

HOUSE OF LORDS  
HOUSE OF COMMONS  
ORAL EVIDENCE  
TAKEN BEFORE THE  
JOINT COMMITTEE ON HUMAN RIGHTS

**THE JUSTICE AND SECURITY GREEN PAPER**

TUESDAY 31 JANUARY 2012

ANGUS McCULLOUGH QC AND JEREMY JOHNSON QC

DAVID ANDERSON QC AND LORD CARLILE OF BERRIEW CBE QC

Evidence heard in Public

Questions 45 - 99

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## Oral Evidence

Taken before the Joint Committee on Human Rights

Tuesday 31 January 2012

Members present:

Dr Hywel Francis (Chair)  
Baroness Berridge  
Lord Bowness  
Mike Crockart  
Lord Dubs  
Lord Lester of Herne Hill  
Lord Morris of Handsworth  
Dominic Raab  
Virendra Sharma  
Richard Shepherd

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**Examination of Witnesses****Angus McCullough QC and Jeremy Johnson QC, Special Advocates**

**Q45 Chair:** Welcome to this session of the Joint Committee on Human Rights on the Justice and Security Green Paper. Could you introduce yourselves for the record, please?

**Angus McCullough:** I am Angus McCullough QC, special advocate and barrister at One Crown Office Row.

**Jeremy Johnson:** I am Jeremy Johnson QC, a barrister specialising in public law and police law. I am also a special advocate and I practise from 5 Essex Court.

**Q46 Chair:** This is a question for both of you in relation to existing closed material procedures. In their response to the Green Paper consultation, the special advocates described closed material procedures as “inherently unfair”. Can you explain why that is?

**Angus McCullough:** I can attempt that first. The question has to be addressed at two levels: one as a matter of principle, and the other as a matter of practice. In principle it appears obvious that, if a person is involved in proceedings and they are not told all of the evidence and allegations against them, and they are therefore unable to answer them, that is inherently unfair. You do not need to be a lawyer or, indeed, a special advocate to appreciate that.

In addition, the proceedings are contrary to the principle of open justice. Of course open justice is not an inflexible principle, but it is one which requires justification if it is to be breached. Of course, the courts have powers to disapply it, to make anonymity orders, to sit in private, but those incursions require strict justification. Closed proceedings represent the most extreme incursion into that principle because the opacity in relation to the proceedings is total. There is no transparency at all in relation to closed proceedings. As a matter of principle, they are unfair for both of those reasons. A party does not know the case against them, or a significant part of it, and so cannot answer it, and that is contrary to the principle of open justice.

Added to that, as a matter of practice, our experience as special advocates has led us to encounter a number of significant difficulties in performing the role within closed

proceedings. You have got the response to the Green Paper proposals that the special advocates have submitted and that you, Mr Chairman, referred to. The principal difficulty that is encountered is the total prohibition on communication from the special advocate to the person whose interest the special advocate is meant to be representing. That prohibition even extends to purely procedural matters. There is also the practical inability to call any evidence to rebut allegations or counter material that is enclosed. I say “practical inability” because there is, under existing closed material procedures, some ability provided for in the rules for special advocates to call evidence, but that has not been reflected in practice by any ability for the special advocates to do so. Any attempts to identify witnesses who might be able to give expert evidence, to enable us to counter what is effectively often expert evidence on the other side, have not been forthcoming.

Thirdly, I would identify the difficulty that there is in the first part of our function, which is to argue for closed material to be made open, where that can be justified, when faced with an assertion by the relevant intelligence agency that it would simply be contrary to the public interest for that material to be disclosed. The courts show a high degree of deference to such an assertion, perhaps understandably, but it makes the task of a special advocate difficult in practice in that respect when performing our disclosure function.

**Q47 Chair:** Mr Johnson, do you wish to add to that?

**Jeremy Johnson:** I agree. On the narrow question of why they are inherently unfair, established principles of natural justice require that a party to legal proceedings knows the case they have to meet; knows the evidence they have to meet; has a right to be heard in order to respond to that case and that evidence; and ultimately knows why they have won or lost. It is inherent in a closed material process that a party to those proceedings does not know the full case that they have to meet and does not know all of the evidence that they have to address, and therefore they cannot be heard on that material. Some of the practical difficulties that Angus has just alluded to flow from that fundamental point. One of the reasons why special advocates cannot communicate with the appellant on the substance of the proceedings is that that would give away the very thing that is intended to be kept secret.

**Q48 Chair:** Thank you for that. Staying with the existing closed material procedures, again the special advocates’ submission describes the Green Paper’s claim that closed material procedures are “familiar to practitioners” as “seriously misleading”. Why would they say that?

**Jeremy Johnson:** For my part, that is because, although in the narrow context of SIAC and control order proceedings there are a number of members of the Bar who have taken part in those proceedings, there is a very small proportion of members of the Bar who have taken part in the closed part of those proceedings. They are the special advocates, and it is a relatively small proportion of the body of special advocates that regularly act in closed proceedings, and the government lawyers. In the context of a proposal to extend this out to the full ambit of civil proceedings, it is potentially misleading to suggest that the procedures are well known to practitioners generally. The reality is that it is a relatively small number of practitioners who are familiar with what goes on in closed hearings.

**Q49 Mr Sharma:** Why will the proposals in the Green Paper effectively replace public interest immunity, or PII?

**Jeremy Johnson:** The starting point for PII, or for a PII issue, is that a government Minister or a chief constable, whoever it is, takes the view that disclosure of relevant material would be damaging to the public interest. That then triggers a process, which ultimately would have as its logical conclusion a judge having to balance on the one hand the public

interest in keeping the material confidential and on the other hand the public interest in open justice and ensuring a fair hearing. The logical starting point in the Government's Green Paper for triggering a closed material process is an assessment by the Secretary of State that disclosure of material would be damaging to the public interest. It is the very same assessment that is made to trigger a closed material process as is made to trigger a PII application. Therefore, if Ministers and public authorities generally have the ability to seek a closed material process because they think disclosure would be damaging to the public interest, that would be the natural application to make.

**Angus McCullough:** As formulated in the Green Paper, the proposals would replace PII, where the Minister has fired the starting gun, as it were, and there would no longer be that balance that is inherent in PII, which Jeremy has just described, between the public interest in national security and the public interest in open justice. The degree of harm that disclosure would cause can be assessed, and may in many cases in relation to national security issues be determinative against there being fully open disclosure. Conversely, if the degree of harm would be relatively small, but the significance of the material to the administration of justice of the proceedings was high, the balance may fall differently. There is an important flexibility in PII that would be replaced and lost if the proposals in the Green Paper were adopted.

It is not what the Green Paper suggests, but there is theoretically the possibility of having a hybrid procedure, so only resorting to a closed procedure, in the way that we currently understand it, after PII has failed and after the ancillary tools that there are, and that PII can be operated in conjunction with, have failed. By those ancillary tools I mean, for example, holding proceedings in camera, making orders to restrict publication of sensitive information and, in more extreme cases, having confidentiality rings, so requiring a party's lawyers to maintain the confidentiality of particularly secret information. All of those procedures could have been tried and failed before resorting to a closed material procedure. That has been floated by a number of other respondents, and I think Mr Anderson, the Independent Reviewer, from whom you will be hearing later, has suggested that.

To go back to your original question, the Government's proposal would, as it is currently formulated, replace PII in the category of cases where the Minister certifies that sensitive information is involved.

**Q50 Lord Lester of Herne Hill:** I should just disclose my interest. I was a counsel for the third party in *Al Rawi*, namely the press on the open justice point. I wonder if you can help me with my puzzlement. In *Al Rawi* in the Supreme Court, my memory is that the Government's position was that it should be for the courts to make the determination, as with PII and as with *Conway v Rimmer*. The Green Paper seems to come to a different view, which is that it should not be for the court but for the Minister. First of all, am I right about that shift? Secondly, can you explain it?

**Angus McCullough:** You are right about that shift, and it is a shift of profound concern to a number of people who have submitted responses to these proposals. It seems seriously inconsistent with the notion of equality of arms in proceedings if one party to contested proceedings should have the ability to dictate the nature of those proceedings, rather than, as you correctly remember was the Government's position before the Supreme Court in *Al Rawi*, recognising that the judge, at least under the common law, should and did, as they argued, have that power. If there were to be any closed material procedure, it would, in my view, be unconscionable for the Government to be determining when that procedure should apply. That decision should be in the hands of a judge, who is the best independent arbiter to make the decision on the basis of submissions from both parties.

**Lord Lester of Herne Hill:** Especially if the Government is party to the proceedings.

**Angus McCullough:** Exactly.

**Q51 Mr Sharma:** Do you accept that there will be cases in which the application of the ordinary law of PII does not produce a fair result?

**Jeremy Johnson:** I am prepared to accept, certainly conceptually, that the ordinary law of PII will result in cases where relevant evidence is excluded from the proceedings. Therefore, the court will not have before it all of the relevant evidence with which to determine the case. I do not think that that involves any departure from rules of natural justice so far as process is concerned—both parties to the litigation still see all of the material that is before the court and are able to be heard upon it—nor does it involve any departure from open justice. Whether there is an unfairness in the result because one party has not been able to deploy all of the evidence that might assist that party is a matter in which different people might hold different views. It is no different in principle from the result that obtains in a number of contexts where parties are unable to deploy evidence for any one of a number of reasons. Telephone intercept is one example, which will not be touched by the proposals in the Green Paper. There are all sorts of reasons why evidence might not be admissible, and this is just one.

**Angus McCullough:** I, for my part, would acknowledge a theoretical possibility that proceedings could not be justly tried on the basis of existing PII procedures, notwithstanding the flexibility of that procedure, which I am not sure the proposals in the Green Paper fully acknowledge, taken together with the court's ingenuity in making provision for material to be disclosed so far as it can be. What I am unconvinced by is that in practice there is a need for such procedures in civil litigation. That case does not appear to have been made out by the Green Paper. There is reference to one case, *Carnduff v Rock*, which the Court of Appeal determined could not be tried fairly. It is a somewhat controversial case. It does not have anything to do with national security. It was sensitive information related to a police informer. Jeremy knows more about the case than I do because he practises more in the area of police law, but it is worth bearing in mind that there was a strong dissenting judgment in *Carnduff v Rock*—Lord Justice Waller considered that it was inappropriate to strike the case out and that existing procedures could and should be tried. *Carnduff v Rock* is the only decided example that is pointed to in the Green Paper. There is extensive mention of *Al Rawi*, the Guantanamo Bay civil litigation claims, which were settled, but they were settled at a stage before the PII procedures had been tried. Those procedures had not played out. Even on the exceptional facts of *Al Rawi*, it is by no means settled that it can be put forward as an example of the failure of existing procedures when they have not been tested.

**Chair:** Mr Shepherd wished to ask a supplementary, and then Mr Raab.

**Q52 Mr Shepherd:** I hope that it is not diverting you. We have had this expression “confidentiality ring”. I take it that the defendant does not know the material in front of them. Who are these, within a confidentiality regime, who cannot even alert him to matters of fact, such as you were in the room on the occasion or not in the room on the occasion? What is this confidentiality ring?

**Angus McCullough:** A confidentiality ring is a restricted number of people who are made privy to highly sensitive information. It is an extreme procedure pretty much of last resort, because it involves separating a lawyer from his or her client, but it is better than neither the lawyer nor the client being made privy to the information.

**Mr Shepherd:** But it is of no use that the lawyer knows the information but the client does not know the information, and therefore is not able to inject anything into an appreciation of the facts.

**Angus McCullough:** With respect, it is of more use to the lawyer to know it than not to know it. It may well influence the approach taken to the deployment of other evidence in

the case. It may well influence the tactics that are adopted in the conduct of the client's case, without breaching the undertakings of confidentiality that are made. It is unsatisfactory. It is a measure of last resort, but it is better than total non-disclosure.

**Jeremy Johnson:** It is also better than the special advocate process, because at least it means that the lawyer who is directly representing the interests of the defendant, in your example, has access to the information. That person will have a much closer relationship with the person he is representing and will be setting the overall strategy of the case. Although they will not be able to communicate the information that is confidential, they will still be able to allow it to influence the overall approach they take to the case.

**Q53 Mr Raab:** Mr Johnson, can I address a specific question to you? One of the points made about the proposals in the Green Paper is that they are very broad, so, for example, there will be nothing to preclude their application to civil claims against the police. Do you think that the current PII system works adequately for those kind of civil actions against the police, and therefore is that something where the scope of the Green Paper goes too far, in your view?

**Jeremy Johnson:** The short answer is yes. The principles of PII have been worked out through the courts over a number of decades and have reached the position we are now at, where the principles are well understood and applied routinely in police civil litigation. It is not at all unusual for sensitive material to be relevant to police proceedings. Very often there will be intelligence material that has informed the decision to arrest a suspect. If a claim is brought for wrongful arrest, that information is in principle relevant and has to be managed.

The sort of tools that Angus has alluded to, not just confidentiality rings but well before one gets to that stage, include setting out the issues in such a way that one avoids the problem by making admissions or concessions and providing a summary of the intelligence that underpinned the arrest without disclosing anything that is source-sensitive. Those sorts of approaches have worked well over the years, with the result that Carnduff is about the only example I can readily think of where a case has been absolutely untriable—or the court has decided that it cannot be tried. The principles simply work in practice. There is the potential, however, if these proposals are introduced, that a Minister will be able to say that disclosure of source-sensitive information would be injurious to the public interest. Rather than triggering a PII process, which involves discussion and work at trying to find a solution to that, it simply drives one into a closed hearing, where the person who is the claimant in the proceedings is excluded from being able to play a meaningful part in a section of the case.

**Q54 Mr Raab:** You have given one example of civil actions against the police where the PII system is adequate. Can you think of other types of case where this is not something that should be sucked into a new closed material process—obvious ones that would be covered by the very general terms of the Green Paper?

**Jeremy Johnson:** I can give you an example of an area of practice that has been sucked into closed material process, which is parole board hearings, but in fact it is very rare for them to be used. As I understand it, the parole board strive to find alternatives and are successful, so that it is only less than a handful of cases out of many thousands where it has been assessed as necessary to use this process.

**Angus McCullough:** In trying to address the same question, I would perhaps try to turn it on its head. I do not think that the Green Paper makes out a sufficient case for sucking any additional proceedings into closed procedures, certainly not the closed procedures envisaged in the Green Paper. There is a dearth of examples in the Green Paper. I was also struck by the Independent Reviewer's memorandum to you in terms of his attempt to drill into the number of cases and the nature of the cases that were potentially involved and constituted

the justification, which he says have met with an “uncharacteristic” lack of response from the Government.

**Q55 Lord Lester of Herne Hill:** Going back to Al Rawi, my memory is that the whole thing was entirely hypothetical and that the question was something like, “Are there any circumstances in which it would be in the interests of justice to have a closed material procedure?” without any specific examples being cited. There was the same entirely hypothetical approach, and I wonder whether my memory is right.

**Angus McCullough:** I am not sure whether I am in a position to agree or disagree with your memory. I was not involved in the proceedings at that stage. I have no reason to doubt your Lordship’s memory.

**Lord Lester of Herne Hill:** Well, I may be wrong.

**Q56 Mr Raab:** You touched on *Carnduff v Rock*, which was a claim against the police that was struck out because it could not be determined fairly without disclosing sensitive material. There is some mention of this en passant in the special advocates’ submission. In your view, either individually or collectively, was that case correctly decided or not?

**Jeremy Johnson:** It is a Court of Appeal decision. It was decided in 2001. It has not been overruled or even doubted judicially, explicitly at least, since then. The central premise of the case is that, if a case cannot be determined fairly, it should not be determined at all and the court should draw a halt to it. I would not quarrel with that central proposition. I would say two things, though. First, as a matter of generality, history has shown that it is very rare that a court is put in that position. *Carnduff* is an isolated example. I have had experience of a case that the police thought could not be determined fairly and relied on *Carnduff*, and it was given very short shrift by the Court of Appeal. I am not aware of cases where *Carnduff* has been followed.

*Carnduff* was preceded by a similar case of an informant seeking to sue for his reward, and the Court of Appeal allowed that case to go forward, so even on similar facts the courts have taken a different view on the particular circumstances that they are presented with. The other thing I would say about *Carnduff* is that it did not go through the PII process, and so it involved the court speculating as to what would happen if the trial ran the distance and whether it really would involve having to look at sensitive material that could not sensibly be disclosed. I wonder whether now, 10 years further on, with more use of things like confidentiality rings and more use of the civil procedure rules, which were in their infancy at the time *Carnduff* was decided, the courts might require the parties to go through a PII process before taking that final decision that the case simply cannot be tried.

**Mr Raab:** Thank you. Do you have anything to add, Mr McCullough?

**Angus McCullough:** I do not think I do. It would be brave and brash of me to assert that *Carnduff* had been wrongly decided, it being Court of Appeal authority that has not subsequently been doubted. But I would echo what Jeremy has said about it having been decided quite a number of years ago now; procedures may have moved on, and it would not necessarily be decided on the same facts in the same way now, and it is a unique example.

**Q57 Lord Morris of Handsworth:** I have a couple of questions for you, Mr Johnson. Can you explain what further reforms to the special advocate system would go further on than the Government’s proposals?

**Jeremy Johnson:** Yes. Let me preface the explanation, though, by saying that I do not think that any reform is going to undo what we refer to as the inherent unfairness, because the very nature of closed materials involves the inherent unfairness of a party not knowing the

evidence that is being used in the case against them. In the paper that we have submitted we have set out a number of practical proposals that would assist us in our work, not to undo that inherent unfairness but at least to make the process a little easier. They involve, for example, a relaxation on the prohibition on communicating with the lawyer for the appellant, not on the closed material but on purely procedural matters that cannot involve any disclosure of any confidential material. They involve, for example, the setting up of a closed judgment database so that one begins to address the problem that is already happening of judgments being handed down by the courts in secret; no one knows about those judgments, and even individual special advocates will not know about them unless they are involved in that particular case. These are some practical suggestions that will make the job a little easier, but I do not think they begin to address the fundamental problem.

**Q58 Lord Morris of Handsworth:** In light of your response, do you think the Government's concern about the risk of inadvertent disclosure of sensitive information is without foundation?

*Jeremy Johnson:* If they are suggesting that there is a risk of inadvertent disclosure of sensitive information by allowing special advocates to communicate on purely procedural matters, I do think that is without foundation. There is no basis for that. There is, of course, always a risk of inadvertent disclosure of sensitive material, where sensitive material is being used, by carelessness in the procedures that are adopted, but I do not think that is enhanced in any way by allowing communication on procedural matters.

**Lord Morris of Handsworth:** So, a proportionate risk at worse?

*Jeremy Johnson:* Yes. It does not go to the inherent unfairness, but it does become a little tiresome and cumbersome when one has to go through quite a long-winded process simply to communicate with another lawyer about how long a trial is likely to take, for example.

*Angus McCullough:* To be fair to those drafting the Green Paper, I do not think that the Government has set itself absolutely against that limited relaxation. They say that they are continuing to look at the possibility of categorising communications with a view to permitting a restricted category. I think that is work in progress.

**Q59 Lord Morris of Handsworth:** Can you explain how more communication between the special advocate and open representative would work in practice?

*Jeremy Johnson:* On a very prosaic, mundane level, it would involve picking up the phone and discussing how long the trial is likely to take, when the open advocate will be needed, when the special advocate will be needed, and allowing diaries to be managed. Some of it is as basic as that. On a more detailed level, where the special advocate considers there is a closed issue that has been decided in an erroneous way by the court and would wish the matter to go on appeal, it will be things like simply being able to say to the open advocate, "There is a closed point. I consider that it merits being tested on appeal. Please issue a notice of appeal and we will supplement it with closed grounds of appeal." You are not telling anything about what is sensitive or what the decision was; you are simply facilitating a procedure that will allow you to test the point on appeal.

*Angus McCullough:* It occurred to me that a further reassurance could be provided if the channel of communication were restricted to communication in writing, including e-mail, so one could have a fairly instantaneous dialogue, but it would then have the advantage of having an auditable trail of communication, which would provide a degree of reassurance and lower what risk there may be perceived to be that there would be some inadvertent blurring out of some sensitive nugget. It is not a risk that we who practise in the field regard as a

significant one, but if it provided for reassurance, that could be a further safeguard—in other words, restricting it to written communication, including by e-mail.

**Q60 Lord Bowness:** I should declare an interest as I hold a solicitor’s practising certificate, but I have not got any experience of what I am asking you about. In your memorandum, on this point you say that there should be an opportunity for the special advocate to communicate about the substance of the closed material through the court, possibly a designated judge, without automatically revealing the substance of the proposed communication to the Secretary of State. Can you explain to me what you envisage practically? Am I wrong in reading that a designated judge is separate from the judge who is hearing the particular case? If that is the case, how is that going to work?

**Angus McCullough:** That is one possibility that is canvassed in the Green Paper, and so we were addressing it on those terms. I say at the outset that I think there are problems with all of these suggestions, because as soon as one is seeking to communicate on matters that touch on the substance of closed material, you are liable to run into difficulties. If a special advocate has a matter on which, in the view of that special advocate, to pose the question would not involve revealing anything of sensitivity, rather than putting that question, as is currently required, through the Government and then through the court, the proposal is to have a procedure whereby that could be bypassed and one would go directly to the court. Whether it would be the court hearing the case or a designated judge with particular expertise in security matters, what is envisaged is that the judge would review the communication and say, “Yes, I cannot see any conceivable security interest in putting this question. It is so anodyne it is not going to reveal or tend to indicate anything of sensitivity, so I give you permission to ask it of the open representatives without going through the Government and them knowing that you have asked it.” That is what the proposal involves.

If the judge were in any doubt, I would expect the procedure to provide for the special advocates being put to their election. If you want to pursue this, you have to get the sanction of the Government to indicate that they agree that there is no disclosure that would be given by making the communication. It provides a possible route to ease the current restriction on communication.

**Jeremy Johnson:** We understand, though, that another rationale for that proposal is that, ordinarily of course, communications between a client and his or her lawyer are confidential, but the process that currently exists requires communications between a client’s special advocate and a client to be exposed both to the opponent in the litigation and the judge. That is the underlying thinking behind that: at least you are only exposing the communication to a third judge, who will not be involved in proceedings.

**Chair:** We need to make some progress.

**Q61 Lord Lester of Herne Hill:** In your written evidence, you criticise the Green Paper for not looking at United States law and practice in the survey in Appendix J. You also make suggestions based upon the possible use of American federal habeas corpus procedure. If I can put it this way, you are not experts in United States law. I do not know whether you have considered the position of the executive privilege for state secrets, for example, which operates in the States, and other matters of that kind. Are you asking us seriously to look at the United States as a model, or is this simply something that is floated more generally, if I can put it that way?

**Angus McCullough:** It is certainly a fair observation that we are not experts in United States law. The reference to other procedures in our response paper was born of what seemed to us to be the surprising inadequacy of the exercise that was performed at Appendix J, which includes no consideration as to the procedures that are operated in the United States.

My partial and imperfect understanding of those procedures is that there are really two extremes. There is an absolute blanket of secrecy over a category of material on the one hand, but on the other, in habeas corpus proceedings, there are provisions whereby security-cleared lawyers representing the individuals concerned have access to the secret and sensitive material, albeit under some extreme measures to protect the sensitivity of that material. The proposal we make in our response is that that should at least be looked at here if there is to be a thorough exercise reviewing the use of sensitive information in judicial proceedings in other jurisdictions, and it is not there.

**Q62 Lord Lester of Herne Hill:** I shall not pursue it—and I shall ask the Independent Reviewers, past and present, the same question—but my puzzlement is this: I assume that the driving force behind the Green Paper comes from the United States. I am assuming that the American security service, in particular, wishes to plug any gaps by having the equivalent of the United States law in this country. Working on that assumption, I then assume that the United States law is quite illiberal and prescriptive. Therefore, I am surprised when I read your evidence, where you seem to be under the impression that it is rather liberal and not restrictive. That is why I raise the point about executive privilege as it operates for state secrets in the States. I assume that you are not really in a position to comment on that.

**Angus McCullough:** There were a lot of assumptions that I am not in a position to comment on earlier on in your question, Lord Lester. As to the last one, I have already acknowledged, and I am sure that I speak on behalf of my colleague as well, that we are not in a position to comment authoritatively on American procedures, but, as I have indicated, our understanding is that they represent two categories: one very illiberal, and the other much more liberal than what we think we have here.

**Jeremy Johnson:** I just want to add a footnote on one of the other assumptions that underpinned your question—that the pressure is coming from the United States. I can certainly sympathise with the Government in relation to Norwich Pharmacal applications, where the Government has no option but to disclose material if required to do so by the court. Questions might arise in an inquest and public inquiries as well, but in routine civil litigation there is no question of the Government having to put national security at risk. If the Government ultimately lose on a PII application, they can simply bring the litigation to an end, either by discontinuing the claim, if they are the claimant, or by settling the claim by making admissions if they are defendant. If that is one of the underlying concerns, I would suggest that it is answered by recognition of the fact that in ordinary civil litigation there is simply no question of the Government having to put national security or the public interest at risk.

**Q63 Lord Lester of Herne Hill:** Can I ask one more question, which is not about United States law but is about the Green Paper's use of Article 6 of the European Convention on Human Rights? The premise of the Green Paper seems to be that Article 6 of the convention is the standard rather than the common law. My question is this: I had always assumed that Article 6 provided a floor and not a ceiling. In other words it was the bare minimum in a Europe with non-common law procedures. Do you think that we ought to be looking at the common law and our own tradition and treating Article 6 as a floor, or should we, as the Green Paper seems to assume, treat Article 6 as the maximum protection there should be and nothing more in our system? Do you follow the question?

**Angus McCullough:** I think it is an easy question to answer, with respect: yes. Article 6 should be the floor and not the ceiling, and the common law should be closely examined, because it provides, in my view, greater protections than the minimum provided by Article 6. Furthermore, and it is a point that is easy to overlook, the category of proceedings to which

Article 6 applies is limited. It remains an undetermined question as to just how limited it is in relation to ordinary civil proceedings. The unfairness of closed procedures is particularly acute where the House of Lords judgment in *AF (No 3)*, which only applies where Article 6 applies, would not be applicable. In other words, you have no entitlement, even to sufficient information to enable you to give effective instructions.

**Chair:** Lord Lester, do you have any further questions?

**Q64 Lord Lester of Herne Hill:** Again, very briefly, is it not right that, where Parliament has given a blank cheque to Ministers to stop proceedings on grounds of national security, both European Courts have said that that is not good enough and used Article 6 and Article 13 of the convention. I am thinking of *Johnston v Chief Constable*, *Tinnelly v United Kingdom* and cases of that kind. In that sense the European rule of law does give examples of where Ministers given too much power by Parliament misuse their powers, and Europe comes in to try to curb the abuse. Is that right?

**Angus McCullough:** Yes, we obviously have an informed questioner, but that reflects my understanding as well.

**Q65 Mr Sharma:** Why do the special advocates think that there would be no advantage in legislating to identify proceedings in which the *AF (No 3)* disclosure obligation does not apply?

**Jeremy Johnson:** My answer to that is that it is already adequately catered for by the rubric of Article 6 and the manner in which it has been interpreted by the courts. To the extent that there is any uncertainty about that, it will ultimately be for the courts and the European Court to resolve that. If Parliament legislates, it is far from certain that it would come to the same conclusion that the courts would ultimately come to. The better approach is to allow the existing test, which is reasonably clearly set out in Article 6, to be applied on a case-by-case basis through the courts, as it has been over a number of years.

**Angus McCullough:** It is a seductive proposal, but in reality it would not save any time or trouble because the courts would still have to determine where the margins of Article 6 lay.

**Q66 Baroness Berridge:** Is there any guidance from the Bar Council to barristers as to their professional obligations when acting as a special advocate? Would it be helpful to have something put down on paper, because you are in a very unusual position? Could you comment on the suggestion from the Independent Reviewers that in one of the cases PII was not useful because it would have taken three years to complete the process? I am trying to understand how having CMP would chop down that time sufficiently. I can only presume that you would not have to disclose everything. Could you comment on your professional obligation, and in particular the change in timing, which is used as a justification for needing this?

**Angus McCullough:** Let me address the two questions separately. First, there is not any guidance from the Bar Council. I am not sure that it would be of particular assistance. The performance of our role does not involve any particular ethical difficulties. Our role is clear. We are there to represent the interests of the person who is denied sight of material. We are not there in some impartial role to assist the court. We are there to represent someone's interests in proceedings in which their interests are compromised because of the nature of those proceedings. I am not sure that further guidance would assist.

We are given detailed guidance, partly in open and partly in closed, as to the nature of the special advocate role. There is guidance there; it is published by the Treasury Solicitor's Department, which may seem a slightly unusual source, but the Treasury Solicitor's

Department also houses the Special Advocates Support Office. Although it may be thought to be an unusual structure, in practice there is genuine and real independence for the lawyers who are supporting and instructing us from people housed within the same building who are acting for the Government in contentious proceedings.

**Jeremy Johnson:** Can I just add to the first part of that question, because I take a slightly different view? The work we do as special advocates is in practice very different from the work we do as ordinary members of the Bar in routine cases. The law we are applying is different, and the context within which we are applying it is very different. The fundamental feature of it is that one does not have a client from whom one can take instructions. That means that people coming into this work afresh can feel very isolated and not have a ready template to apply. Experience from routine litigation is of limited utility in that context.

All that said, I am not sure that guidance from the Bar Council would particularly assist. The Special Advocates Support Office has effectively provided open and closed guidance through the Treasury Solicitor to us. Usually, when somebody is appointed to their first case as a special advocate, they will be appointed as a junior counsel with somebody else who can provide guidance in the context of a particular case. On the whole that has worked.

**Angus McCullough:** I do not think there is any difference between us. Jeremy is focusing on the practicalities of the role, which is an extremely difficult one. It is as challenging work as I have had in my career at the Bar. I was focusing on the ethical part of your question. I do not think the ethics of it are particularly difficult when one is discharging the role.

**Q67 Lord Lester of Herne Hill:** The second part of Baroness Berridge's question goes to time, and I think it is important, because in Al Rawi the argument was, "There are thousands and thousands of documents and we have not got time to go through them, so let us give them to the special advocates". The question really is: if that is right, how does it save time?

**Chair:** That is a rhetorical question.

**Lord Lester of Herne Hill:** It is not meant to be.

**Chair:** Well, I will rule on that one. If we have time, we will come back to it.

**Angus McCullough:** If I can answer Baroness Berridge's actual question concisely, it would have taken a long time to have gone through a PII procedure in Al Rawi. I do not think it would have taken any less time to go through a closed material procedure.

**Q68 Mike Crockart:** I have a very brief last question, moving on from closed procedures to closed judgments. Mr Johnson, you mentioned it earlier on when you were talking about the case that you had put forward for extra or different powers. I wonder if we can look specifically at your response to the Green Paper. You mentioned the need for a searchable database of closed judgments. Can you explain what the current arrangements are for special advocates getting access to those judgments?

**Jeremy Johnson:** In order to get access to a judgment, you have to know that it exists, and it is usually happenstance whether you know it exists or not. Special advocates have regular meetings and discuss matters of law, and in that context tend to be aware in general terms of legal issues that have arisen, but it is little more than happenstance as to whether you know in a particular case if there is a decision that touches on the issue that you are litigating in that case.

**Q69 Mike Crockart:** Obviously it is a growing judgment load, but what sort of size is that? I am at a loss as to know exactly how much value access to those close judgments

would give if you have restricted knowledge by the very nature of the circumstances of those cases.

**Jeremy Johnson:** In the AF litigation in the House of Lords, the special advocates put together a paper that sought to distil some of the principles that had come out of a whole number of cases. That is the beginnings of a process that would lead to a searchable database. I agree that many cases will turn on their own facts. In many cases the closed judgments are purely factual and do not raise issues of law, but there are cases that do raise issues of law. It seems to me that there is merit in a process being adopted of either trying to isolate that issue of law and making it into an open judgment, because the issue of law on its own terms is unlikely to be sensitive, or at least having a mechanism in place so that those who work in this area have ready access to the law that is being applied in this area.

**Chair:** Thank you very much for your evidence today. Apologies to Lord Lester. Could you respond in writing to his question? We will prompt you with a letter. We need to make progress now. Therefore, thank you very much for your attendance and the comprehensive way in which you have answered our questions. Could the next witnesses come forward please?

### Examination of Witnesses

**David Anderson QC**, Independent Reviewer of Terrorism Legislation, and **Lord Carlile of Berriew QC**, Former Independent Reviewer of Terrorism Legislation

**Q70 Chair:** Good afternoon and welcome to the Joint Committee on Human Rights. For the record, could you introduce yourselves please?

**Lord Carlile of Berriew:** I am Alex Carlile, the former Independent Reviewer of Terrorism Legislation.

**David Anderson:** I am David Anderson; I am the Independent Reviewer of Terrorism Legislation.

**Q71 Chair:** Thank you very much. Lord Carlile, could I begin by asking you a question about the need for change? Can you explain exactly how current court procedures are inadequate to protect national security? Also, could you give us some examples of sensitive information being damagingly disclosed in the course of legal proceedings?

**Lord Carlile of Berriew:** I think that current procedures are inadequate. The case involving the Guantanamo suspects and Binyam Mohamed are examples of cases where current procedures are inadequate. Of course, it depends on the importance you attach to national security, but if you attach the importance that I and the Government in the Green Paper—in my view, rightly—attach to national security, one has to protect it, whether in the context of criminal proceedings or civil proceedings of whatever kind. The trick is finding the right method for protecting it.

As to examples, the Binyam Mohamed case might be a very good example. It would have been interesting for counsel to have been able to cross-examine Mr Mohamed about, for example, his holiday habits, which were unusual to say the least. But in order to do so that might have involved the disclosure of secrets, including the source or sources of intelligence. Plainly, that might have been very damaging to national security in general and to individuals in particular.

**Q72 Lord Lester of Herne Hill:** Of course, all of us take national security very seriously, but I am sure that Lord Carlile agrees with me that there have been examples where national security has been invoked without proper basis. This has been in cases like the ones I have mentioned already, such as *Johnston v Chief Constable* and *Tinnelly v the United Kingdom*, where Ministers have a blank cheque to stop proceedings altogether on grounds of national security; they use it, and then it turns out to be abusive.

**Lord Carlile of Berriew:** I agree entirely with Lord Lester, and I think one of the important tasks that the Committee has and, indeed, that the Government and Parliament have is to find the right balance.

**Q73 Lord Lester of Herne Hill:** I have asked the question of the other witnesses already, but this is for both of you. Do you regard Article 6 of the European Convention on Human Rights as a floor or a ceiling in this context when we are trying to get the appropriate standard? Should we be looking at the common law or at the European convention?

**Lord Carlile of Berriew:** I have heard Lord Lester using this architectural metaphor before, and I am not hugely attracted by the metaphor. If by a floor you mean a place where we keep our feet on the ground, then yes, I am quite attracted by Article 6 being used as the floor. I certainly think that we should apply our own common law standards in considering whether Article 6 is sufficient or whether more might be done. It is a bit like the standard of

proof in some civil and particularly disciplinary proceedings—you have to have a concept that is elastic enough to deal with the exigencies of the situation. There is national security and national security.

**Q74 Lord Lester of Herne Hill:** You will both be in a much better position than anyone else to answer this if you can. Am I right in thinking that the driving force behind the Green Paper, apart from what happened in Binyam Mohamed as such, is that we wish to have full co-operation with the United States security service in sharing intelligence secrets, and if we do not make some change to our system, they may reduce co-operation with us?

**Lord Carlile of Berriew:** It is undoubtedly one of the driving forces, as Mr Anderson has said in his memorandum to the Committee. If I can answer your next question or the one you asked of the previous witnesses, I most certainly would not adopt American standards. I much prefer the Australian model, for example, which is referred to in Appendix G to the Green Paper. I had an experience last year as a barrister of being instructed to negotiate in the United States on behalf of an organisation that is proscribed in the United States but not here or elsewhere in Europe. I kept being met with the term “state security”, to which judges in the United States have an extreme level of deference that is unimaginable on the Strand.

**Q75 Lord Bowness:** Mr Anderson, in your memorandum you say that you accept that cases in which PII does not lead to a fair result are likely to exist. How many actual examples of such cases are you aware of?

**David Anderson:** I have pressed the Government on this. They say in Appendix J to the Green Paper, I think, that there are 27 cases to which sensitive information is central. I asked them for details of those cases; I did receive certain details of them and I have indicated the categories into which they fell. What I was not able to ascertain from the Government was how many of those cases it could really be said were incapable of being fairly tried without a closed material procedure. The reason I said I think there probably is a problem is that we have already introduced a closed material procedure in the context of, for example, control orders, SIAC, asset freezing and proscribed organisations. These are all areas where one would expect intelligence information to be at the absolute centre of the case.

It would not surprise me if there were civil cases in a similar category. However, in terms of what I have seen, am I able to put a number on it? No I am not. I am cautious because, as the Committee raised with the last witnesses, one is conscious that there are whole other fields of litigation. I refer not only to litigation against the police, where the identity of an informer, for example, may be very sensitive, but also to litigation about prisoners and their categorisation. Very often there is an informer somewhere there, whose evidence is very sensitive. I would be very interested to know what those entrusted with that sort of litigation say about the adequacy of PII and whether a closed material procedure is necessary, because there is not much about that in the Green Paper.

**Q76 Lord Bowness:** I assume from what you are saying that you think it is at least likely that such cases will arise in the future.

**David Anderson:** Yes. Look at the parole board litigation. There was the case of Roberts—a case earlier than Al Rawi—in which it was held that it was possible for the parole board to operate a closed material procedure in certain cases. As Mr Johnson quite rightly said in his evidence to you, that procedure has been very infrequently used. I can see the argument for making a closed material procedure available to our judges and putting it in their procedural armoury, but in the expectation that it would be used only when it was unavoidable. I would not anticipate that that would be very often.

**Q77 Mike Crockart:** That was really the central point of the next question I was about to ask. If such cases do arise in the future, is it not the case that merely more imaginative use of the powers that are available at the moment, such as confidentiality rings, might actually be able to deal with those cases short of using the closed procedure outlined in this case?

**David Anderson:** Certainly, a great deal of ingenuity is used in such cases. I have been in a very few of them myself, and I am aware from talking to others of just how resourceful people are. But I would suggest that a confidentiality ring, for example, is not the answer to everything. It drives a barrier between counsel and client, which can be very difficult to maintain. It is all right if it is a commercial case and there is a particular figure that has to be kept from the client because it has something to do with the competitor's pricing or something like that; that can be managed. But when the whole central allegation of the case is something that you have to keep from your client, that is very difficult. I think it is for that reason that the House of Lords in a Scottish case, *Somerville*, in 2007 went so far as to describe a confidentiality ring in cases of that kind as wrong in principle. I am not sure that one would try to extrapolate that comment too widely, but it shows that they are not an answer to everything.

**Lord Carlile of Berriew:** Can I just put in a word on that? Mr Anderson and I have shared experience, albeit from different viewpoints, of the work of the Competition Appeal Tribunal, where confidentiality rings are used frequently for the purposes that Mr Anderson described a few moments ago. They work reasonably well, but I am very concerned about the use of confidentiality rings in cases where, for example, the liberty of the subject is at stake, and I think it brings us close to the sort of ethical questions that Lady Berridge was asking earlier. In a typical criminal case there can be no confidentiality between counsel and his or her client, and I see this as being a similar area in ethical terms. So, I would ask the Committee not to be too enthusiastic about confidentiality rings in this range of cases. They are not right in principle here.

**Q78 Baroness Berridge:** Can I just ask a supplementary? You have talked very highly about national security, and the balance we are dealing with here is natural justice, and it is obviously a very difficult area. We heard evidence last week from Dinah Rose, who said that basically clients are often put to proof in civil proceedings of having to reveal damaging information or settle. Why are we putting the Government in a separate category here? Would that not be a price to pay for retaining your national security? There are going to be cases where you decide not to reveal the information and not to disclose it. She just put it as an accident of civil litigation generally.

**Lord Carlile of Berriew:** If you will forgive me, I am not completely clear about what the question is, but perhaps I can try to answer it in this way. I think closed material procedures are necessary, generally speaking, to protect national security, and it is national security that is the issue, not the nature of the proceedings. I would favour closed material procedures in a wide range of cases, but subject to control by the court. Obviously, the procedure has to be triggered by the person who asserts national security, and that is going to be the Government or occasionally an interested party, perhaps in judicial review asylum cases. Once that has been triggered, I am strongly of the view, and I think Mr Anderson shares this view, that it is the court that should decide in trying to make the balance that you described at the beginning of your question.

**David Anderson:** My view is that a system founded on PII does not threaten national security. The reason for that is that, if the Government feels its hand has been forced and the court is requiring it to disclose something that is confidential, it can pull the prosecution if it is a criminal case—and of course it sometimes does. If it is a civil case, it can settle the case,

and I am quite sure that in routine cases against the police and so on that is a course that is sometimes taken.

However, I would not be quite as easy as perhaps Dinah Rose was about that possibility. It seems to me that it is corrosive if not of national security then at least of justice, and that there is a public interest in these very sensitive national security cases being fairly resolved. If Government has to settle a vast and high-profile series of damages claims brought by people who went to Guantanamo, while feeling that it has perfectly good evidence on which to defend the case, that is corrosive of trust in the security services; it is corrosive of trust in the authorities; it is corrosive of trust in the legal system. So, I do not put it in terms of national security until we come on to Norwich Pharmacal, which is a slightly different issue. I put it in terms of justice.

**Q79 Lord Lester of Herne Hill:** I think this is really for David Anderson. You recommend that closed material procedures should only be available in civil proceedings where they are strictly necessary, which oddly enough is the same test in the American Attorney General's memorandum on the same subject. How could any legislation ensure that closed material procedures can only be resorted to by courts if the just resolution of the case cannot be secured by other procedural means? How could that be done?

*David Anderson:* I think you have to build certain safeguards into the legislation. The first of them is that the judges must have control. Plainly, an application for a closed procedure is always going to be made by the Government or by somebody else with information of that nature to protect, but it seems to me it has to be the judges who decide. Secondly, you have to try to circumscribe the subject matter. The Green Paper talks about sensitive information, which is a very broad category; I would prefer something limited to national security, at least in the absence of any evidence that the problem is further reaching than that. Then the third point, which you have raised, is that you would have to write in something like, "Only if just resolution cannot be obtained by other procedural means." The question is whether you entrust the Government and Parliament with the task of elaborating those words or you trust the good sense of the judges. My tendency would be to trust the judges on that.

**Q80 Lord Lester of Herne Hill:** I understand. As I understand it, you are not saying that PII processes must be exhausted first, or are you saying that?

*David Anderson:* I think it might well be for the judge to decide that, but it is very difficult in advance to dictate that this is always going to be the case. If the Government was correct in what it told the Supreme Court in Al Rawi, and I have no reason to suspect it was not—that PII was going to take three years and was going to be futile, because at the end of that process the Government would have deprived itself of the information that it needed to defend the case—one could understand that, from the point of view of the judge at the beginning of that process, there would perhaps be another way of doing it. I think it would be unwise for the legislation to be too prescriptive about that.

**Q81 Lord Lester of Herne Hill:** In the Human Rights Act there is something that says, "You can only get damages when you have tried everything else." Would you envisage some such thing that says, "You can only use closed material procedure when you have tried everything else," or some last resort language of that kind?

*David Anderson:* I do not think legislation should require people to bang their head against a brick wall, and if the exercise is plainly going to be futile, I do not think legislation should require it to be performed. It is reasonable to entrust the court with an element of

predictive power, and if the judge reasonably takes the view that just resolution is not possible via PII, I think the court should be able to back its judgment, subject of course to appeal.

**Q82 Lord Morris of Handsworth:** My question is to Mr Anderson. Could you explain why it is profoundly wrong in principle that a closed material procedure should be triggered by a decision of the Government and not the courts?

*David Anderson:* I think it is wrong in principle both as a matter of perception of justice and as a matter of actual justice. It is not my job, thank goodness, to try to sell laws to the public, but I am not sure how you would sell a law that enabled one party to the litigation simply to click its fingers and dictate that subsequent stages of the proceedings were going to be heard in secret. I think that would simply cause people to be intensely suspicious of what the Government was about.

I think it also threatens actual justice. I would disagree with the special advocates when they suggest that *Carnduff v Rock* is a very strange case that will probably never be followed. It was after all widely approved by members of the Supreme Court in the recent *Al Rawi* and *Tariq* cases. If you have a case that the Government thinks might be struck out under *Carnduff v Rock*, and it takes the view that if they just hold their nerve the court is likely to strike out the case and they will not be bothered with it any more, why should it opt for a closed material procedure, which means opting for all its dirty washing to be brought out in public? It seems to me profoundly wrong that the Government should give itself that decision. Like any other case management decision, it should be for the court to take, as it can balance the interests of both sides and not just the interests of one.

**Q83 Lord Morris of Handsworth:** Just for clarity in my mind, are you saying that in all cases, in all circumstances, the responsibility should fall to the courts and not the Government?

*David Anderson:* Yes.

**Lord Morris of Handsworth:** No qualification to that?

*David Anderson:* No.

**Lord Morris of Handsworth:** And the basis of your judgment on that?

*David Anderson:* That is on the basis of my belief that the court is there to hold the ring between the parties. There is usually something to be said on both sides. There may be cases where it is very clear—I do not know—that a closed material procedure is necessary, but in that case it should be the court that decides.

**Q84 Lord Morris of Handsworth:** Yes, but is it not the Government that is ultimately responsible for national security and not the courts?

*David Anderson:* Yes, it is, but even under the existing procedure, it seems to me, there is no threat to national security, because the worst that can happen is that the Government is required to produce evidence that it is not prepared to produce in open court, whereupon it is open to the Government to abandon whatever issue that evidence goes to. That might not be very satisfactory from the point of view of fairness, because you might end up settling a case that really ought to be fought, but I do not think it is a problem from the point of view of national security.

**Q85 Lord Lester of Herne Hill:** Can I just follow up on what Lord Morris has asked? Is it not the responsibility of Parliament, the Executive and the courts to protect justice and national security, and strike a proper balance? It is not the responsibility of any one of the branches of government as distinct from the other, is it?

*David Anderson:* That is certainly right, particularly in the context of a case to which one of those branches of government is a party.

*Lord Carlile of Berriew:* I think we are in danger of a semantic dispute here. In Lord Morris's question he used the word "triggered" and this was picking up something that had been said by Mr Anderson. I did not interpret Mr Anderson to mean that the Government could not trigger closed procedures, but I think he is meaning that the Government should not determine closed procedures.

*David Anderson:* It could request it.

*Lord Carlile of Berriew:* Yes, exactly, and to that extent I think we are at one.

**Q86 Mr Sharma:** Can you explain how your proposals to allow more communication between special advocates and those whose interests they represent would work in practice without any change to the current legislative framework?

*Lord Carlile of Berriew:* Can I start by saying that I think the special advocates, in their memorandum and here, have sold themselves short? I think if you look at the cases, and I have looked in detail at all the control order cases over the years, the special advocates have been extremely effective and have changed the outcome of many cases. However, I think that the special advocates should be allowed to communicate on procedural matters far more often than they do. I also believe, and recommended in my reports when I was the Independent Reviewer, that they should be permitted in certain instances to communicate with the people whose interests they were representing on questions of fact, but subject to controls.

For example, there might be an issue as to whether the subject of a control order—or a TPIM now—was in a certain town at a certain time on a certain date. I can see no respectable argument against asking the controlee or TPIM subject where he or she was on that date at a particular time and obtaining the answer. It might be extremely instructive and save a huge amount of time before the court or tribunal. Therefore, it is my view that this should be more feasible, and if the rules need to be altered—and they are only rules; it does not require primary legislation—then they must be altered.

One thing I would wish to add about this is that you will see from the Green Paper that the level of training of special advocates is vestigial or small. They are given a one-day training course when they are appointed, and there is practically no ongoing training. They organise events themselves through the Special Advocates Support Office, I believe. In my view, they should have far more training in the way in which they deal with secret material. All of them are very good advocates, but they come into this sector without any experience of the secret world. Also, in my judgment, they should be given much more support in the preparation of the papers they are given by the security services.

*David Anderson:* Can I just come in on one point? I accept that the control order cases are a good guide to how special advocates function, and I agree that they do a very good job. But I think it would be a great mistake to assume that, if we go into a closed material procedure in civil litigation, it is going to be like control order proceedings. In control order proceedings, thanks to the Strasbourg court and to our own Supreme Court, the appellant gets the gist of the allegations against him; he knows in essence what the case against him is and he has enough information to enable him to instruct the special advocate properly.

That is not so in all other closed material proceedings, and here I go back to a question of Lord Lester's. He asks about Article 6 and the common law; the common law is the inspiration for Article 6 and it still goes further than Article 6, as Lord Dyson said in the Al Rawi case. There are whole areas, such as the immigration area, where Article 6 does not apply and where you are not guaranteed a gist of the allegations against you. A special advocate's job is very difficult in cases where the individual involved can know very little indeed about the case in question. Those are not just marginal cases; they are not just

immigration cases. Even in the field of asset freezing, for example, if you are subject to an asset freeze it does not feel very different from being subject to a control order. The Government is continuing to argue, so far successfully, that there is no application of Article 6 and no obligation to gist. So although they do a good job, in cases where there is no gist that job is particularly difficult.

**Q87 Baroness Berridge:** Lord Carlile, could I follow up on your point about the training that is needed? From what has been described, who is keeping the special advocate accountable? Clearly, the client-lawyer relationship is a very important relationship in terms of professional obligation and your duties to your client. Where is that? I have a missing piece: who is keeping the special advocates accountable in that sense with that missing obligation to the client?

**Lord Carlile of Berriew:** As I understand it, the answer to your question—and you have experience of this as a barrister—is that it is on the back of counsels’ briefs and in counsels’ notebooks. As far as I am aware, there is no formal audit trail, other than court orders, of any relationship between counsel and the people whose interest they represent. Of course, there is very little contact at the moment anyway, so there may not be much to keep. If the rules are relaxed or if practice changes, then of course there would have to be a detailed audit trail of all contacts, and it may be that contacts would have to be recorded in some way, which is very easily done, subject of course to the same rules of legal professional privilege applying to such contacts as to normal client-lawyer relationships.

**Q88 Baroness Berridge:** I understand that with the move to general civil procedure the appeals are different—they are not on law; they can be on fact. So who would have the obligation to advise a client as to whether they could appeal in a civil procedure that has involved the closed material procedure? Would it be the special advocate or would it be their counsel?

**Lord Carlile of Berriew:** Generally speaking, it is their own counsel, but I cannot see any objection to the special advocate giving at least general advice to the effect that an appeal should take place. Indeed, my understanding is that special advocates under present dispensation have the ability to advise appeals. If appropriate, those appeals are taken at government expense.

**Q89 Lord Lester of Herne Hill:** Before coming to my next question, I want to follow up something that Lord Carlile was saying just now about communicating fact. The only case in which I ever appeared with this problem was on behalf of the People’s Mujahedin of Iran (PMOI) in one of those proscribed organisation hearings, where we had precisely that problem—namely, you did not know which place you were alleged to have been in on a particular day—and eventually my clients withdrew from the proceedings on the grounds that it was manifestly unfair. Then a much better counsel much later, from Mr Anderson’s chambers, managed to win a case on their behalf in Luxembourg. Is the present position—because I just do not know—that a special advocate could in fact say to counsel on behalf of the organisation, “The allegation is that it was in Oxford,” or is the position that you still cannot even say that if you are the special advocate?

**Lord Carlile of Berriew:** I do not think the position is that you cannot; I think they just do not. They should be able to do so. I know a lot about the PMOI case and they were wonderfully successful in the end in front of POAC, the Court of Appeal, which strengthened the decision of POAC, and in Europe of course, but not in the United States as yet. They were the organisation I was referring to earlier, actually. I believe that AF standards should apply to all proceedings in any event. I can see no respectable argument against gisting in any

circumstances, otherwise the Government should withdraw. I would say to the Committee that, if you want to get a body of opinion about withdrawing from cases on disclosure grounds, you should ask the Public Prosecution Service of Northern Ireland, who have done it over many years, having considered disclosure issues very carefully in a situation in which they have separate disclosure judges.

**David Anderson:** Just in answer to your question, Lord Lester, the position as I understand is that, if a special advocate thinks it is important the person should know that the allegation is about Oxford, he will make submissions to the court for disclosure of that as part of the gist. He may also, to very much the same effect, make an application to the court to put that specific question to open counsel for the individual concerned. Their complaint is not that they cannot make such applications—they can; their complaint is that the Government is sitting there as they make the application, and therefore the Government knows what they are up to when they are asking about Oxford.

It is interesting to hear Mr McCullough; he accepted that this is a very difficult issue, for reasons that are given in the Green Paper, at around 2.30, and that is why I suggested that rather than come to a quick off-the-cuff view, it is something that might repay proper study and a working party of some kind, preferably chaired by a High Court judge.

**Lord Carlile of Berriew:** Can I say there is one point that I disagree with Mr Anderson about? That is the Government being present when the question is put. In every criminal case these days, the defence are obliged to put in a defence case statement. The defence case statement, if it is done properly, reveals issues like alibi and other evidential material. I think openness between the two sides in the case is a very good thing and does no harm at all.

**David Anderson:** I am pleased to say that Lord Carlile does not disagree with me about that. I simply said that it is a very difficult issue, as it obviously is, although, like him, I cannot see why the special advocate should not be able to pick up the phone, or at least write an e-mail to his opponent the day before a procedural hearing, and say, “Look, it’s going to take three days instead of two,” or “I’ll be calling another witness.” I can see no problem with that at all.

**Q90 Lord Lester of Herne Hill:** The notion of playing the game with all cards face up on the table is an interesting one.

**David Anderson:** It is the way that criminal law is going.

**Lord Carlile of Berriew:** It is not a parlour game; we are talking about getting the truth.

**Q91 Lord Lester of Herne Hill:** I was being frivolous. One of the things that special advocates float is the idea that we should adopt an American model of directly instructed, security-cleared lawyers who receive sensitive information subject to protective orders. They were kind enough to say they were not experts, but would either of you like to comment on that idea?

**Lord Carlile of Berriew:** No thank you.

**Lord Lester of Herne Hill:** Do you mean you do not want to comment?

**Lord Carlile of Berriew:** No thank you; I do not want the American system. I have some experience from my years as Independent Reviewer of looking at the way in which the American Executive exert power over secret matters, and I think it is completely counterintuitive to our common law tradition.

**Lord Lester of Herne Hill:** Thank you.

**David Anderson:** I think what they like about the system is that defence counsel are served with confidential information and they are trusted to look after it. But I think one has to look at that in the context of two other things: the first is the operation of the state secrets

principle and the possibility of executive orders that might keep such information away from everybody; and, secondly, I think it was reported towards the end of last year that the commander of Guantanamo signed an order requiring the interception of communications between lawyers and clients. Although I do not claim to have an in-depth knowledge of all this, it may be that the degree of trust is not quite as great as it might at first appear.

**Q92 Lord Bowness:** Gentlemen, you seemed to give us, as I understand it, a slightly different approach to the proposals on gisting. If I am correct, I think Mr Anderson thinks it is unwelcome that there is a proposal to legislate to define the categories of case in which disclosure obligation does not apply. On the other hand, Lord Carlile I think thinks it is a good idea. Could I ask, Lord Carlile, why you think it is a good idea?

**Lord Carlile of Berriew:** We are back to Lord Lester's architectural metaphor. If we apply what we regard as appropriate standards of justice, the person whose rights are being questioned should be given the opportunity of at least knowing the basis of what is alleged against him or her. I cannot see that national security would suffer from an appropriate degree of gisting, though there may have to be some kind of statutory definition of either what gisting means or what it may include—a kind of provision we are very accustomed to.

**David Anderson:** Once again I think we are very much on the same page. We are both very much in favour of gisting. The courts have identified categories of case in which they say gisting is not required; they have also said that it is not a hard-edged area of law. In other words, it is one for them to decide on rather than for Parliament. The second reason I would be reluctant to see Parliament legislating on this, as they say, to define the categories in which gisting will not be required, is that judging from the stance they have taken, both as various Bills have gone through Parliament, such as the recent TPIM Bill and the Terrorist Asset-Freezing etc Bill that went through in 2010, and also from the stance they take in the courts, they will do everything they can to resist the principle of gisting. I suspect that neither Lord Carlile nor I would like the legislation they produce very much.

**Q93 Mr Sharma:** You have partly explained it, but can you explain why you are against legislating to provide greater certainty about the context in which the AF (No 3) disclosure obligation does not apply?

**David Anderson:** Just to summarise two reasons: first, it is not an area where certainty can sensibly be provided by legislation; secondly, I do not think I would like the legislation very much if it came out.

**Q94 Lord Lester of Herne Hill:** Mr Anderson, I think you indicated that you thought that the introduction of closed material procedures in civil proceedings would provide an opportunity to provide for the admissibility of intercept evidence in those proceedings. Can you explain why you think that is so?

**David Anderson:** Yes. Section 17 of RIPA, as the Committee will know, prevents evidence being adduced or questions being asked in court that disclose the contents of a domestic intercept or even the existence of a domestic intercept. But there are exceptions in Section 18 for, I think, all the procedures where CMPs currently operate—the Investigatory Powers Tribunal, control order proceedings, SIAC, POAC and asset-freezing procedures—subject of course to the condition that nothing is disclosed to the individual himself.

I can see no logic in failing to extend the same power to civil CMPs. The whole point of a civil CMP is that the court should be able to determine the case in the light of all the evidence. In circumstances where secrecy functions as a protection against the inadvertent disclosure of very sensitive evidence, I cannot see why intercept evidence should not be part of the body of facts that the court considers.

**Q95 Lord Lester of Herne Hill:** Lord Carlile, do you agree?

*Lord Carlile of Berriew:* I agree because I think there is a very fundamental difference between civil proceedings and criminal proceedings. In criminal proceedings there are the complexities of quantity connected with the CPIA obligations of disclosure. In a criminal case it may not be possible to produce evidence that may undermine the prosecution case because it may not have been retained. The Chilcot committee is still struggling with that problem after four or five years. I cannot see those problems in civil proceedings, where one is dealing simply with what is available.

**Q96 Lord Lester of Herne Hill:** Mr Anderson, you have suggested that the Norwich Pharmacal jurisdiction might be reformed to introduce a system of exemption from disclosure based on traditionally reviewable ministerial certificates. How could a system of that kind be compatible with the right of access to court guaranteed by Article 6.1 of the European convention? Sorry, am I usurping somebody else?

**Chair:** No, do not worry.

**Lord Lester of Herne Hill:** I am so sorry.

**Chair:** You are not the first.

**Lord Lester of Herne Hill:** May I transfer the question?

**Mike Crockart:** I would have asked the same question.

**Lord Lester of Herne Hill:** I am so sorry.

*David Anderson:* Could I say briefly first that perhaps the prior question is whether anything needs to be done at all. I think there is no doubt that the Americans and perhaps others were very upset by the original application of the Norwich Pharmacal principle, which they perceived as a failure to acknowledge the control principle. They said, "Well, if we give you our secret information on the basis that you promise to keep it to yourselves and you then start showing it to other people, we're not going to give you as much as we did before." That seems to me a reasonable position to take.

One thing I should perhaps have questioned the Government more carefully on is the seven cases they refer to as having raised the difficulty. It is certainly not just Binyam Mohamed; they refer to seven cases. But I wonder how many of those seven cases post-date the judgment of the Court of Appeal in Binyam Mohamed in February 2010, in which the Court of Appeal gave a great deal of weight to the control principle and a great deal of deference to the Secretary of State, in deciding both what national security required and also how it had to be balanced with the requirements of justice in other proceedings.

On the basis that something does need to be done or may need to be done, not least to reassure our international liaison partners, it seems to me that some of the proposals in the Green Paper are simply too absolute, and you are not going to get away with a blanket exclusion of all evidence in the hands of the security service, or even all evidence in the hands of the Government, as they suggest at one point. A conclusive certificate, of the sort that was issued in Tinnelly and McElduff and Johnston v Chief Constable of the Royal Ulster Constabulary, two of Lord Lester's great forensic triumphs, would presumably also not outlast the onslaughts of Lord Lester. So, what I have suggested is something more modest: either a ministerial certificate that will be judicially reviewable or perhaps a rebuttable legislative presumption against the disclosure of certain types of national security material. It might not be watertight, but it will be something and it could help to provide the necessary reassurance.

**Q97 Baroness Berridge:** Can I just follow you up on that point? If you look at the public, these were not cases of information that what the Americans were up to was

insignificant. These were really serious allegations, and I know you know much more than I, but these were very serious allegations—that we were complicit in rendition, in torture, et cetera. We would only have disclosed that if we had got ourselves muddled up in the wrongdoing, so I hear what you say, but is there not an issue here that we are over-responding to something that actually we just should not have been muddled up with in the first place?

**David Anderson:** First of all, you are right—the phrase is mixed up in the wrongdoing, and it does not mean that you actually have to be a tortfeasor. It does not mean you are actually in the frame legally, but it does mean that you have got mixed up to the extent that you have picked up some knowledge about it. That is the only basis on which the Norwich Pharmacal order was brought.

Of course, they are always sought in desperate cases, and Binyam Mohamed was facing a capital trial. Therefore, one would expect the courts to be very sympathetic towards him. But it seems to me that the reality is that, if you start giving away secrets that you promised to keep to yourself, it is inevitable that people are not going to give you those secrets to the same extent that they have before. I have said in my report, having made plenty of inquiries about this, that that is happening and that the Green Paper is not being alarmist in the way that it describes that reduction in willingness to share intelligence. It is a very hard choice and I think in the Norwich Pharmacal area one is very much in this business of balancing justice against national security. The difference between this and the other areas we have been discussing is that, once this information is released into other proceedings, it is not in the Government's hands anymore, so they cannot do anything to stop it being publicised. That is why there is a risk to national security. I quite agree it is an unpalatable choice, and they are hard cases, but at the end of the day, this intelligence sharing is very important to us. It seems to me that we should do, within limits, what we need to do to make sure that it continues.

**Q98 Baroness Berridge:** What I find difficult is that we know it is the Americans pressuring us and actually this started out with us getting mixed up, allegedly, in American wrongdoing. I find that a little bit rum, if that is the right word.

**David Anderson:** Of course, if the British Government is sued, the police are sued, or MI5 are sued—and we are sued in some of these cases, and all these things have happened—then the Government has a choice under the current procedures. It can either release the material into open court or it can withhold it on PII grounds and then end up possibly having to settle the case. At least in that situation, where we are defendants, there is not the same risk to national security because the Secretary of State can always pull the plug. That is what the Secretary of State cannot do under Norwich Pharmacal. That is one respect in which I differ from Dinah Rose.

**Q99 Lord Lester of Herne Hill:** The difficulty that we are in, and I do not just mean this Committee, is that we do not know and probably never will know the bottom line, so far as the United States is concerned, for our legislation. We do not know whether the approach that you have both taken and special advocates have adopted would satisfy the United States, or whether the security service would be told by their counterparts, “That's not good enough.” What I find troubling, and I do not know whether you want to comment on it, is that as legislators, if we are faced with a demand for something tougher, we are going to find it very difficult to resist that unless we know exactly what it is that we are being asked to do and why. That seems to me to be a practical difficulty, and neither of you presumably knows exactly what it is the United States are seeking to persuade us to do.

**Lord Carlile of Berriew:** I certainly do not know, but I would say to you that we should not only talk about the United States in this context. The control principle is very

important and relates to many foreign intelligence agencies and extremely useful information that comes into the hands of British intelligence agencies as a result. We cannot throw away the control principle.

**Lord Lester of Herne Hill:** No, of course not.

**Lord Carlile of Berriew:** Otherwise, I certainly agree with the conclusions that Mr Anderson has reached in the paper he has placed before this Committee.

**Chair:** Thank you very much for your co-operation today and your evidence.