In The House of Lords

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

RB (ALGERIA) & U (ALGERIA)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

LIBERTY, JUSTICE AND HUMAN RIGHTS WATCH

Interveners

SUBMISSIONS ON BEHALF OF LIBERTY

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1. By order of the Appeal Committee of your Lordships' House dated 8 October 2008, Liberty was given leave to present written and oral submissions in intervention in this appeal.

2. Liberty (the National Council for Civil Liberties) is a company limited by guarantee. Formed in 1934, it is an independent, non-political body whose principal objectives are the protection of civil liberties and the promotion of human rights in the United Kingdom. Liberty has intervened in more than 35 cases before the European Court of Human Rights ("ECtHR") and in the domestic courts, including *Chahal v UK* Tab 28

Tab 4
Tab 1
Tab 18

(1997) 23 EHRR 413, *A v SSHD (No. 1)* [2005] AC 68, *A v SSHD (No. 2)* [2006] 2 AC 221, and *SSHD v E & S* [2008] 1 AC 499. Liberty intervened in the Court of Appeal in the instant case, as well as in *AS & DD (Libya) v SSHD* [2008] EWCA Civ 289.

3. Liberty sought leave to intervene in this appeal because of its particular concerns about two developments in deportation proceedings before the Special Immigration Appeals Commission ("SIAC"): the reliance on closed evidence which is not seen by the person concerned or his or her legal representatives, and the use of diplomatic materials to support decisions to deport to countries where there would otherwise be an accepted risk of treatment contrary to article 3 of the European Convention on Human Rights ("the Convention"). The approach taken by Your Lordships' House to those two issues is of profound importance to the protection of human rights in the United Kingdom.

4. In outline, Liberty submits that:

A. the minimum requirements of fairness under the common law demand that the SSHD discloses to the appellants in these cases sufficient material concerning their alleged threat to national security to enable them to deal effectively with the case against them;

B. the unfairness of placing reliance on undisclosed material is not cured by the Special Advocate procedure which applies to these cases;

C. there are alternative procedures which could be adopted without infringing the essential requirements of fairness;

D. the principle of legality applies such that rule 4 of the SIAC Procedure Rules, as interpreted by SIAC, is unlawful;

E. rule 4 of the SIAC Procedure Rules does not permit reliance by the SSHD on evidence and submissions on risk on return which are withheld from the appellant; and

F. diplomatic assurances, such as those relied upon in the present cases, should carry little, if any, weight in the assessment of risk on return, and should only lead to the upholding of a deportation order where the Government can conclusively demonstrate that the risk of article 3 ill-treatment has been eliminated.

A-E: CLOSED EVIDENCE & SPECIAL ADVOCATES

A: Whether the current disclosure regime infringes the constitutional right to a fair hearing

5. Liberty recognises that there can be a role for Special Advocates in proceedings before SIAC where the disclosure of evidence raises national security concerns. Their use may enable the proceedings to be conducted more fairly, for example by showing that the effect on national security of disclosure of particular evidence is less than claimed by the SSHD or by showing how sufficient disclosure can be made to enable the appellant to know and respond to the case against him. However, they should be used to improve the fairness of proceedings. They should not undermine the fairness of proceedings by being used as an excuse to refuse disclosure to the appellant of information and evidence that a judge would otherwise order be disclosed to him. Liberty is deeply concerned by the Special Advocates system as it currently operates in SIAC and shares the conclusion of the Joint Committee on Human Rights (JCHR) in its Nineteenth Report of Session 2006-07 that the Special Advocate system "fails to afford a substantial measure of procedural justice" (para 192 and see below). Tab 315

6. Appellants before SIAC retain the right that the hearing be fair. In Tab 161 *SSHD v MB* [2007] UKHL 46 [2008] 1 AC 440, Lord Bingham said that "I understand the House to have accepted in *Roberts* [that] the concept of fairness imports a core, irreducible minimum of procedural protection" (para 43). That core requires the appellant to be told the case against him.

7. Liberty agrees with the submissions of the Appellants that the Convention includes this right. SIAC has held that while interim bail hearings are subject to this irreducible minimum standard of fairness Tab 94 under the Convention, the substantive appeals are not (*OO*, 27th June 2008). This would mean that the case against an appellant would have to be disclosed in bail hearings but not at the substantive deportation hearing. To require such core fairness at interim hearings but not at the substantive deportation hearing is anomalous and absurd and whatever the position under the Convention, Liberty submits this is not the position at common law.

8. Liberty supports the Appellants' submissions on articles 5(4) and 6 of the Convention. It is submitted, however, that the requirements of the common law and the principle of legality set out below are equally stringent in this context and for the avoidance of repetition the Convention arguments are not addressed in detail in these submissions.

Tab 280 9. De Smith's Judicial Review (Woolf, Jowell, and Le Seur, 6th edition, 2007) states that "The Human Rights Act 1998 now incorporates provisions of the European Convention on Human Rights into domestic law. Breach of Convention rights by anyone exercising public functions therefore offends legality. However, what we now explicitly call constitutional rights, based on constitutional principles such as the rule of law, have always been acknowledged in the common law." (para 5-

036) It lists amongst the constitutional rights recognised by the common law "the right to a fair hearing" (para 5-039), citing *R (McCann) v Manchester Crown Court* [2002] UKHL 39 [2003] 1 AC 787 at [29]. Tab 110

10. Liberty respectfully agrees with the statement of Lord Brown in *MB*: Tab 161

> **I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute (*A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221), so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing.** (para 91)

11. In *A v SSHD (No 2)*, Your Lordships read down the relevant provision in the SIAC Procedure Rules in order to render it compatible with the requirements of the common law. Lord Carswell said "I should emphasise that my conclusion relates only to the process of proof before judicial tribunals such as SIAC and is not intended to affect the very necessary ability of the Secretary of State to use a wide spectrum of material in order to take action to prevent danger to life and property." (para 149) Lord Brown said that "No doubt the effects of your Lordships' judgment will spill over into other court proceedings designed to provide a judicial check on the exercise of other executive powers to place constraints of one sort or another on terrorist suspects in the interests of national security – most notably appeals to SIAC under section 2 of the Special Immigration Appeals Commission Act 1997 against deportation orders, and statutory applications to the Administrative Court challenging control orders under the Prevention of Terrorism Act 2005." (para 168) Tab 1

12. Your Lordships' decisions in *MB* and *R (Roberts) v Parole Board* [2005] UKHL 45 recognise that the core minimum requirement of

Tab 161 fairness is a requirement of the common law. Lord Bingham said in *MB* that

> **I do not understand any of my noble and learned friends to have concluded that the requirements of procedural fairness *under domestic law or under the Convention* would be met if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him.** (para 34, emphasis added)

Tab 115 13. In *Roberts*, Lord Woolf CJ said that "it is critical to recognise that the use of an SAA does not affect the overriding obligation for a hearing to meet the requirements of article 5(4) and of appropriate standards of fairness required by domestic law" (para 62).

14. In both *Roberts* and *MB*, Your Lordships relied upon established domestic law principles identified by common law cases decided long before the incorporation of the Convention, as well as authorities from Canada and the USA: see Lord Bingham's speech in *Roberts* at paras 16-18 and his speech in *MB* at paras 28-30. (He went on to observe at para 31 that "Statements to similar effect, less emphatically expressed, are to be found in the Strasbourg caselaw." See also Baroness Hale at para 58 of *MB*.)

15. Under the common law, the requirements of fairness reflect the gravity of the rights at stake and do not rest merely on the characterisation of the dispute. A similar approach is taken in Canada. The Supreme Court Tab 278 of Canada stated in *Charkaoui v Minister of Citizenship and Immigration* [2008] SCC 38 (at para 53) that:

> **whether or not the constitutional guarantees of s. 7 of the Charter apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state's actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life. By its very nature, the security certificate procedure can place these rights in serious jeopardy, as the Court recognized in *Charkaoui*.**

16. Under the common law, the severity of the consequences of the court or tribunal's decision and the nature of the rights at stake in a case raising risk of persecution or torture require the most anxious scrutiny, and only the highest standards of fairness will suffice.

17. In *Bugdaycay v SSHD* [1987] 1 AC 514, at 531F, Lord Bridge said Tab 26

> **The court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk the basis of the decision must surely call for the most anxious scrutiny.**

Tab 128

18. In *R v SSHD, ex parte Saleem* [2001] 1 WLR 443, the SSHD had argued that the fundamental common law right of access to a court did not apply to immigration and asylum tribunals, arguing that there was no "right" to asylum in the same way that there are rights and obligations determined in the ordinary courts and that asylum had not been identified as a civil right for the purposes of article 6 (457G). Hale LJ stated that

> **I am quite unable to accept that argument. There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts. In certain types of dispute between private persons, tribunals are established because of their perceived advantages in procedure and personnel. In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review. This was undoubtedly the motivation for grafting asylum cases onto the immigration appeals system in 1993. In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.**
>
> **I also accept that the more fundamental the right interfered with, and the more drastic the interference, the more difficult it is to read a general rule or regulation making power as authorising that interference. Whether that is approached along the route of "necessary implication" adopted in *Ex p Leech* or along the route of "reasonable contemplation of Parliament" derived from *Kruse v Johnson* [1898] 2 QB 91 may not matter: the result will be the same.** (457H-458C)

A

19. She went on to observe that

> **There is an analogy here with the principles established under article 6 of the European Convention on Human Rights. Immigration and asylum cases have not been held by the European Court of Human Rights to be "the determination of his civil rights and obligations" for the purpose of article 6. Furthermore, article 6 does not guarantee a right of appeal. But if the state establishes such a right it must ensure that people within its jurisdiction enjoy the fundamental guarantees in article 6. It is for national authorities to regulate the procedures governing the exercise of such rights, but these requirements must not be such that "the very essence of the right is impaired". They must pursue a legitimate aim and the means employed must be proportionate to that aim: see, for example, Tolstoy Miloslavsky v United Kingdom (1995) 20 EHRR 442, 475, para 59. The effect of rule 42(1)(a) is in certain circumstances to destroy "the very essence of the right".** (458-F-H)

B

C

20. The Court of Appeal declared that rule 42(1)(a) of the Asylum Appeals (Procedure) Rules 1996 was outside the rule making power of the Lord Chancellor under s.22 of the Immigration Act 1971 and was of no effect so far as it concerned deemed receipt of a special adjudicator's determination (460F).

D

Tab 281

21. In *FP (Iran) v SSHD* [2007] EWCA Civ 13 [2007] Imm AR 450, the Court of Appeal made what Arden LJ described as "a similar order" to that made in *Saleem*. It declared unlawful a rule which required that "The Tribunal must hear an appeal in the absence of a party or his representative" in certain circumstances: rule 19(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, quoted at para 17 of the judgment.

E

22. Sedley LJ said that the Procedure Rules were unlawful in that they "forfeit what our constitutional law (consonantly now with article 6 of the European Convention on Human Rights) regards as a fundamental right, the right to be heard on an issue of radical importance to the individual" (para 49).

F

G

23. Arden LJ said that "The requirements of fairness must depend on the context. When the issue of fairness arose in *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402, at 414, Bingham LJ, as he then was, held that asylum applications are of such moment that only the highest standards of fairness will suffice, and Sir John Donaldson and Mann LJ agreed with his judgment on that issue. In addition, unless a minimum level of fairness is achieved, the principle of the rule of law will be infringed. The rule of law is a fundamental constitutional principle in the United Kingdom..." (paras 58-59)

24. Wall LJ said "In the final analysis ... I have come to the conclusion that, absent the availability of ECHR Article 6, the concepts of fairness and natural justice on which the common law prides itself must prevail". (para 86)

25. In the Asylum and Immigration Tribunal, *MNM (Surendran guidelines for Adjudicators) Kenya* * [2000] UKIAT 5 [2000] INLR 576 provides authoritative guidance on the requirements of fairness. Collins J held that Tab 83

> **whether Article 6(1) applies or not will make little if any difference. The fact is that the IAA provides an independent and impartial tribunal established by law. The hearing is in public and the procedures are designed to ensure that it is fair. If there is any unfairness, the tribunal or the Court of Appeal will correct it. Thus any complaints that the special adjudicator conducted an unfair hearing fall to be considered by us and we apply the same tests as would be applicable if Article 6(1) applied. (para 16)**

The decisions of SIAC and the Court of Appeal in the present proceedings

26. It is Liberty's submission that the decisions of SIAC and the Court of Appeal in the present proceedings are inconsistent with the core minimum requirements of fairness at common law. Indeed, it is submitted that they disclose an approach in stark contrast to the

requirements of fairness recognised by Your Lordships.

OO Appx pp. 55-71

27. SIAC considered its approach to disclosure in its ruling in *Y and Othman* of 12th July 2006. It said that it would ordinarily deal with the issue in closed session but gave an open determination as the submissions raised "issues of principle and of general application about the disclosure process under Rule 38 of the SIAC Procedure Rules" (para 1 of the determination).

28. SIAC held that the Procedure Rules prohibited it from performing the balancing exercise that would ordinarily be performed by a court or tribunal in determining whether to disclose evidence and information to a party where objection to disclosure was taken on public interest grounds. Critically, SIAC accepted that

> **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.** (para 50)

29. SIAC added that

> **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.** (para 54)

30. The role of the Special Advocate should be to add to the fairness of the

proceedings, in particular by testing the SSHD's objections to disclosure to the appellant. It is difficult to understand SIAC's view that the fact that evidence is disclosed to the Special Advocate justifies non-disclosure of evidence to the appellant which would be disclosed by an ordinary court which was not governed by SIAC's procedure rules.

31. In *Roberts,* Lord Woolf observed at para 59 that the use of Special Advocates can 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. For example, *the use of an SAA would not be justified if, in the absence of an SAA, the material would have been disclosed*." (emphasis added) Tab 115

32. While a Special Advocate can argue for further disclosure to the appellant and his representatives, the Special Advocate cannot do so on the basis that the harm identified to the public interest is minor and outweighed by the common law requirement that the hearing should be fair. It will not avail the Special Advocate to show that the evidence would be disclosed by another court or tribunal able to conduct an ordinary balancing exercise. It is hard to see that the ability of the Special Advocate to argue for disclosure on such a basis is of comfort to the appellant and his representatives and compensates for the disclosure that the appellant would otherwise receive pursuant to an ordinary judicial balancing exercise.

33. The JCHR said that the Special Advocates who gave evidence before it identified one of the "obstacles to the [individual concerned] finding out the precise nature of the allegations against him, even with the help of a Special Advocate" as being that Tab 315

> **when the court or the Commission is considering whether or not closed material should be open, there is no balancing of the interests of justice to the individual on the one hand against the public interest in non-disclosure on the other. If there can be shown to be any public interest**

> **against disclosure, that is the end of the matter, because the court and the Commission are subject to an overriding duty, which is to ensure that information is not disclosed contrary to the public interest (which includes, but is not confined to, national security). In addition, the Special Advocates describe the Commission as being"zealous" in its compliance with this duty, and the Secretary of State also takes a precautionary approach to treating material as being closed rather than open, even if there is only the slightest possibility that what is going to be disclosed will damage national security.** (para 196)

34. One of the Special Advocates observed that "If you have a ton of evidence or a ton of reasons why there should be disclosure and you have a feather against, the feather beats the iron ton because the statute says nothing which transgresses the line is permitted and that is the point." (JCHR report, Counter Terrorism and Human Rights, Ev 11, q.37 to Nicholas Blake QC)

Tab 161

35. That is in contrast with the approach directed by Baroness Hale in *MB* by which

> **Both judge and special advocates will have to probe the claim that the closed material should remain closed with great care and considerable scepticism. There is ample evidence from elsewhere of a tendency to over-claim the need for secrecy in terrorism cases: see *Turner & Schulhofer, The Secrecy Problem in Terrorism Trials* (2005), Brennan Centre for Justice at NYU School of Law.** (para 66)

36. Regardless of how much material may be disclosed to a Special Advocate, this cannot render the hearing fair where the Special Advocate is unable to persuade SIAC that the material should be disclosed to the appellant. The respondent's disclosure of evidence to a Special Advocate which might *not* be disclosed to a party in an ordinary court does not make it fair to withhold from the appellant evidence which *would* be disclosed to him in the absence of a Special Advocate. Liberty submits that it is plain that SIAC did not recognise any core requirement that the appellant (rather than the Special Advocate) must know the case against him.

37. The effect of the exclusion of even a balancing exercise is illustrated by

the range of material disclosed voluntarily by the SSHD in *Youssef v HO* [2004] EWHC 1884 (QB), a claim for damages for false imprisonment, to which SIAC was referred by the Special Advocate. The disclosure included material which had been withheld in previous proceedings reviewing Mr Youssef's detention because it was described by the SSHD as "highly sensitive" (para 24 of *Youssef*). That material included communication between the SSHD and the Prime Minister indicating that "the Foreign Office has made very clear to us that they would at best be able to offer a 'very carefully circumscribed' view that they accepted a specific 'torture' assurance as far as it went. Whilst this could cover the torture of the men on the direct orders of the Egyptian Government, it would not go to the far more significant question of free-lance behaviour on the part of members of the security forces." (para 51)

Tab 191

38. SIAC stated that

> **We did not find *Youssef* 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.** (para 51)

OO Appx pp. 68-69

39. Clearly, the SSHD took the view in *Youssef* that the requirements of fairness in the false imprisonment claim outweighed any harm to relations with Algeria. The Procedure Rules do not prevent the SSHD performing a similar balancing exercise and making voluntary disclosure in SIAC proceedings where she considers that the likely harm to international relations is far outweighed by the requirements of

fairness. Her public law duty to act fairly (reflected by her original assurance that she would disclose exculpatory material before the requirement was incorporated into the Procedure Rules) might arguably require her to conduct such a balancing exercise in deciding what to disclose to the appellant. However, the Procedure Rules as interpreted by SIAC oust any judicial review of that balancing exercise.

40. SIAC's emphasis on the wide definition of public interest under the Procedure Rules (para 44 of its determination and see below) highlights the implications of SIAC's view that it is precluded from permitting disclosure of anything said by the SSHD to be likely to harm the public interest: the existence of *any* likely harm to the 'public interest' broadly defined is a card that trumps the harm, however grave, to the fairness of the proceedings.

B. Defects in the Special Advocate system

41. Serious defects in the Special Advocate system have been consistently highlighted including the inability of the Special Advocate to have any meaningful communication with the appellant or the appellant's legal team after he or she has access to the closed material as well as the limits placed on disclosure.

Tab 223

42. In April 2005 the House of Commons Constitutional Affairs Committee's report 'The operation of the Special Immigration Appeals Commission and the use of Special Advocates' listed three important disadvantages faced by Special Advocates: (1) once they have seen the confidential material, they cannot, subject to narrow exceptions, take instructions from the appellant or the appellant's counsel; (2) they lack the resources of an ordinary legal team for the purpose of conducting in secret a full defence; and (3) they have no power to call witnesses (para

52). Since the publication of the report the government has established a Special Advocates Support Office. However, the lack of support continues to be highlighted as a key concern.

43. In a report prepared in August 2007 for the Canadian Parliament following the Supreme Court's decision in *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9, 'Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings', Craig Forcese & Lorne Waldman highlighted the fact that the UK system bars meaningful contact between the Special Advocate and the named person once the former has seen secret evidence and called this the UK system's most objectionable quality. (See pp. vi-vii, paragraph 10)

44. This view was echoed in the Nineteenth Report of Session 2006-07 of the JCHR which found that Tab 315

> **200. The most serious limitation on what Special Advocates can in practical terms do for the person whose interests they represent is the prohibition contained in the Procedure Rules which prevents any communication between the Special Advocate and the person concerned or their legal representative about any matter connected with the proceedings as soon as the Special Advocate has seen the closed material. The Rules provide for SIAC or the High Court to give directions authorising communication in a particular case at the request of the Special Advocate, but in practice this is very rarely used by the Special Advocates.**
>
> **201. The Special Advocates told us that the prohibition of communication with the controlled person frequently limits the very essence of their function of protecting their interests, because the Special Advocate may have no idea what the real case is against the person until the start of the closed proceedings, by which time it is too late to ask any questions of the controlled person to find out what explanations they might have.**

45. The SSHD must be notified of the questions the Special Advocate wishes to ask the Appellant and a concern about notifying the opposing party is a key reason Special Advocates do not use the procedure (see also Ev 14-15). The SSHD has a very large say in what may be

communicated by the Special Advocate to the appellant. Once the Chinese wall has gone up, SIAC will usually only give permission to speak of procedural matters. Experience suggests that Special Advocates are never allowed to disclose any of the secret material in order to take instructions on it. Did the appellant make a phone call on such and such a day? What was it about? Where was he at such and such a time on a particular day? These are all potentially 'no-go areas' and demonstrate the inherent unfairness of this kind of disconnected representation. It follows that a Special Advocate is often quite unable to mount any viable attack, without these instructions, on the assessment being put forward.

46. The JCHR record that they put to the Home Office minister the Special Advocates' view that they could better perform their function if they were permitted more contact with the appellant and were prepared to shoulder the burden of avoiding inadvertent disclosure. The Home Office minister said that the issue was not their trustworthiness but avoiding placing undue burdens on them (para 204).

47. On disclosure, the SSHD and the Special Advocate may reach limited agreement about what should be disclosed and the security services are able to agree that the gist of some documents should be disclosed, but it would be quite wrong to say this was in any way satisfactory. On most items the SSHD will not budge on the usual basis that further disclosure might compromise their sources, that disclosure might reveal their modus operandi, or that it might displease the Security Services of friendly nations. In some instances disclosure would simply embarrass the government or reveal possible wrongdoing by a friendly government.

Tab 315

48. The JCHR stated:

> **We heard that there are cases where all the relevant material is "closed", i.e. there is no open material at all for the subject of the control order to see, and others where virtually all of the relevant material is closed. Where the individual is given an open statement, he has no way of knowing whether the open statement that he is given represents 1% or 99% of the case against him. There is no obligation on the Secretary of State to provide a statement of the gist of the closed material. The Special Advocates often try to formulate a "gist" from the closed material which would be acceptable to the Secretary of State, and although this sometimes succeeds it is often completely unsuccessful.** (para 195)

49. The JCHR heard evidence from Special Advocates that

> **it is not uncommon for it to transpire that material which has been served as closed material by the SSHD is in fact available on the internet, but the Special Advocates' ability to track down such material is inevitably limited by their lack of support from Arabic speakers. Moreover, even they do not get to see everything they would like to see in order to be able to assess the reliability of the material which is relied on against the controlled person.** (para 197)

50. Special Advocates can never be sure how much the closed information revealed to them is a true reflection of all the available information.

51. Defects in the disclosure process and "the absence of any requirement to provide the appellant with even the gist of the case against him in the closed material, mean that he is at the enormous disadvantage of not knowing what is alleged against him and therefore not only unable to provide explanations himself in the open hearing, but unable to provide any explanations to the Special Advocate whose task it is to represent his interests in the closed proceedings." (para 199)

52. The conclusions of the JCHR are thus quite damning of the fairness of the Special Advocate system:

> **210. After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as "Kafkaesque" or like the Star Chamber. The Special Advocates agreed when it was put to them that, in light of the concerns they had raised, "the public should be left in absolutely no doubt that what is happening … has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system." Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against basic notions of fair play as the**

lay public would understand them.

...

212 ... The evidence of the Special Advocates has confirmed us in our previously expressed view that the Special Advocate system, as currently conducted, does not afford the individual the fair hearing, or the substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law. In short, as we heard in evidence, the system frustrates those who have been through it who do not feel they have had anything like a fair crack of the whip because they still do not really know the essence of the case against them.

C. Alternatives to total non-disclosure to the appellant and disclosure in open court

53. The Court of Appeal in the present case recorded that

RB & U Appx pp. 163-225

> **Very much as a second-best solution, but none the less strongly pressed, the claimants and Liberty said that, even if the whole SIAC procedure did not fail, within it SIAC must take steps to ensure that as much as possible of the "closed" material was made available to the applicants. That was particularly so in respect of material that was confidential because of diplomatic sensitivities, but which did not involve the operations of the security services, or state secrets in the usual sense of that expression.** (para 19)

54. Liberty proposed in the Court of Appeal that as an alternative to disclosure in open proceedings, the press and the public could be excluded from the hearing where the feared damage related to international relations rather than national security.

55. The concern of the SSHD was that the documents in closed evidence were private communications between the governments of the United Kingdom and Algeria, which took place on the understanding that they were confidential. It was thought that Algeria would not expect confidential exchanges or documents still under negotiation to be made public, and that their disclosure would cause considerable damage to the UK's relations with Algeria.

56. Liberty submitted that the proportionate solution to the problem was to

A

disclose the material to the appellant and his legal representatives, with confidentiality undertakings, and for the hearing to take place in private, with reporting restrictions.

B

57. Liberty noted that the recent criminal trial at the Central Criminal Court of David Keogh and Leo O'Connor, for disclosure contrary to s.3 of the Official Secrets Act 1989 of material damaging to international relations, was held in camera. As with the SSHD's position here, the prosecution case was that international diplomacy was based on trust and if the contents of confidential discussions between the Prime Minister and other world leaders were made public it would undermine Britain's ability to conduct international relations. The jury were nevertheless shown the material in camera and those sections of the trial were conducted in private without any damage to national or other interests.

C

D

58. When SIAC considered these issues at the request of the Special Advocate (interlocutory judgment of 14th November 2006 in *BB*), it accepted that it had power to conduct hearings in private with the appellant and his lawyers present.

RB & U Appx pp. 31-42

E

59. The Special Advocate referred SIAC to the case of *In re A* [2006] EWCA Crim 4 [2006] 1 WLR 1361 where the press and public had been excluded in the interests of national security although the alleged terrorist defendant and his lawyers were present. SIAC said that the balance was struck differently in a criminal trial where the defendant had a right to be present. It considered that the risk in *In re A* had been reduced rather than eliminated and held that "Rule 4 [of the SIAC Procedure Rules] does not permit a damage limitation or risk reduction exercise" (para 30). It did not so permit because it did not permit of any balancing exercise at all.

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60. The Court of Appeal held that

RB & U Appx p. 171

> **Whatever the correctness of the charges brought against these claimants, it is accepted that they are significant opponents of the Algerian state. As Mr Tam said, they are the last people who ought to be admitted to that state's confidential diplomatic dealings. We are not clear whether SIAC was invited to adopt this option. It would have been entirely within its powers in rejecting it.** (para 20)

61. Liberty respectfully submits that the Court of Appeal's reasoning in this regard fails to have proper regard to the fairness of the proceedings. It simply accepted that the appellants were "the last people who ought to be" given disclosure. The SSHD did not specify from whose point of view they were the "last people" who "ought" to receive such disclosure of the evidence put before the SIAC to rebut the appellants' article 3 claim.

62. Presumably, it was in the first instance the point of view of the Algerian government. It may be assumed that a government would not welcome disclosure of much information to its opponents. There was however no information about how concerned the Algerian government was and to what extent its reaction would damage the UK's interests. It was not claimed that any reaction by the Algerian government would be likely to harm the UK's national security. The mere fact that they were opponents of the government was viewed by the Court of Appeal as obviously disqualifying the appellants from disclosure in their own appeals. This suggests that the threshold for withholding evidence is disturbingly low. The Court of Appeal gave no apparent weight to the fact that they were the opposing party to the proceedings in determining that they were the last people to whom disclosure should be made.

63. Liberty also proposed as a fallback procedure that an appellant could agree to his lawyers seeing material on terms that his lawyers would not disclose it to the appellant. SIAC again accepted that it had power to

take such a course upon the undertaking of the lawyer given with the appellant's consent (para 25). RB & U Appx p. 38

64. SIAC gave three reasons for concluding nevertheless that there were "no circumstances" in which the procedure "could ever be deployed". It said "First, there is an obvious risk of inadvertent disclosure" (para 32); "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" (para 33); "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" which "would put the Commission in a wholly invidious position of potentially distinguishing between representatives ... 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" (para 34). pp. 40-41

65. Liberty submits that these reasons are not an adequate basis to rule that this course should never be adopted. Two of the three factors appear not to involve the interests of SIAC in avoiding any unwarranted accusation of inadvertent disclosure and avoiding being put in what it described as an 'invidious' and 'distasteful' position of assessing the trustworthiness of open advocates. (As to this, it is not obvious why the SIAC would be in a more difficult position than any other court considering an undertaking from a lawyer, especially in relation to material that was not concerned with national security and did not require any security vetting). Liberty also submits that when considering the matter in principle, SIAC was wrong to accept and rely on the SSHD's counsel's claim (apparently without reference to evidence, or notice to the advocate concerned) that on a previous occasion, the procedure had

resulted in impermissible disclosure by the open advocate (para 31).

66. The Court of Appeal said that

RB & U Appx pp. 171-2

> **In the present context, such an arrangement would seriously undermine the careful division between counsel appearing in the open proceedings and the special advocates. Counsel would be put in the impossible position of being asked to play, part-time, the role of the special advocate, but without the protection, and formal position, that the special advocates enjoy. That is objectionable not so much in the interests of counsel, but in the interests of not distorting the trial process. SIAC was right to hold that the disadvantages of this course far outweigh any benefit that might accrue to the applicants.** (para 21)

67. An appellant could instruct his lawyers not to agree to such a process and lawyers can decline to act if they are professionally embarrassed. The Court of Appeal did not explain how this course would lead to a greater "distorting [of] the trial process" than the position by which neither the appellant nor his lawyers can know the evidence.

D. The interpretation of the legislation under the principle of legality

68. The Court of Appeal in the present case reached no conclusion inconsistent with in *Roberts* and *MB* as to a core requirements of the constitutional right to a fair hearing. In particular, it did not suggest that RB's hearing was fair notwithstanding the fact that he was told effectively nothing of the case against him. It observed that the importance of the principle of legality was "not in doubt" but that "Whether it can prevail in the fact of the statutory provisions is another matter." (para 15) It decided it could not:

RB & U Appx p. 170

> **17... [W]hen Parliament passed the statutory scheme, it was concerned, and well knew that it was concerned, with very specific legislation to address a clear and particular case. In creating SIAC and providing for its particular procedure, including the use of special advocates, Parliament did squarely confront what it was doing and accepted the political cost. There are no sensible grounds for fearing that the full implications of its words may have passed unnoticed in the democratic process. It must be obvious that Parliament was well aware that the SIAC procedure would be used in claims under the Human Rights Convention, including in particular under article 3. The case is quite different from *Simms's* case, where a general and blanket ban on**

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> **contacts between prisoners and journalists was held not to apply to contacts aimed at assisting in a further reference of the prisoner's case to the Court of Appeal; or *R (Morgan Grenfell Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, where a very general power to seek documents created by section 20(1) of the Taxes Management Act 1970 was held not to extend to documents covered by legal professional privilege.**

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69. It is unclear whether SIAC recognised a core, irreducible minimum requirement of fairness under the common law, but when it considered the matter in its determination of 12th July 2006, it in any event concluded that the statutory provisions left no room for reliance on the principle of legality.

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> **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.** (para 43)

OO Appx p. 66

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70. Liberty agrees that Parliament was aware that SIAC would be determining appeals involving article 3 and that it was making provision

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for a system which would allow for exclusion of the appellant from aspects of the proceedings and for Special Advocates to seek to advance the appellant's interests. Liberty nevertheless maintains that the wording of the primary legislation does not establish that Parliament intended to infringe the constitutional right to a fair hearing.

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71. Liberty submits that the conclusions of SIAC and the Court of Appeal to the contrary result from a failure to recognise the strength of the principle of legality, including as described in the cases to which the Court of Appeal referred (above).

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The principle of legality

72. The effect upon the task of statutory interpretation of the infringement of a constitutional right recognised by the common law was discussed by Lord Hoffmann in *R v SSHD, ex parte Simms* [2000] 2 AC 115. He said at p.131E-132B that

Tab 132

> **I add only a few words of my own about the importance of the principle of legality in a constitution which, like ours, acknowledges the sovereignty of Parliament. Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. 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 express 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. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.**
>
> **The Human Rights Act 1998 will make three changes to this scheme of things. First, the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention on Human Rights and Fundamental Freedoms. But much of the Convention reflects the common law: see *Derbyshire County Council v. Times Newspapers Ltd.* [1993] A.C. 534, 551. That is why the United Kingdom government felt able in 1950 to accede to the Convention without domestic legislative change. So the adoption of the text as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights. Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 and will gain further support from the obligation of the minister in charge of a Bill to make a statement of compatibility under section 19. Thirdly, in those unusual cases in which the legislative infringement of fundamental human rights is so clearly expressed as not to yield to the principle of legality, the courts will be able to draw this to the attention of Parliament by making a declaration of incompatibility. It will then be for the sovereign Parliament to decide whether or not to remove the incompatibility.**

73. In *B (A Minor) v DPP* [2000] 2 AC 428, Lord Steyn said that "Parliament does not write on a blank sheet. The sovereignty of Parliament is the paramount principle of our constitution. But

Tab 277

Parliament legislates against the background of the principle of legality... [I]n other words, in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text. " (470B; 470H). Lord Hutton said that "I consider that it would be reasonable to infer that it was the intention of Parliament that liability under section 1(1) of the Act of 1960 should be strict so that an honest belief as to the age of the child would not be a defence. But the test is not whether it is a reasonable implication that the statute rules out mens rea as a constituent part of the crime - the test is whether it is a necessary implication." (481G)

74. In *R (Morgan Grenfell & Co) v Special Commissioner of Income Tax* [2002] UKHL 21 [2003] 1 AC 563 (referred to by the Court of Appeal along with *Simms*), Lord Hobhouse referred to the above statement of Lord Hutton in *B* and observed that Tab 287

> **A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation. (para 45)**

75. In *R (Daly) v SSHD* [2001] UKHL 26 [2001] 2 AC 532, Lord Bingham tested the measure that was challenged first against the principle of legality applying "an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review" before going on to conclude that "the same result is achieved by reliance on the European Convention" (para 23). He described the decision in *R v SSHD, ex p Leech* [1994] QB 198 as important inter alia because it observed that fundamental common law rights will very rarely be held to be abolished by necessary implication (para 10) . The Court of Appeal had held in *Leech* that Tab 285 Tab 288

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> **It will be a rare case in which it could be held that such a fundamental right was by necessary implication abolished or limited by statute. It will, we suggest, be an even rarer case in which it could be held that a statute authorised by necessary implication the abolition or limitation of so fundamental a right by subordinate legislation. (212D)**

Tab 55

76. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [2004] 2 AC 557, Lord Rodger, in a decision which emphasised the strength and impact of s.3 of the Human Rights Act, reiterated Lord Hoffmann's statement that s.3 "enacts the principle of legality as a rule of construction" (para 104).

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Tab 115

77. In *Roberts*, Lord Woolf referred with approval to "the need for any significant departure from the normal requirements of a fundamental common law right, such as the right to natural justice, if it is to be lawful, to be authorised expressly by primary legislation or something equivalent thereto" (para 74). He concluded that

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> **The interpretation of current rule 6 is not totally clear, but I take the view that it is intended to enable the chair of the panel to authorise in appropriate circumstances the withholding of information from the prisoner and his representatives. However this does not mean that the rule should be interpreted in a manner that would be wholly inconsistent with the prisoner's right to a fair hearing before the board. The statutory power of the Secretary of State to make rules contained in section 32(5) of the 1991 Act cannot properly be construed as authorising the creation of a rule which had such an effect without expressly stating that this was the position. Accordingly to give any broader interpretation to rule 6 would mean the rule would at least in part be ultra vires. It would also inevitably result in conflict with article 5(4) if it was applied in a manner that involved a fundamental breach of a prisoner's rights to a fair hearing.** (para 75)

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78. The principle of legality is similarly applied in Australia. In *Coco v The Queen* (1994) 179 CLR 427, 437-8, Mason CJ, Brennan, Gaudron and McHugh JJ stated that:

Tab 31

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> **The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in**

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the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

11. So long as the requirement for express statutory authorization is understood in the sense explained above, we would accept the requirement as a correct statement of principle. At the same time, in our view, the principle was expressed more simply by Brennan J in *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 at 523 in these terms:

> **"Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation."**

12. In *Bropho v. Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at 18, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ pointed out that the rationale against the presumption against the modification or abrogation of fundamental rights is to be found in the assumption that it is:

> **"'in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used' (*Potter v. Minahan* [1908] HCA 63; (1908) 7 CLR 277 at 304)"**

At the same time, curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.

The application of the principle to the rule making power in the SIAC Act

79. The power to make procedure rules for SIAC is contained in s.5 of the 1997 Act. Section 5(3) provides that:

RB & U Appx pp. 233-234

> **(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 [Special Advocates], and**

(d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence.'

80. Section 5(3) does not authorise the making of procedure rules that infringe the constitutional right to a fair hearing. It does not authorise a rule prohibiting SIAC from conducting any balancing exercise such as might ordinarily be conducted by a court or tribunal considering a public interest objection to disclosure. It does not authorise rules requiring or permitting SIAC to dispense with the core, irreducible minimum of procedural protection identified in *Roberts* and *MB*.

81. As indicated above, SIAC placed determinative weight on section 5(6) in addressing the principle of legality. This provides that:

> **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.**

OO Appx p. 66

82. SIAC stated that the Lord Chancellor was "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'." It then held without further explanation that this showed that Parliament had "grapple[d] with the asserted unfairness and ... express[ed] a clear conclusion on it" (para 43 of determination of 12th July 2006).

83. Liberty submits that s.5(6) does not bear the weight that SIAC placed on it. It directs the Lord Chancellor only to "have regard" to two potentially competing "needs". The first is "the need to secure that decisions which are the subject of appeals are properly reviewed". It is unlikely that a decision could be "properly" reviewed through a process which failed even the core, irreducible minimum requirements of fairness. The Lord Chancellor is to have regard to *both* factors identified

in s.5(6). The sub-section plainly does not require or authorise the Lord Chancellor having *exclusive* regard to avoiding information being disclosed contrary to the public interest. Yet rule 4(1) reflects only this second consideration and excludes any balancing of the first consideration, the proper review of decisions through the appeal process. Quite apart from the principle of legality, the Lord Chancellor's decision to make a rule which disregards one of the two relevant considerations identified on the face of the Act is flawed on ordinary principles of rationality.

84. SIAC further concluded that

> **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. (para 44)**

85. SIAC's emphasis on the extent to which the term 'public interest' extends beyond national security concerns in reality undermines its conclusion that the primary legislation authorises its obligation of non-disclosure under rule 4(1). It would be all the more startling if the primary legislation authorised a rule which excluded any judicial balancing exercise when the public interest which trumps considerations of fairness is expanded so far beyond national security considerations. Concern for international relations is the public interest often relied upon to object to disclosure related to safety on return. If SIAC and the Court of Appeal are correct that the legislation is so clear that it defeats the fundamental right to a fair hearing, then any likely harm to a public interest unrelated to national security can defeat the most pressing imperative of fairness in a case raising the right to life and freedom

from torture.

86. Far from Parliament having "grapple[d] with the asserted unfairness and ... express[ed] a clear conclusion" approving the terms of rule 4(1), Parliament was in fact given an "assurance" by the SSHD's minister during the Third Reading of the Bill that the closed procedure would only be used for reasons of national security:

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> **The hon. Gentleman asked for an assurance that matters not involving national security would not be heard in camera. I am sorry about the double negative there, but I give him that assurance. It is envisaged that matters would be heard in camera only when there is a need for secrecy for reasons of national security. Other matters would not be heard in camera.** (col 1040, quoted at para 91 of the Case of JUSTICE and Human Rights Watch)

87. That further undermines the SSHD's contention that the Act demonstrates a clear intention by Parliament to authorise the terms of rule 4(1).

88. SIAC also referred at para 47 to the fact that s.97 of the Nationality, Immigration and Asylum Act 2002 permitted the SSHD to issue a certificate requiring the transfer of appeals to SIAC inter alia where the decision relied on information which she considered should not be made public in the interests of international relations as well as national security. But the 2002 Act plainly did not authorise a rule requiring SIAC to determine disputes over disclosure in a manner incompatible with a fair hearing.

89. It is instructive to compare the primary legislation in the present case with the terms of the legislation with which Your Lordships were concerned in *MB*. Baroness Hale observed that

Tab 161

> **paragraph 4(3)(d) [of the Schedule to the Prevention of Terrorism Act 2005] provides that rules of court must secure "that the relevant court is required to give permission for material not to be disclosed where it considers that disclosure of the material would be contrary to the public interest". This is carried through into CPR r 76.2(2): "The court must ensure that information is not disclosed contrary to the public interest."**

> **Further, in rule 76.29(8): "The court must give permission to the Secretary of State to withhold closed material where it considers that the disclosure of that material would be contrary to the public interest." Disclosure contrary to the public interest is widely defined in rule 76.1(4):**
>
> > **"For the purpose of this Part, disclosure is contrary to the public interest if it is made 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."**
>
> **On the face of it, therefore, the judge is precluded from ordering disclosure even where he considers that this is essential in order to give the controlled person a fair hearing.** (para 68-69)

90. She also observed that the procedural rule "apparently requir[ed] that the court deal otherwise than justly with at least some cases" (para 59).

91. The Prevention of Terrorism Act 2005 did on its face direct that the procedural rules "must secure" that the relevant court is "required" to permit nondisclosure where disclosure would be contrary to the public interest. By contrast, no such express direction appears in the Special Immigration Appeals Commission Act 1997 that the Lord Chancellor "must secure" that SIAC is "required" to permit closed proceedings. Your Lordships regarded s.3 as strong enough to read down the primary legislation in *MB* notwithstanding the mandatory language. That is unnecessary in the present case: the mandatory language is in the rule rather than the primary legislation. As was held in *Leech* (above), it is an "even rarer case in which it could be held that a statute authorised by necessary implication the abolition or limitation of so fundamental a right by subordinate legislation". Tab 288

92. Since the primary legislation does not clearly authorise infringement of the right to a fair hearing, rule 4(1) is unlawful to the extent that it infringes that fundamental right. As in *Roberts* (see Lord Woolf at para 75), the question then arises whether it can be'read down' or should simply be declared unlawful. In *Saleem* and in *FP (Iran)*, the relevant Tab 128 Tab 281

procedure rules were declared unlawful. In the latter case, Wall LJ observed that the rules "are clear and wholly unambiguous. I cannot, speaking for myself, construe them in any way which mitigates their consequence for either of the appellants". (para 87) He concluded that "Since my construction of the rules forces me into a choice, I reach the clear view that the common law doctrine of fairness must prevail; that the rules breach it and are thus unlawful." (para 95)

E. Compatibility with article 3

93. Liberty considers it clear that the Special Immigration Appeals Commission Act 1997 was not intended to be used to withhold from an appellant evidence relied upon by the Government to demonstrate the absence of a risk of torture or ill treatment contrary to article 3. It is submitted that article 3 requires full, open and independent anxious scrutiny of whether expulsion will violate the substantive obligation. There is no scope for balancing national security against the absolute nature of the obligations under article 3. As JUSTICE and Human Rights Watch point out at para 91 of their Case, Parliament was assured that closed proceedings would be restricted to national security matters rather than matters relating to risk on return. Liberty also supports the observation at paras 75-78 of their Case that there would be no scope for the Government to defend an article 3 claim before the Strasbourg Court through secret evidence and assertions, and therefore no proper basis for it to do so before domestic courts.

94. Further, the obligation on a court to consider an article 3 expulsion case with "rigorous scrutiny" has been considered by the Court of Appeal in *Nasseri v SSHD* [2008] EWCA Civ 464. The Court of Appeal set aside the declaration of incompatibility which had been granted by McCombe J: [2007] EWHC 1548 (Admin) [2008] 2 WLR 523. (A petition for

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leave to appeal against the Court of Appeal's judgment is before Your Lordships.) Laws LJ, with whom the Master of the Rolls and Carnwath LJ agreed, stated that

> **18... there appears to be no distinct authority for this second proposition as it was formulated by the judge at paragraph 39: "[f]ailure to conduct an adequate investigation of the risks of loss of life or torture or inhuman and degrading treatment is a breach of the substantive Article"... I would accept that there is no free-standing duty as such to investigate risk. Accordingly the judge's formulation at paragraph 39 with respect misstates the position. But that is not the end of the matter: the judge's formulation reflects, I think, an obvious and necessary truth. If the State is to avoid breach of Article 3 by removal of an individual to another territory where he might be ill treated or whence he might be sent elsewhere and ill treated there, the authorities of the first State plainly have to apprise themselves of the relevant law and practice of the place to which the removal will be effected. Otherwise they cannot know whether their actions will violate the ECHR or not. This is not a distinct, separate or adjectival duty, but a necessary incident of the substantive obligation to fulfil Article 3. It is underlined by the need of rigorous scrutiny where an individual claims that expulsion will expose him to Article 3 ill treatment.**
>
> **19. In those circumstances the court should in my judgment proceed on the basis that if paragraph 3(2) of Part 2 of Schedule 3 to the 2004 Act in truth precludes the Secretary of State from examining the law and practice of any of the 28 listed States, or indeed the circumstances of individual cases, in order to decide whether to seek legislation to remove any State or States from the list, there would be a systematic violation of Article 3. The statute would blindfold the Secretary of State to Article 3 risks. Equally it must be open to the court to investigate such law and practice, and the circumstances of individual cases, in order to decide (where a proper application is made) whether to grant a declaration of incompatibility in relation to the inclusion of all or any of the States named in the list. If a statutory measure prevented the court from doing so, it would frustrate the court's duty under the HRA to vindicate the Convention rights; and the measure would for that reason be incompatible with Article 3.**

95. Liberty submits that the court's duty under the HRA to vindicate an appellant's article 3 rights will equally be frustrated where the court is not permitted to hear the appellant's informed response to the case against him. That is an essential component of the court's duty to apply "rigorous scrutiny" to the dispute.

96. The Court of Appeal in the present case said that

RB & U Appx p. 169

> **11. There is no doubt that the national court must engage in rigorous scrutiny of an article 3 case, in view of the absolute character of the**

> **article 3 obligation and the fundamental values that it enshrines: see for instance *Chahal's* case 23 EHRR 413, para 96. However, it does not follow from that that presence throughout of the applicant, or the giving to him of all of the evidence, is a necessary component of the rigorous scrutiny. That presence and participation is of course a very important element in the process of getting to the correct answer, since the applicant may be able as no one else is to correct factual errors. But absence of that element does not in itself disqualify what otherwise is a rigorous scrutiny. Rather, overall imperative for the applicant to be present is in order to respect the values of openness and legality. Those are logically different from the value of getting the correct answer.**

97. The Court of Appeal had recognised that "presence and participation is of course a very important element in the process of getting to the correct answer, since the applicant may be able as no one else is to correct factual errors". As has been seen, the Procedure Rules as interpreted by SIAC prohibit the "presence and participation" of the appellant whenever there is any likely harm, however minimal to the public interest. SIAC has held that the public interest does not include the UK's interest in complying with its international obligations under article 3 (para 52, determination of 12th July 2006)). SIAC considered that the prohibition of any balancing exercise precluded even in camera proceedings with the appellant present as it held that "Rule 4 does not permit a damage limitation or harm reduction exercise." (para 30, determination of 14th November 2006)

OO Appx p. 69

RB & U Appx pp. 39-40

98. SIAC therefore considers itself required to prohibit the appellant knowing the case against him even where the appellant's participation in the proceedings is "a very important element in the process of getting to the correct answer". The court said that "absence of that element does not in itself disqualify what would otherwise be rigorous scrutiny". However, it does not explain this statement. On the Court of Appeal's own recognition that it was an important component of rigorous scrutiny, it ought to have recognised that rule 4(1) as interpreted by SIAC was incompatible with article 3.

99. The inability of Special Advocates to consult and utilise experts including interpreters and their inability to call experts and other witnesses to give evidence is also particularly debilitating when addressing risk on return. Many issues concerning risk on return including the assessment of purported assurances and the context in which they have been negotiated are issues upon which an appellant would be highly likely to rely on expert evidence in response to the SSHD's evidence. In adversarial proceedings, the Special Advocate's inability to do so highlights the incompatibility of closed proceedings with rigorous scrutiny of risk on return.

100. Liberty therefore submits that rule 4 as interpreted by SIAC is incompatible with article 3 and should be read down to prohibit reliance by the SSHD on evidence and submissions on risk on return which are withheld from the appellant.

F. DIPLOMATIC ASSURANCES

101. Liberty's particular concern is that the absolute and fundamental nature of article 3 protection (*Soering v United Kingdom* (1989) 11 EHRR 439 at [88]; *A v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221, at [12] (Lord Bingham)) should not be diluted, especially in cases where the Government seeks to rely on a diplomatic assurance from a country whose state agencies and associates are known to practise torture. Tab 166 Tab 1

102. Since the Government first proposed to use diplomatic assurances to remove foreign nationals suspected of involvement in terrorism to countries known to practise torture[1], Liberty has been cautioning against

[1] Announced by the Home Secretary of 26 January 2005 in response to the House of Lords judgment in *A v Secretary of State for the Home Department (No. 1)* [2005] AC 68 (Hansard,

their use. Liberty and JUSTICE made submissions to the JCHR on the issue for the purposes of its Nineteenth Report of 2005-6 on the UN Convention Against Torture. Liberty also intervened in the Court of Appeal in the case of *AS & DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289, in which the Court of Appeal upheld a finding by SIAC that diplomatic assurances given by Libya were not sufficient to exclude a real risk of torture.

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Tab 18

103. It is submitted that there is now a need for Your Lordships' House to give clear guidance on the approach to be taken to diplomatic assurances. The interests of justice require consistency on this issue, not least because of the importance of the state's obligations under the Convention. These submissions are therefore directed to the general approach to be taken rather than the application to the facts of the Appellants' cases. For the avoidance of doubt, however, Liberty supports the criticisms made by JUSTICE and Human Rights Watch (paras 41-65) of SIAC's approach to the diplomatic assurances in the Appellants' and OO's cases.

The test for risk of article 3 ill-treatment in deportation cases

104. The ECtHR has set out the requirements as to the standard of proof for risk of article 3 ill-treatment in the following terms:

> "it is well established in the case law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.": *Chahal v United Kingdom*, at [74].

Tab 28

105. This test was reaffirmed in *Saadi v Italy* (application no 37201/06), 28 February 2008 at [139], *Ismoilov v Russia* (Application no. 2947/06) 24 April 2008 at [126] and *Ryabikin v Russia* (Application no. 8320/04) 19

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Tab 67

Tab 155

HC Debates, 26 January 2005, Col 307). The Government began actively seeking assurances following the London bombings on 7 July 2005.

June 2008 at [110]. Liberty supports the submissions JUSTICE and Human Rights Watch (para 12) that the requirement that the risk is "real" imports nothing more than that the risk must not be fanciful or unreal and that there can be no "acceptable level" of risk of torture.

106. In cases where the Contracting States seek to remove individuals to countries in which torture and significant human rights abuses are known to take place, the approach of the ECtHR has been to impose a burden on the Contracting State to satisfy it that, despite the general country conditions, there is a guarantee that the particular individual will not be harmed. A guarantee means that the real risk has been removed. This is the ECtHR's approach, for instance, where Contracting States rely on the possibility of the individual moving to safe third countries or regions within the home State (so called "internal flight" cases): see *Hilal v United Kingdom* (2001) 33 EHRR 2, in which the Court required "a *reliable guarantee against* the risk of ill-treatment." ([68], emphasis added). Tab 62

107. The same approach has been taken by the ECtHR in cases involving diplomatic assurances. In *Soering,* in relation to potential exposure to the death penalty, the Court held that the diplomatic assurance in question was insufficient to enable an article 3 compliant extradition as "it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom *eliminates* the risk of the death penalty being imposed." ([98], emphasis added) Tab 166

108. Likewise, in *Saadi v Italy* at [129], the Grand Chamber of the European Court confirmed that once the applicant has adduced evidence indicating that there is a real risk of article 3 ill-treatment, the evidentiary burden shifts to the Government to dispel any doubts as to safety on return before deporting the applicant: Tab 157

> "It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to article 3 (see *N v Finland*, (application no 38885/02), 26 July 2005, at [167]. Where such evidence is adduced, it is for the Government to dispel any doubts about it".

109. The Court continued at [148]:

> "Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, at [105])."

110. The correct approach for a court then is to scrutinise carefully the practical effect of the assurances, in order to determine whether they guarantee against the risk of article 3 ill-treatment.

111. Further support for this approach of requiring the *removal* of risk before expulsion is found in numerous authoritative international sources:

(a) Comments by the Council of Europe's Commissioner for Human Rights who has stated that, "due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains": Report by Mr A. Gil-Robles, Sweden, 8/7/04, CommDH(2004)13, at [9].

Tab 225

(b) UNCAT has held that the procurement of diplomatic assurances must "suffice to protect against" the risk on removal: *Sweden* – CAT/C/34/D/233/2003 [2005] UNCAT 9 (24 May 2005).

Tab 8

(c) The Canadian Federal Court has also held that diplomatic assurances must be "effective", "meaningful" and "reliable" for the court to be satisfied that removal is lawful: *Sing v Canada* 2007 FC 361, at [139], [142] (de Montigny J).

Tab 165

(d) The need for assurances to provide an effective guarantee has also been implicitly accepted by the European Committee for the Prevention of Torture (15th General Report on the CPT's activities, Strasbourg 22 September 2005; CPT/Inf (2005) 17): Tab 229

> "It has been advanced with some cogency that even assuming those authorities do exercise effective control over the agencies that might take the person concerned into their custody (which may not always be the case), there can be no guarantee that assurances given will be respected in practice. … While the CPT retains an open mind on this subject, it has yet to see convincing proposals for an effective and workable mechanism [for post return monitoring of the assurance]."

(e) The United Nations Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment, 1 September 2004, UN Doc A/59/324 at [40] has, with reticence: Tab 258

> "recognised that there are situations and cases where resort to diplomatic assurances should not be ruled out a priori ... [however] it is, in the Special Rapporteur's opinion essential that … such assurances contain an unequivocal guarantee that the person concerned will not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of that person has been put into place.

112. It is therefore submitted that if the Government seeks to rely on diplomatic assurances to justify deporting a person to their home country, it is incumbent on the Government to satisfy the court that the safety of the individual has been guaranteed. The correct approach for the court is to ask whether the diplomatic assurance in question entirely removes (i.e. dispels any doubts as to) the real risk of torture that otherwise exists, by providing an adequate or effective guarantee against abuse. This means that a diplomatic assurance must render any risk implausible and unreal. If the court is not satisfied that the real risk is removed by the assurance, it should conclude that deportation would breach article 3.

Particular problems with reliance upon diplomatic assurances

113. It is noted that the weight to be accorded to a diplomatic assurance by a court must be determined in light of the prevailing circumstances at the time of the proposed deportation (*Saadi v Italy* at [148]). It is submitted that the following particular concerns which arise in relation to diplomatic assurances are also material considerations in evaluating the weight to be assigned to an assurance in any individual case.

Tab 157

114. Diplomatic assurances are sought from countries which have a proven record of torture or other ill treatment contrary to their international obligations. The very fact that a diplomatic assurance has to be obtained testifies to the grave risk that the individual will face torture or other inhuman treatment if returned to that country. As such, by seeking the diplomatic assurance, the requesting State is implicitly recognising that torture occurs in the receiving state. Assurances may thus encourage States which routinely practice torture in the belief that such practices are tolerated in at least some cases. This is a repugnant situation to encourage; as Lord Hoffman has said: "The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it." (*A v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221 at [82])[2]

Tab 1

115. Further, diplomatic assurances are unlikely to be effective in ensuring compliance with human rights standards as they are mere bilateral agreements brokered at diplomatic level, seeking to govern behaviour which inevitably already breaches international human rights

[2] See also the report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights on his visit to Sweden, 21-23 April 2004, Strasbourg, 8 July 2004, CommDH(2004) 13, at [9]; the United Nations Commission on Human Rights, Report of the Special Rapporteur, Manfred Nowak, on the question of torture, UN Doc E/CN.4/2006/6, 23 December 2005 at [31](b); and the memorandum by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe following his visit to the United Kingdom on 5-8 February 2008 and 31 March – 2 April 2008 (18 September 2008, CommDH (2008) 23) at [92].

Tab 225
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Tab 254

A

obligations. Since the State's compliance with their international legal obligations cannot be relied upon, the State is equally unlikely to comply with assurances given in a particular case. Moreover, these documents rest on an assessment of a country's present self-interest rather than on any commitment to human rights or international law, still less to any concern for the well-being of the individual concerned. A State's assessment of its self interest can change and hence diplomacy cannot be a reliable mechanism of human rights protection.[3]

B

C

116. An additional feature of diplomatic assurances is the lack an enforcement mechanism. They are not treaties and have no legal character or force in law. If the assurances are breached, the sending government has no way to hold the receiving government legally accountable and the individual concerned has no available remedy.

D

117. Finally, the assurances are dependent upon post-return monitoring which has been proven in many cases not to be effective. This concern is particularly grave in relation to torture and ill treatment of persons in custody, and has been widely recognised by international human rights bodies[4]. Torture and ill-treatment are notoriously difficult to ascertain even where systemic, varied and professional visiting or monitoring or

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[3] See also the Special Rapporteur on the question of torture, Manfred Nowak, in his Report to the United Nations Commission on Human Rights, UN Doc E/CN.4/2006/6, 23 December 2005, at [31](c); the United Nations General Assembly on 4 March 2008 in resolution 62/148 at [12]; and the United Nations Human Rights Council Resolution 8/8 on Torture and other cruel, inhuman or degrading treatment or punishment, adopted at its 28th meeting on 18 June 2008 at [6](d). Tab 257 Tab 273 Tab 274

[4] The UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or punishment, Manfred Nowak, in UN Doc A/60/316 of 30 August 2005, at [51]-[52]; Report of 23 December 2005, UN Doc E/CN.4/2006/6 at [31]; The European Commission for Democracy through Law ('Venice Commission'), in its opinion of the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners, 17 March 2006, No 363/2005, CDL-AD(2006)009 at [140]; *Alzery v Sweden*, Communication No 1416/2005, CCPR/C/88/D/1416/2005, 10 November 2006, at [11.4]-[11.5]; United Nations Human Rights Committee, 30 July 2008 Concluding observations in relation to the United Kingdom at [12]; the United Nations Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment, Theo Van Boven on 1 September 2004 in UN Doc A/59/324 at [40]-[42]. Tab 260 Tab 257 Tab 227 Tab 182 Tab 222 Tab 258

other preventive mechanisms are in place. They are even more difficult to ascertain where there are occasional visits to an individual detainee. In addition, if an allegation of torture is made, arguably neither the sending nor receiving government has any incentive to acknowledge or investigate such a charge. The sending government would necessarily have to admit its violation of its absolute obligation not to transfer a person to a place where he or she is at risk of torture and the receiving government would have to admit a violation of the absolute prohibition against torture. For this reason, both the requested and requesting States may be seen to have a common interest in the monitoring body finding no evidence of torture.

Conclusion

118. In light of these inherent problems in relying on diplomatic assurances, courts considering their weight should start from a position of rigour and utmost caution. The assurances should carry little, if any, weight in the assessment of risk on return, and should only lead to the upholding of a deportation order where the Government can conclusively demonstrate, *inter alia* by ensuring that appropriate independent monitoring and other safeguards are implemented, that the risk of article 3 ill-treatment has been entirely eliminated. Furthermore, in countries where State sponsored or State condoned torture is widespread or systematic, diplomatic assurances can never in themselves eliminate the risk of an individual facing torture. To allow otherwise would be a wrongful dilution of the absolute and fundamental nature of article 3 protection.

A

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Garden Court Chambers

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B

MICHELLE BUTLER
Matrix Chambers

C

9 October 2008

D

E

F

G

IN THE HOUSE OF LORDS

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

RB (ALGERIA) & U (ALGERIA)
Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

and

LIBERTY, JUSTICE AND HUMAN RIGHTS WATCH
Interveners

SUBMISSIONS ON BEHALF OF LIBERTY

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