, that they were masters of their own procedure.

17. We were also referred to In re A [2006] EWCA Crim 4, [2006]1WLR 1361. A judge trying a criminal case could exclude the press and public from part of the trial in the interests of national security, even though the alleged terrorist defendant and his lawyers would be present. However, that case is of limited value here as the defendant in a criminal trial has the right always to be present, subject to exceptions which are irrelevant here, and the restrictions diminished as far as practicable the risk to national security. It was not said to eliminate the risk and it could not do so in the context of a criminal trial. It was the best if somewhat uneasy compromise which could be struck. We did not derive any further assistance from R v Davis [2006] EWCA Crim 1155.

18. In support of his textual submissions, Mr Blake referred to certain aspects of the Act and Rules. S5 did not necessarily preclude Rules being made of the sort for which he contended, as Mr Tam felt constrained to concede. It does however, and again there was no dispute, provide for the absolute primacy of the protection of the various public interests from harm through disclosure. As we held in Y and Othman, there is a clear grappling by Parliament with the requirements of legality. The House of Lords so found in Roberts, paragraph 26 in the speech of Lord Bingham, and a fortiori the majority. (Roberts was not cited in Y and Othman).

19. There is in our view no advantage to be gained by Mr Blake from the language of s5 which refers to "the appellant" in subsections (3)(a) and (d) and the "appellant and any legal representatives" in subsection (3)(b). The "appellant" in the context of service includes the representatives; the representatives are specifically referred to in the context of exclusion to make it clear that both could be excluded. It does not positively show that only one might be excluded. The Act is otherwise of no particular assistance in this debate beyond the foundation which it provides for the Rules, and Rules 4, 38 and 43 in particular.

20. S106 of the NIA 2002 and Rule 54 of the AIT Rules are of no help in guiding us as to the scope of the SIAC Act rule-making power in this context. The reference to s106 is to provide for the general range of powers available to the ordinary immigration appellate body, but those powers must be read subject to the specific provisions made to cater for the specific purposes for which SIAC was set up. S106 says that the AIT Rules must entitle an appellant to be legally represented at any hearing of his appeal, and may enable the AIT to determine an appeal in the absence of parties in certain circumstances. Rule 54 can go no further than to permit the public to be excluded in certain circumstances. It does not permit one party but not the other to be excluded. We see no warrant for interpreting the power in s106 as permitting Rules to provide for the exclusion of the appellant when his representative cannot be excluded, and hence contemplating that that same power might apply to SIAC. The AIT Rules do not in fact so provide, not surprisingly. Nor is there an equivalent imperative to that in s5 (6) of the SIAC Act; this is not surprising in view of the power in s97

which enables cases to be brought in or transferred to SIAC where risk to national security or other interests is at issue. The SIAC Act makes express provision for the exclusion of appellant and representative.

21. As a matter of textual analysis, the Commission's power in Rule 38 to uphold or overrule the SSHD's objection to disclosure, could be said to relate to a potentially two-fold objection. This could be an objection to disclosure to the appellant or to his representative, following the language of Rule 37, which permits the SSHD to object to disclosure "to the appellant or his representative". But in this context that provision does not contemplate that the SSHD could object to disclosure to the appellant but not to disclosure to the representative and so disclose it to him: there is no provision which would prevent the representative passing the information on. If, as Mr Blake contends, that power exists as a matter of implication, it does not exist by implication from what would be a rather imperfectly expressed provision for it in Rule 37. It exists, if at all, by way of implication from the more general powers in Rule 39 and from the nature of the Commission as a Court.

22. We now turn to our conclusions. The express power for the Commission to hold a hearing "in private" enables the exclusion of the appellant and his representative. It does not provide for their inclusion and for the exclusion of the press or public alone. If such a power exists, it has to be found by necessary implication from the Rules and the ability of the Commission, as a Court, to regulate its own procedure. We consider that the general powers in Rule 39 and those which the Commission has as a Court do give the Commission that power, and we did not understand Mr Tam to deny that such a power might exist. But any such power is to be used sparingly. It can only be deployed where the interests of justice compellingly so require. There are specific boundaries within which the Commission is properly required to act in the absence of the public and the appellant and his representative. Otherwise it should conduct its proceedings in open. Indeed, the distinction in the Rules between open and closed material, and private and other hearings, emphasises to our minds that a power which might have to be exercised in a court which lacked those distinctions and procedures should be exercised very sparingly indeed by the Commission. It might be deployable for example if there was material which an appellant for very good reason wished to prevent entering the public domain, or perhaps where sensitive information had been disclosed inadvertently, as a way of reducing the damage to the relevant public interest. We express no concluded views on that. This however says nothing about whether such a power is precluded where the application of Rule 4 is at issue in the light of the specific statutory provisions in the Rules.

23. The true question therefore is whether such a power exists, and if so, whether it could ever be used, in circumstances where the application of Rule 4 is at issue. The issue between the parties is really whether, as Mr Tam contends, the Special Advocate system and the elaborate procedures within the Rules for dealing with closed evidence draw a bright line between open and closed material, so that the question never arises as to whether the exclusion of the press and public might prevent a breach of Rule 4 in relation to any particular piece of material, or whether, as Mr Blake contends, the overriding question is whether disclosure to

an appellant would breach Rule 4, if the press and public were excluded from hearing that particular piece of material: if there would be no such a breach in those circumstances, then, he says, there are no grounds for not disclosing the material to the appellant. We answer that question later because it is common to the other main suggestion raised by Mr Blake, to which we turn.

24. There is clearly no power given expressly to the Commission to exclude an appellant or his representative other than in the circumstances specified in the Act and Rules. Rule 43(2) would permit the appellant and his representative to be excluded for other good reason, in addition to his exclusion when closed evidence was being heard. There is no need for the Rules to make express provision for the appellant not to attend if he so chooses or to agree with his representative that they can receive information which they cannot impart to him, and for that consent to be stated to the Commission. The advocate or representative or both can give personal undertakings to the Commission that he will not reveal to anyone what he has heard in such circumstances, without any specific Rules being necessary for that purpose. We assume that the status of the Commission as a superior court of record means that it could punish a breach of such an undertaking as a contempt of Court, though the point was not argued, and it would mean committing counsel or other legal representative to prison.

25. We regard the general power of direction as being broad enough to permit the Commission, where such an undertaking has been given with the appellant's consent, to direct that specified material should not be shown to him, or referred to in his presence, whether or not the press and public are present as well. We would be unwilling to conclude that the powers of the Commission to regulate its own procedures are too constrained to permit of that in the appropriate circumstances. If the Parole Board had sufficient power impliedly from its functions or its Rules to institute a special advocate system, it would be a lesser step for the Commission to say that its powers extended in the way described above. Again that does not resolve the question of whether such powers are precluded where Rule 4 is at issue.

26. So the question here is the same as it is for the exclusion of the press and public: does such a power exist, and if so could it ever be appropriate to use such a power, where the application of Rule 4 is at issue? Mr Blake says that if the use of such powers in any instance means that material can be disclosed without breach of Rule 4, there is no reason not to use them and thereby to increase the openness of the system at least as far as the appellant or his representative is concerned. He challenges Mr Tam's argument that there is no jurisdiction permitting such powers or at least their exercise in relation to open versus closed material, as implicitly arguing that material could remain in closed, even if there were no harm in its being made open in such restricted circumstances. Mr Tam's argument as to jurisdiction presupposes that in all circumstances there would be a breach of Rule 4 by the use of such a system, and asserts that the rules do not permit that power, or do not permit it to be used in relation to Rule 4 material. It does not matter that that might mean that the imaginative suggestions from Mr Blake as to the scope of the Rules might never find practical use.

27. We now seek to answer the common question: could the powers and procedures which we accept exist ever be used to create a category of "restricted open material"? The prohibition on disclosure is a prohibition on "disclosure" in the context of the Rules, i.e. on disclosure to the appellant or his representative. The Rules prohibit disclosure of Rule 4 material to an open advocate alone, whatever terms they offer to safeguard it and whether or not the press or public are present. Rule 43(1) makes clear that the appellant and representatives are to be excluded in order to secure that information is not disclosed contrary to the public interest; the Rules do not permit disclosure at all to those who are not permitted to attend private hearings. They do not provide for and in our judgment therefore prohibit disclosure in an intermediate, restricted form: material is either closed material, disclosure of which to an appellant would damage a protected interest, or open material which would not. As we go on to say, in reality, restricted open material is open and has to be treated as such. The structure of the provisions for the appointment, after vetting, of a special advocate, the provision for the determination of objections to material being revealed to the appellant, the obligation of the special advocate to deal with those objections and the closed material, and the restrictions on communications between the special advocate and the appellant and his open representatives after service of the closed material, all show that a clear differentiation between open and closed material was intended. The Rules provide a complete code for dealing with open and closed material; they are not to be supplemented or potentially subverted by suggestions such as Mr Blake put forward. The Rules do not permit a balance to be struck between fairness to the appellant in knowing the case and the protection of the Rule 4 interests; that balance is struck through the special advocate system and the provisions for disclosure.

28. The answer offered by Mr Blake to this was that this might mean that there was material which could be disclosed, subject to those safeguards, which would not in fact be disclosed. This showed he said that Mr Tam's approach was wrong. But his arguments postulated that there might be such material. Although we have not had exhaustive argument in this particular case on that, we did invite Mr Blake to illustrate his point by reference to some closed material. This did not persuade us at all that there was any material which could be disclosed in this restricted open fashion. Nor has the Commission's experience of dealing with closed material, under its present Chairman, ever led it to the view that there was closed material which could safely be disclosed in restricted circumstances.

29. There are good reasons why the sharp division should be observed in practice. These reinforce the conclusion that on the correct interpretation of the Rules, while the powers contended for by Mr Blake may exist for other purposes, they cannot be used to overcome the clear structure of the Rules for distinguishing between closed and open material.

30. So far as the exclusion of the press and public is concerned, we accept that this could reduce the damage or risk to the protected objects of Rule 4, as the decision in A above suggests. But that decision reflected the difference between the way in which a balance has to be struck in a criminal trial where the defendant has a right to be present, and the way it is struck in the SIAC Act and

Rules. A did not suggest that the risk had been eliminated but only that it had been reduced so far as possible for a criminal trial. Rule 4 does not permit a damage limitation or risk reduction exercise. Mr Blake fastened on a comment of ours made in dealing with the principles to be followed in considering disclosure, which required parties to remember that the impact of disclosure could not be confined to the appellant. He could pass it on directly or indirectly to associates in or out of custody. Representatives could properly pass it on to other clients. It could become widely known through the internet even if the press or public were excluded. The prohibited risk is always run by disclosure of closed material to the appellant, and the risks created by his onward disclosure cannot be eliminated but only to a degree reduced by the exclusion of the press and public. We cannot conceive of a single instance in which the exclusion of the press or public would permit disclosure of any material to an appellant which would otherwise remain closed. In reality such material would be open.

31. The suggestion that material could be disclosed to a representative, given appropriate undertakings and the consent of the appellant not to seek sight of documents or to be present at parts of a hearing when a particular matter was discussed, is so problematical that we cannot conceive any instance in which it would be proper to allow such a practice. We accept that this practice was adopted by SIAC in Rehman v SSHD [2001] UKHL 47, [2003] 1 AC 153. We accept what Mr Tam told us about the way in which it worked or rather failed to work to prevent repeated open discussion of restricted material by the open advocate.

32. First, there is an obvious risk of inadvertent disclosure, by the representative eg in discussions with other representatives or clients, or to others, or in paper management. It is self-evident that the more who have the material, the greater the risk of inadvertent disclosure. The difficulties in managing the separation between open and closed material in terms of questions of witnesses, discussions with advocates in submissions, indeed judgment writing including technical support and publication, would all be greatly increased. All this increases the risk of accidental disclosure. It is easy to see why the experience when these suggestions were tried was an unhappy one. If cross-examination is proceeding on a topic which involves a restricted open document or point, it would have to stop while people left court; the point would be potentially highlighted and inferentially it could be revealed widely. It might give rise to very strong questions from a client to his representative as to why a point had not been pressed, leading to inadvertent disclosure. The answer to a judicial question raised in open submission might make avoidance of reference to such material very difficult, and asking questions in open is already inhibited enough by knowledge of the closed material. The ability to remember which different system applied to which material during a hearing would make for error on all sides. These might be very difficult to correct and could sell the pass for resistance to full disclosure, as we have already seen happen with inadvertent disclosure. If those risks do not matter in relation to any particular material, that is because it is in reality open.

33. Second, if the information became public, there would be inevitably a risk that suspicion would fall on the innocent, whether the open advocate, special advocate, SSHD representatives or the Commission and its staff. The reduction in the number of those who have access to the restricted information, the less that risk.

34. Third, it would involve the Commission being asked to take a view about the willingness and ability of an advocate or representative, barrister or solicitor, to abide by the terms of his undertaking. The Commission does not accept that the mere fact that a representative has a professional qualification suffices to ensure that the undertaking would not be broken, and broken in circumstances which made the breach impossible to detect. Lord Woolf in Roberts pointed out that not all professionals could be trusted. Accordingly, such a process would put the Commission in a wholly invidious position of potentially distinguishing between representatives, or even between representatives from the same firm or chambers, on what might be impression or closed objection, or of having to raise such matters with a representative which could give an impression of bias. It would involve the Commission undertaking some distasteful, inadequate and primitive vetting for integrity and carefulness in substitution for the developed vetting process which special advocates undergo. It is not to be assumed that all open advocates would be acceptable as special advocates by the Attorney General or would pass the vetting process, although some open advocates have done so in other cases. The alternative of simply accepting all lawyers as equally trustworthy rather highlights the weakness of Mr Blake's point. Such an approach could only work if the material were in reality open. The prospect of a penalty is no substitute for not running the risk in the first place.

35. In essence, these factors persuade us that there are no circumstances in which Mr Blake's suggestions could ever be deployed. That conclusion reinforces our view that the Rules do not permit them in the context of Rule 4. A clear line is preserved for good reason around closed material. If it is material disclosure of which is not contrary to the protected interests, it is disclosed. If it would be contrary to a protected interest, that breach cannot be avoided by procedures such as those for which Mr Blake contended. In reality the postulate that there is material which could be disclosed in a restricted fashion is false. Practical reality and the powers in the Act and Rules unite against the contentions of Mr Blake.

36. We just add this. Mr Blake did not suggest that his ideas could be deployed in relation to national security material but rather suggested that the safety on return material might afford a more probable area for their use. It might be that that general area could be more promising in terms of degree of sensitivity, but if he is right at all, there would be no bar in principle to its use in relation to any material subject to Rule 4. It is also worth pointing out that the ability of the appellant to give instructions on safety on return material is rather limited by virtue of the nature of most of the material. This stands in contrast to the position which could arise if the national security material were disclosed to the appellant, which was not the purpose of Mr Blake's submissions.

37. There is no closed judgment.

MR JUSTICE OUSELEY
14 NOVEMBER 2006