

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Claim Nos HQ08X01180
HQ08X01413
HQ08X01416
HQ08X03220
HQ08X01686

- (1) BISHER AL RAWI
- (2) JAMIL EL BANNA
- (3) RICHARD BELMAR
- (4) OMAR DEGHAYES
- (5) MOAZZAM BEGG
- (6) BINYAM MOHAMED
- (7) MARTIN MUBANGA

Claimants

-and-

- (1) THE SECURITY SERVICE
- (2) THE SECRET INTELLIGENCE SERVICE
- (3) THE ATTORNEY GENERAL
- (4) THE FOREIGN AND COMMONWEALTH OFFICE
- (5) THE HOME OFFICE

Defendants

-and-

JUSTICE and LIBERTY

Interveners

WRITTEN SUBMISSIONS OF
JUSTICE AND LIBERTY
AS JOINT INTERVENERS

INTRODUCTION

1. These submissions are made on behalf of JUSTICE and Liberty (referred to together as "the Interveners") in respect of the preliminary issue to be determined at the hearing on 26 to 28 October 2009. Permission to intervene by way of written submissions was granted by Burnett J on 24 September 2009.

2. JUSTICE, founded in 1957, is a UK-based human rights and law reform organisation. It is also the British section of the International Commission of Jurists. Liberty (the National Council for Civil Liberties) was formed in 1934 and is an independent, non-political body whose principal objectives are the protection of civil liberties and the promotion of human rights in the UK. Both organisations have a particular interest in issues arising from closed proceedings and the use of closed material. They have intervened in many of the leading cases in this area including *Secretary of State for the Home Department v MB* (2008) 1 AC 440, *A and others v United Kingdom* (ECtHR, 19 February 2009), *RB (Algeria) and others v Secretary of State for the Home Department* (2009) UKHL 10 and *Secretary of State for the Home Department v AF and others* (2009) UKHL 28. In June 2009 JUSTICE published *Secret Evidence*, a 238-page report on the use of closed proceedings and closed material in UK courts.

3. The Interveners sought permission to intervene in this case in light of the Defendants' unprecedented request that the court should adopt a 'closed material procedure', including the filing of a closed defence, in a civil claim for damages. The interveners have consistently questioned the need for and fairness of closed proceedings even where adopted under statutory authority and even where the ordinary civil rules of disclosure may not apply. The suggestion that the court should simply set aside the established rules of fairness and open justice in the context of the present proceedings has potentially serious and far-reaching negative consequences for the justice system in the UK. The court's determination of this preliminary issue is therefore of the utmost public importance and the interveners seek to provide some assistance to the court by way of the following submissions.

4. The preliminary issue is whether it could be:

“lawful and proper for a court to order that a ‘closed material procedure’ (as defined below) be adopted in a civil claim for damages if satisfied that such a procedure is necessary for the just disposal of the case?”

The definition of ‘closed material procedure’ in the preliminary issue includes (but is not limited to) a procedure by which a party may:

“rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to others parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as ‘closed material’).”

5. Specifically, the Defendants seek to rely on “material the disclosure of which [they] consider would cause real harm to the public interest” (para 3 of the Defendants’ first or ‘open’ defence). They assert that the existing law on public interest immunity (‘PII’) is inadequate in the present case because it would:

- (a) be “enormously time consuming” (para 13 of the Defendants’ Skeleton Argument dated 29 September 2009);
- (b) be “fraught with practical problems” (para 14 *ibid*);
- (c) be likely to result in relevant material being “wholly excluded from the court’s consideration” (para 4), putting the defendants “in an impossible position, where they are unable to properly defend themselves” (para 14);
- (d) in the event that the defendants are ordered to disclose the relevant material, leave them “with no real choice but to make

comprehensive admissions – regardless of the strength of their defence – in order to avoid the necessity for such disclosure and the consequent harm” (ibid);

- (e) in the event that the claimant’s claim had to be struck out following a PII exercise, result in “an enormous waste of public funds and of the parties’ and of the court’s time” (para 17); and
- (f) be less likely to achieve a fair trial (para 4).

SUBMISSIONS

6. The Interveners submit in outline as follows (these subparagraphs being picked up as separate headings below):

- (i) There is no such thing as a closed defence in civil proceedings under the common law. To the extent that one party has relevant material that it does not wish to disclose on public interest grounds, PII principles set the terms by which such material may lawfully be withheld from the other party.
- (ii) The law on PII has been extensively reviewed. No inquiry, either judicial or parliamentary, has ever come close to suggesting that a closed material procedure may sometimes be necessary instead.
- (iii) It is not unfair to a party to be prevented from relying upon material that he or she considers they are unable to disclose to the other side. Indeed, the inability of a public body to rely on material that cannot be used for reasons of public policy is ‘almost inevitable in any case of judicial supervision of

executive action' (*A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 per Lord Hoffman, at para 93).

- (iv) The inherent common law power of the court to arrange its own procedures in order to do justice is not unqualified. A court may not act unjustly. In particular, it may not use its inherent power to act contrary to basic principles of open justice and procedural fairness.
- (v) Although the courts have held "there is power in the court to request the appointment of a special advocate of its own motion",¹ all previous uses of that inherent power have been instances of either (i) the management of PII issues; (ii) the appellate review of lower courts and tribunals with statutory authority to use closed proceedings; or (iii) cases involving material which the other side was not entitled to disclosure of. The extension of that hitherto limited use to mainstream civil litigation where the government happens to be the defendant, is contrary to principle (see above) and is wholly inappropriate.
- (vi) To allow a closed material procedure to be adopted in civil matters would also fatally undermine legal certainty and confidence in any civil case involving sensitive material.
- (vii) It would be especially improper for the court to waive PII principles when it has not yet had the opportunity to consider the merits of the PII claim, i.e. to determine PII is *a priori* inadequate.

¹ *Malik v. Manchester Crown Court* [2008] EWHC 1362 (Admin) at para 99, endorsed by the Court of Appeal in *Secretary of State for the Home Department v. AHK and others* [2009] EWCA Civ 287, Sir Anthony Clarke MR at para 22.

(i) The position at common law

7. There is no such thing as a closed defence to a civil claim under the common law. As Blackstone makes clear, evidence in civil matters in a trial by jury:

“is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders; and before the judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country; which must curb any secret bias or partiality, that might arise in his own breast.”
(*Commentaries*, Bk 3, Ch 23)

This rule reflects not only the right of each party to a fair trial but also the more general principle of open justice as later set out by Lord Shaw in *Scott v Scott* [1913] AC 417.² Indeed, in the history of the common law, it has never been suggested that a party to a claim in tort or contract could rely on evidence not disclosed to the other side.

8. In the absence of legislation, therefore, each party to civil proceedings has:
- (i) a *qualified* right to disclosure of all *relevant material* held by the other (“saving all just exceptions”: *Davies v Eli Lilly & Co (No 1)* [1987] 1 WLR 428 per Donaldson MR at 431); and
 - (ii) an *unqualified* right to disclosure of all *evidence* relied upon by the other before the court (see e.g. *Secretary of State for the Home Department v AF and others* [2009] UKHL 28 per Lord Phillips of Worth-Matavers at para 64: “[t]he best way of producing a fair

² See e.g. *R v Crown Court at the Central Criminal Court ex parte A* [2004] EWCA Crim 04 per Judge P at para 32: “The principle of open justice, whether in the Court of Appeal, or at the court of trial, is so fundamental that supporting citation of authority is not required”.

trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied in support of those allegations”).

These rights correspond to duties on each party to disclose to the other:

- (i) all *relevant material* (see CPR Part 31); and
- (ii) all *evidence* which they seek to rely upon before the court (see e.g CPR 31.21).

The duty to disclose relevant material is subject to various exceptions. The duty to disclose the evidence on which a party relies is not.

9. The only relevant exception to the requirement of disclosure in the present case is that provided by PII principles. Specifically, the court may permit material to be withheld to the extent that “the public interest in preserving [its] confidentiality ... outweighs the public interest in securing justice” (*R v Chief Constable of West Midlands, ex p Wiley* [1994] 3 WLR 433 per Lord Templeman at 433).
10. The firm rule has always been that any material that is immune from disclosure on public interest grounds is equally inadmissible as evidence: *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 All ER 617 per Bingham LJ at 623: “where a document is, or is held to be, in an immune class, it cannot be used for any purpose whatever in the proceedings to which the immunity applies”. See also *ex p Wiley* at 455 per Lord Woolf: “it was conceded in this case by all the parties and accepted by the court ... that if documents were protected from disclosure in the public interest, the Chief Constable was not entitled to make any use of information contained in the

documents. It made no difference that both parties were well aware of the contents of the documents. They were not even entitled to rely on secondary evidence of the documents”.

11. In the absence of contrary legislation, therefore, it is plain that the right of each party to disclosure of the other side’s evidence remains unqualified.

(ii) Judicial, parliamentary and governmental review of PII law

12. The law on PII has been extensively considered and reviewed many times in the past four decades, either directly or in the course of a broader inquiry, including:

(a) Sir Cyril Philips (Chair), *Royal Commission on Criminal Procedure*, Cm 8092 (1981);

(b) Viscount Runciman (Chair), *Report of the Royal Commission on Criminal Justice*, Cm 2263 (1993);

(c) Scott VC, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, HC 115 (1996);

(d) Auld LJ, *Review of the Criminal Courts of England and Wales* (2001);

(e) Butterfield J, *Review of criminal investigations and prosecutions conducted by HM Customs and Excise* (July 2003),

(f) Lord Newton of Braintree (Chair), *Report of the Privy Counsellor Review Committee Review of the Anti-Terrorism Crime and Security Act 2001*, HC 100 (2003);

- (g) Law Commission, *In the Public Interest: Publication of local authority inquiry reports*, Cm 6274 (2004);
- (h) House of Commons Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, HC 323 (2005);
- (i) Lord Coulsfield, *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (2007).
- (j) Sir John Chilcot (Chair), *Report of the Privy Council Review of Intercept as Evidence*, Cm 7324 (2008); and

13. No inquiry, whether judicial, parliamentary or governmental, has ever come close to suggesting that material withheld on PII grounds could nonetheless be used as evidence, or that a closed material procedure may sometimes be necessary.
14. In addition, Parliament has had many opportunities in the past four decades to legislate in relation to PII, including the Criminal Procedure and Investigations Act 1996. While Parliament has legislated on several occasions to provide a closed material procedure in certain specific contexts,³ there has been no attempt by Parliament to alter the common law principles of PII themselves.

³ Specifically, the Special Immigration Appeals Commission Act 1997; Section 91 of the Northern Ireland Act 1998; Section 5 of the Terrorism Act 2000; Section 8 of the Race Relations (Amendment) Act 2000; Section 70 of the Anti-Terrorism Crime and Security Act 2001; Sections 80-81 of the Planning and Compulsory Purchase Act 2004; Prevention of Terrorism Act 2005; Section 71 of the Equality Act 2006; Part 6 of the Counter-Terrorism Act 2008. Further provision for a closed material procedure has been made by order on at least 2 occasions: the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564) and Schedule 2 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SI 2005/150).

(iii) The fairness of the exclusionary rule

15. The Defendants complain that the exclusionary rule against the admission of material withheld on PII grounds will put them “in an impossible position, where they are unable to properly defend themselves” (para 14, Defendants’ skeleton argument).
16. However, the Interveners submit that it is not unfair to a party to be prevented from relying upon material that he or she is unwilling (for whatever reason) or unable to disclose to the other side.
17. On the contrary, the exclusion of any material that cannot be disclosed to both parties is the very essence of fairness, because, regardless of the reason for non-disclosure, it is always unfair *to the other side* for a party to rely on evidence that the other side cannot see. It is, after all, a ‘first principle of fairness’ that each party is entitled to know the evidence against them: *Re D (Minors)* [1996] AC 593 at 603-604 and 615 per Lord Mustill: “[i]t is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party”. See also e.g. the speech of Upjohn LJ in *Re K* [1963] Ch 381 at 405-406:⁴

“It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. *It cannot be withheld from him in whole or in part.* If it is so withheld and yet the judge takes such information into account in

⁴ This statement of principle was subsequently endorsed on appeal by the House of Lords [1965] AC 201 (see Lord Devlin at 238: “these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called principles of natural justice”). See also Lord Bingham’s discussion of this line of authority in *Roberts v Parole Board* [2005] 2 AC 738 at para 16: “The ordinary principle governing the conduct of judicial enquiries in this country is not, in my opinion, open to doubt”.

reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial.” [emphasis added]

18. In *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, the Secretary of State submitted that an exclusionary rule against material obtained by torture would “create a mismatch ... if the Secretary of State were able to rely on material at the certification stage which SIAC could not later receive” (para 46). The House unanimously rejected the Secretary of State’s submission.
19. Lord Bingham described the lack of correspondence “between the material on which the Secretary of State may act and that which is admissible in legal proceedings” as “not an unusual position” (paras 47-48):

“It arises whenever the Secretary of State (or any other public official) relies on information which the rules of public interest immunity prevent him adducing in evidence: *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 All ER 617, 623 e to j; *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274, 295F-297C. It is a situation which arises where action is based on a warranted interception and there is no dispensation which permits evidence to be given. This may be seen as an anomaly, but (like the anomaly to which the rule in *R v Warickshall* gives rise) it springs from the tension between practical common sense and the need to protect the individual against unfair incrimination. The common law is not intolerant of anomaly.”

20. Lord Hoffman said (paras 93-95):

“In my opinion the ‘mismatch’ to which counsel for the Secretary of State refers is almost inevitable in any case of judicial supervision of executive action. It is not the function of the courts to place limits upon the information available to the Secretary of State, particularly when he is concerned with national security ...

But the 2001 Act makes the exercise by the Secretary of State of his extraordinary powers subject to judicial supervision. ... [SIAC] is exercising a judicial, not an executive function.

In my opinion, Parliament ... was expecting the court to behave like a court."

21. Lord Nicholls took a slightly different view of the 'mismatch' (see paras 71-72) but noted that it also arose in the PII context (para 72):

"Repugnance to the use in court of information procured by torture does not require the police to give an incomplete account of the matters they took into account when making their decisions. (Different considerations apply where, in the interests of national security, there are statutory or other restrictions on the use of certain matters in legal proceedings, such as the contents of intercepted communications or information attracting public interest immunity. In these cases the 'mismatch' arises from a perceived need to preserve confidentiality, not from the application of a broad moral principle)."

22. So too did Lord Rodger (para 133):

"[T]here is a stark disjunction between what the Home Secretary can properly do and what SIAC can properly do. It is, of course, true that, because of public interest immunity or section 17(1) of the Regulation of Investigatory Powers Act 2000, a party to a litigation may not be able to lead evidence of a matter which it was nevertheless legitimate for him to take into account."

23. There can be no doubt, therefore, that the House of Lords in *A and others (No 2)* contemplated and squarely confronted the Defendants' position in the present case. The Interveners therefore submit that, were there any doubt before *A and others (No 2)*, the situation is now abundantly clear: the inability of a public body to rely on material that cannot be used for reasons of public policy – whether because it has been procured by torture or because it has been excluded on PII grounds – is not unfairness that requires remedy by the court.

(iv) When to exercise the court's inherent power to do justice

24. The court has an inherent power to arrange its own procedures in order to do justice: see *Cocker v Tempest* (1841) 7 M & W 502 at 503-504 per Alderson B:

“The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion.”

25. The court’s power may be unlimited but it is not unqualified: see e.g. the speech of Lord Diplock in *Bremer Vulcan v South India Shipping* [1981] AC 909 at 977C-H:

“The High Court’s power to dismiss a pending action for want of prosecution is but an instance of *a general power to control its own procedure so as to prevent its being used to achieve injustice*. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff’s choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an ‘inherent power’ the exercise of which is within the ‘inherent jurisdiction’ of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were *confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.*” [emphasis added]

26. In *Taylor v Lawrence* [2002] 3 WLR 640, Lord Woolf CJ (as he was then) at para 54 referred to Lord Diplock's speech in *Bremer Vulcan* as follows:

"Earlier judgments referring to limits on the [inherent] jurisdiction of this court must be read subject to this qualification. It is very easy to confuse questions as to what is the jurisdiction of a court *and how that jurisdiction should be exercised*. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances *is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised*. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded *can also create injustice*. There therefore needs to be a procedure which will ensure that proceedings will only be reopened *when there is a real requirement for this to happen*." [emphasis added]

This reasoning was further endorsed by Phillips MR in his subsequent judgment in *Bhamjee v Forsdick and others (No 2)* [2003] EWCA Civ 1113.

27. Sir Jack Jacob described the inherent jurisdiction of the court as:

"a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, *to do justice between the parties and to secure a fair trial between them*." (*Halsbury's Laws of England*, vol 37, 4th ed, 1982) [emphasis added]

28. See also the speeches of Lord Bingham and Lord Rodger in *R v Davis* [2008] 1 AC 1128 (a criminal case). The Interveners submit that there are clear qualifications to the court's inherent powers. A court may not act unjustly. In particular, it may not use its inherent power to regulate its own procedures to act contrary to basic principles of open justice and procedural fairness. It is assumed that this statement of principle will be common ground.

(v) Previous uses of the inherent power of the courts, relied on by the Defendants

29. The Defendants claim as 'binding precedent' previous instances of the court using its inherent power to appoint special advocates (paras 23-25 Defendants' skeleton). However, each instance cited is immediately and obviously distinguishable from the closed material procedure that the defendants propose in the present case, a tort claim for damages:

- a. *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 involved an appeal from SIAC, in which Parliament had already authorised the use of closed material against the defendant under the Special Immigration Appeals Commission Act 1997. Although the 1997 Act was silent on the appointment of special advocates during appeal proceedings, the Court of Appeal determined that it could use its inherent power to adopt such a procedure "to reduce the risk of prejudice to the absent party so far as possible and by analogy with the 1997 Act" (para 31 per Woolf CJ).
- b. *R v Shayler* [2003] 1 AC 247 did not involve the appointment of a special advocate. Instead, Lord Bingham contemplated *obiter* the possibility of a special advocate being appointed by the High Court in proceedings for judicial review involving a former member of the security service, to help determine whether certain sensitive material could be disclosed to the public at large (see para 34). Since disclosure of the material would have been the primary issue at such a hearing, the appointment of a special advocate in such a context would in any event be analogous to PII proceedings as opposed to a closed material procedure now proposed in this civil claim for damages.

- c. In *R v H and C* [2004] 2 AC 134, the House of Lords held unanimously that the inherent powers of the court could be used to appoint a special advocate to represent the interests of the accused in an *ex parte* PII hearing.
- d. In *Roberts v Parole Board* [2005] 2 AC 738, the House of Lords held that the Parole Board had an implied jurisdiction to adopt a closed material procedure. The Defendants claim that if the Parole Board has such a power, then “the position in the High Court is *a fortiori*”. On the contrary, the Defendants have confused the implied statutory power of the Parole Board under the Criminal Justice Act 2003 with the inherent power of the court.⁵ As Menzies J of the High Court of Australia held in *R v Forbes ex parte Bevan* (1972) 127 CLR 1 at 7: “[i]nherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction ... ‘inherent jurisdiction’ ... as the name indicates, requires no authorizing provision”.⁶
- e. *Malik v Manchester Crown Court and others* [2008] EWHC 1362 (Admin) and *AHK and others v Secretary of State for the Home Department* [2009] EWCA Civ 287 both concerned statutory schemes in which the appointment of the special advocate was sought by the *appellants* in

⁵ See, for example, Lord Carswell at para 131: “The functions of the board are to assess whether it is safe to release offenders or whether they would constitute a danger to the public if set free from prison. In order to discharge these functions it is essential that it has before it all material information necessary for determination of that issue of public safety. If the only effective way to get that information from reluctant informants is to use the SAA procedure, then I consider that the use of that procedure incidental to or conducive to the discharge of its functions.”

⁶ It is also to be noted that, for the majority in *Roberts*, the main justification for allowing the necessary implication into the Parole Board’s Procedural Rules was because they considered “the use of an SAA is confined to situations where the SAA can provide additional protection for the prisoner” (see Lord Woolf CJ at para 57: “the reasoning of the European court [in *Chahal*] is to be supported as long as the use of SAAs is confined to situations where their involvement is not used to justify a reduction in the protection available to the person affected by the non disclosure.” And Lord Rodger at para 107: “.. [the appointment of an SAA] is a step which can only help the prisoner ...”)

circumstances where they otherwise would not have been entitled to disclosure of the closed material. Paragraph 99 of the judgment of the Divisional Court, referred to above, should be read in its proper context.

30. In other words, all the cases cited by the Defendants of the appointment of special advocates using the court's inherent power have either been instances of:

- (i) appellate review of closed proceedings authorised under statute (*Rehman*);
- (ii) PII (*R v H and C*); or
- (iii) PII-like proceedings in which the primary aim of the proceedings was disclosure of sensitive material to a party who would not otherwise have been entitled to it (*Shayler, Malik, AHK*).

As noted above, *Roberts* was not a case of the court's inherent power but the exercise of an implied *statutory* power.

31. The Defendants also fail to note other instances where the court has used its inherent power to appoint a special advocate to *enhance* disclosure to a party. Other relevant instances include:

- a. *Roberts v Nottinghamshire Healthcare NHS Trust* [2008] EWHC 1934 (QB), in which Cranston J appointed a special advocate to assist with the appellant's claim to disclosure of a confidential medical report under the Data Protection Act.

- b. *CAAT v Information Commissioner and the Ministry of Defence* [2008] UKIT EA 2006 0040, in which the Information Tribunal agreed to the appellants' request for the appointment of a special advocate to inspect the closed material they were seeking disclosure of.

- c. *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), in which the Divisional Court exercised its inherent power to appoint special advocates to represent the appellant in PII proceedings.

Far from being an “ad hoc regime of special advocates” as described by the Defendants (para 10, Defendants’ skeleton), the practice of appointing special advocates to *assist* in PII proceedings is now, if not common, at least reasonably well-established.⁷

(vi) A closed procedure would undermine confidence in civil proceedings

32. As Lord Shaw made clear, the principle of open justice and respect for the legislative function of Parliament go hand in hand. The “open administration of justice according to known laws truly interpreted” allows the public – who are ultimately responsible for the making of law in this country – to see that it is being properly applied by the courts.⁸ And, as Blackstone notes, the requirement on the judge to conduct the trial in public “must curb any secret bias or partiality, that might arise in his own breast”.⁹ To substitute a closed

⁷ It is JUSTICE’s published position, here repeated, that “special” advocates in PII claims should be replaced by “public interest advocates”, representing the public interest in disclosure - see JUSTICE, *Secret Evidence*, June 2009, paras 444-445.

⁸ Hallam, *Constitutional History of England*, vol 1, 7th ed (1854), 230-231, quoted in *Scott v Scott* [1913] AC 417 at 477-478 per Lord Shaw of Dumferline.

⁹ *Commentaries*, Bk 3, Ch 23, see para 7 above.

material procedure for an open trial without parliamentary sanction would deprive the public of a crucial degree of democratic oversight of the courts.

33. The adoption of a closed material procedure would fatally undermine legal certainty in any civil matter involving sensitive material. The prospect of a closed material procedure in civil claims would destroy all confidence in the trial process.
34. The operation of precedent would also be undermined, as other courts in the UK (and, indeed, elsewhere in the common law world) would be unable to discern the grounds for the decision.
35. More generally, the creation of such a procedure would undermine the whole structure of the civil justice system, in which the rules on funding and costs are designed to permit access to justice and encourage sensible settlement. It is difficult to see how any legal representative could take on a case in which it is impossible to assess the prospects of success or reassess those prospects during the course of preparation for the trial; certainly this would cause considerable problems for public funding. Further the existence of a closed procedure would prevent the party from whom material is withheld from making informed and sensible decisions about settlement – initially, and particularly during the trial process.
36. The adoption of a closed material procedure would be especially inappropriate in the context of a civil claim against the government involving allegations of serious wrong-doing by government ministers and public officials. The claimants allege, among other things, conspiracy to use unlawful means, conspiracy to injure and torture. It is therefore all the more important that the allegations are dealt with openly and transparently so that the public can be satisfied that justice is done.

37. Further, as already set out, the introduction of a closed procedure into civil claims against government is unnecessary, where there are long-standing PII principles in operation. The application of PII principles serve a useful function, and are consistent with principles of open justice. Under existing PII principles, although parties may not be able to predict which material (if any) will be withheld, they at least know that any trial will be based on evidence made known to all the parties.

(vii) Application to side-step PII premature

38. In any event, it would be especially improper for the court to waive PII principles when it has not yet had the opportunity to assess the merits of the Defendants' PII claim. The Defendants invite the court to conclude not only that PII is inadequate, but inadequate *a priori*.

39. The Interveners note that the present case is far from the first time that the courts have had to consider a case involving (i) one or more allegations of wrong-doing by government officials and (ii) the potential disclosure of large amounts of sensitive intelligence material. It is unclear why PII should be deemed inappropriate in this case and yet appropriate in every other.

40. While it is entirely possible that the PII exercise in the present case will be extremely time-consuming, it is equally important to note the Master of the Rolls's injunction that "principles should not be diluted on the grounds of administrative convenience" (*AHK and others v Secretary of State for the Home Department* [2009] EWCA Civ 287 per Clarke MR at para 37(iv)).

41. It is particularly inappropriate for the Defendants to seek to side-step their obligations under PII law in the light of serious concern expressed by the Divisional Court in *R (Al Sweady) v Secretary of State for Defence* [2009] EWHC

2387 (Admin) about the Secretary of State's "attitude to disclosure" (para 8), which was characterised as "lamentable" (para 13) and which led the court to award indemnity costs against him exceeding £1 million. The court's earlier PII judgment ([2009] EWHC 1687 (Admin) set out in detail the Defendant's "disturbing failures" in this area (para 2), failures which the court said demonstrated "an apparent inability ... to understand the importance and significance of PII applications in the judicial process" (para 47).

CONCLUSION

42. The Interveners submit that the adoption of a closed material procedure in a civil claim for damages would:
- (i) be outwith the court's inherent power to do justice, or (alternatively) an improper extension of the exercise of that power;
 - (ii) breach the principles of open justice and the right to a fair trial;
 - (iii) trespass on the functions of Parliament; and
 - (iv) undermine legal certainty and the civil justice system in general.
43. The adoption of a closed material procedure would be especially inappropriate in the context of a civil claim against the government involving allegations of serious wrong-doing by government ministers and public officials, and is completely unnecessary where PII procedures and principles exist to protect inappropriate disclosure.
44. The court should reject any suggestion that the principles of open justice, a fair trial and the requirements of PII may be evaded by an exercise of the

court's inherent power. In the absence of legislation, no party to a civil claim can ever be permitted to advance its case or defend its actions in secret. Such a procedure would run contrary to the very essence of justice.

45. The open and transparent supervision of the courts is particularly important where the allegation is one of serious wrong-doing by government.
46. If there is a case for closed material procedures to be adopted in civil cases, it is for Parliament to act and not the courts.

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ERIC METCALFE

JUSTICE

CORINNA FERGUSON

Liberty

16 October 2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

HQ08X01180
HQ08X01413
HQ08X01416
HQ08X03220
HQ08X01686

BETWEEN:

BISHER AL RAWI and others
Claimants

– and –

THE SECURITY SERVICE and others
Defendants

– and –

JUSTICE and LIBERTY
Interveners

**WRITTEN SUBMISSIONS OF
JUSTICE AND LIBERTY AS
JOINT INTERVENERS**

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