

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

**THE JUSTICE AND SECURITY GREEN PAPER**

TUESDAY 24 JANUARY 2012

DINAH ROSE QC AND TOM HICKMAN

Evidence heard in Public

Questions 1 - 44

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## Oral Evidence

Taken before the Joint Committee on Human Rights

Tuesday 24 January 2012

Members present:

Dr Hywel Francis (Chair)  
Baroness Berridge  
Lord Bowness  
Rehman Chishti  
Mike Crockart  
Lord Dubs  
Lord Morris of Handsworth  
Mr Richard Shepherd

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**Examination of Witnesses****Dinah Rose QC and Tom Hickman, Barristers, Blackstone Chambers**

**Q1 Chair:** Good afternoon and welcome to this session of the Joint Committee on Human Rights in relation to the Justice and Security Green Paper. Could I ask you both to introduce yourselves for the record?

**Dinah Rose QC:** My name is Dinah Rose QC and I am a barrister practising in human rights and public law at Blackstone Chambers.

**Tom Hickman:** I am Tom Hickman and I am also a barrister practising in public law and human rights at Blackstone Chambers.

**Q2 Chair:** Ms Rose, could I begin by referring to your recent Atkin Memorial Lecture? You said in that lecture it is clear from the Supreme Court's judgments in *Al Rawi* and *Tariq* that the common law gives greater protection to the right to know the case against you than does Article 6 of the European Convention on Human Rights. Could you explain why that is?

**Dinah Rose QC:** I believe the reason is because in England we have always had an adversarial justice system. The essence of an adversarial trial is that each party presents their case, puts forward their evidence and challenges the evidence put forward by the other party, and the judge then sits as the arbiter to make the decision between the two. That is the essence of the adversarial system. Of course, in many European jurisdictions they have a civil law system that may include a greater or lesser inquisitorial element, where the judge carries a greater investigatory role. I think that makes a basic difference to the way that natural justice operates.

Article 6 of course sets the minimum standard that must be adhered to by all states of the Council of Europe. Our own common law tradition sets the standard that is appropriate for our own legal system. The problem is I do not think you can have an effective adversarial trial unless you know the whole of the case that is being mounted against you. Unless you know what the defence is and what evidence is being put forward to support the defence, you are in no position to work out what evidence you need to present or how to challenge the evidence of the other side. The system simply does not work without full disclosure. Indeed, I think

that is the reason why Lord Kerr, in the Al Rawi case, said that a case in which there was not full disclosure lacked the mark of judicial proceedings; it could not be described as a judicial process within our own legal system.

**Q3 Rehman Chishti:** Chairman, may I first of all declare that I am also a barrister and door tenant at 18 Red Lion Court? I have a question for Ms Rose linked to Article 6, which you just referred to. Your argument is founded on common law, but under our constitutional arrangements Parliament has the acknowledged power to override the common law if it so wishes. Article 6 of ECHR, on the other hand, binds Parliament so long as the UK remains part of ECHR. On this specific point of ECHR and Article 6, what constraints does Article 6 place on Parliament in your view?

**Dinah Rose QC:** I believe that Article 6 does place constraints. Their scope is not clear under the current case law. The two most pertinent cases are, firstly, the case of A and others v United Kingdom, which, in relation to detention of terrorist subjects, held that you should at least have the gist of the allegation disclosed so that you can give full instructions to the special advocate. Then there is the case of Kennedy v the United Kingdom, which dealt with the procedures in the investigatory powers tribunal and which appeared to adopt a much looser standard under Article 6. That is the case that the Government successfully relied on in Tariq.

My own view is that, if this legislation were to be introduced, Strasbourg would look at the whole picture again in the context of our common law system. I think what is proposed under this Green Paper would violate Article 6 in a number of ways: first, the principle of natural justice; secondly, the principle that no one should be a judge in their own court, because under the proposal it is suggested that the Minister would decide if there was to be a closed material procedure subject only to a judicial review scrutiny. The idea that a party to the action decides what procedure is to be followed seems to me to be anathema under Article 6. Thirdly, and linked to that, it breaches the principle of equality of arms, which is also a requirement under Article 6. I do not believe that this proposal would survive an Article 6 challenge.

**Q4 Baroness Berridge:** Could I just ask you a supplementary in relation to the first question before I go on to my question? You said that Article 6 is the baseline and that we have this adversarial procedure beyond that. Can you give me some specifics of what is beyond Article 6? Is it just the fuller disclosure that an adversarial system requires or are there other elements that mean the common law right is broader than the Article 6 right?

**Dinah Rose QC:** There may be other respects in which the common law is broader not just than Article 6 but than other convention rights as well. But the example relevant for our case is if you compare the decision of the Supreme Court in Al Rawi with the decision of the European Court of Human Rights in A and others v United Kingdom. In that case the standard that was being set under Article 6 was for disclosure at least of a sufficient gist to enable instructions to be given, but the standard that the Supreme Court sets in Al Rawi is a standard of complete disclosure in order for there to be a civil trial.

**Q5 Baroness Berridge:** I have a question now to Mr Hickman. The Bingham Centre has considered whether there is a problem that is required to be addressed and has concluded that there is not. Can you explain in more detail why you reached that conclusion, because clearly the Government thinks there is a problem that swiftly needs addressing?

**Tom Hickman:** Our position is not quite as simple as that, but I agree that that is the bottom line. It depends on what the arguments being put forward are. The first argument that the Government put forward in the Al Rawi case was effectively a pragmatic argument; they

said that it is very onerous to go through a public interest immunity, or PII, process and that in cases raising significant public interest issues/national security issues, it would be appropriate to bypass that. In our view PII is a constitutional fundamental, and you simply cannot rely on expediency as a reason for going around PII, so that is not a reason for changing the system.

The argument at the forefront of much of the Green Paper is that there are perceived risks to national security in the current arrangements, either because it is said that there may be some disclosure of sensitive material by the courts or because the disclosure of sensitive international relations material may lead to a constriction in security-sharing arrangements. We also say that this case has not been made out at all. In fact, there is no case that we are aware of, as we have said, in which the courts have ever required disclosure of national security information that is operationally sensitive. We have explained why the suggestion that there would be a constriction in intelligence sharing is not sufficiently persuasive to justify the sorts of proposals that have been brought forward.

Indeed, the very justification for the closed material procedure that the Government wants to introduce is supposedly because so much material would not be disclosed by the courts. There is an inconsistency in the Government's position, because they say the courts are not going to disclose a lot of this material. Let us say this file here is full of security sensitive information. The Government's case is that the courts are never going to disclose this information and, therefore, the case will not be able to proceed, and they want to put it before the court in a secret hearing. That is inconsistent with their suggestion that there is a national security risk in the current arrangements. In our view, therefore, that argument does not give rise to any need for change.

They also have an argument that it is unfair on the defendant—that the Government cannot defend themselves if all this material in this file cannot be put before the court. That argument does not assist them either because, in their view, in such a case the case would not go ahead; the Government would not be prejudiced in such a case, because the case would not go ahead. The sole remaining issue is what happens if a claimant wants to bring a case but their case is struck out because the case cannot go ahead as evidence that they need is covered by PII. A number of the judges in the Al Rawi case said that that could potentially be justification for closed material procedure, and we have examined that in our paper.

But that is not the proposal the Government is making; the Government's proposal amounts to effectively a wholesale abolition of PII, and the replacement of it with closed procedures in an unspecified and very broad number of cases. We have said very clearly that the Bingham Centre does not think that any case has been made out to justify that kind of fundamental reform.

**Q6 Baroness Berridge:** Your memorandum helpfully explains that the Binyam Mohamed case did not go through the PII procedure. Can you illuminate for us why they did not go through that procedure in that case and then draw us a conclusion?

**Dinah Rose QC:** There was a PII process in Binyam Mohamed.

**Baroness Berridge:** Sorry, I thought it said that there was “no full-blown PII process in that case”.

**Dinah Rose QC:** I think you are referring to the Al Rawi case.

**Baroness Berridge:** Sorry, Al Rawi.

**Dinah Rose QC:** In Binyam Mohamed there was a PII. What happened in the Al Rawi litigation was that there was some disclosure. There was then a mediation and the cases were settled. The case never got to trial and there was no full-blown disclosure exercise and, therefore, no full testing of PII. My view is that one of the weaknesses of the Green Paper is that it dismisses PII without appearing, with respect, to have a very clear understanding of the

power and flexibility of the PII principle, and without putting forward any evidence of why it is inadequate.

**Q7 Baroness Berridge:** Was not your point that it was not put to the test as a procedure in that case, so we do not know whether we have reached the end of the line as to what PII can do for us in these situations?

*Dinah Rose QC:* That is correct. Indeed, they do not point to any case suggesting there is a serious problem that needs to be addressed by legislation because PII is inadequate to address it.

*Tom Hickman:* Can I add a supplementary answer to that? While the case was proceeding up to the Supreme Court in *Al Rawi*, the main proceedings carried on until they eventually settled. While they were carrying on, some PII was done and there was disclosure, for example, of some of the internal SIS instructions going back to 2004. That was actually disclosed and is publicly available now on the internet, having been disclosed publicly in that case. That was done by a PII process, so what we said in that case was, “Let’s just have a look at some of this very important documentation and, to start with, just do PII on that information.” That was done successfully. We never got on to the next tranche of information and the next tranche, because the case settled.

**Q8 Lord Morris of Handsworth:** My question is to both of you, but I suspect that Ms Rose might have already given it her answer. I will put the question to you anyway. Do you agree with the Government’s claim in its Green Paper that the extension of closed material procedures will enhance procedural fairness?

*Dinah Rose QC:* I strongly disagree with that.

**Lord Morris of Handsworth:** I thought you would.

*Dinah Rose QC:* It is based on a fallacy identified by Lord Kerr in what is now a very well-known passage—paragraph 93 of the judgment in *Al Rawi*. He makes the point that the argument run by the Government, which was run in *Al Rawi* as well, is that it is fairer for the judge to have more material. Therefore, a process that enables the judge to see all the evidence is fairer than a process that limits the evidence that goes before the judge because some evidence has been declared inadmissible following the PII process. The fallacy in that argument is that the judge may see the evidence and the Government may see the evidence, but the claimant and the claimant’s lawyers cannot see the evidence. That is fundamentally unfair and, as Lord Kerr said, evidence that is not tested may positively mislead.

Let me give you a specific example, which I have put forward a number of times and to which I have never had a convincing answer. The example is this: if you have a case in which the claimant gives oral evidence about what he says happened to him, and in the closed material there is a document inconsistent with the evidence he has given, he cannot be cross-examined on the basis of that material because it is secret from him. So the judge has unchallenged oral testimony from the claimant and then has a document that on its face is inconsistent with that testimony, but the claimant has had no opportunity to explain it and it has not been put to him.

In that situation, how is the judge fairly to determine which evidence he accepts—to decide whether he accepts the evidence of the claimant or what is in the document? He simply does not have the tools to enable him to do that. That brings me back to where I started, which is that in an adversarial process this procedure does not work. It is a fundamental misunderstanding of what an adversarial trial is.

*Tom Hickman:* My answer to that question would be quite simply that it obviously does not and cannot enhance procedural fairness, because you are denying one party to the case evidence being used in their case. It cannot, in any view, enhance procedural fairness.

There were some suggestions in the Green Paper that the special advocate system has been shown to protect procedural fairness. That is clearly wrong. Any use of closed procedures is inevitably a grave departure from procedural fairness.

**Q9 Baroness Berridge:** Can I just clarify first of all what you were previously saying? Are you saying that in your view justice, which is obviously what we are trying to ultimately get to, is better served in an adversarial situation by potentially a more limited disclosure of everything being tested than by having greater disclosure but some of it being untested by the means of trial? Have I understood?

**Dinah Rose QC:** Yes. In the paper that I circulated this morning I have sought to summarise the points. I think PII is really important here, and the Green Paper shows a basic misunderstanding of PII. First, I do not think it appreciates the flexibility of the powers that a judge has in a PII process. It is not simply a decision by the judge: either this sensitive material will be publicly disclosed or it will be inadmissible. That is a false picture of PII. The judge has a range of tools available to him or her when considering a claim for PII. What will happen is that the Minister will sign a certificate that says that particular evidence, if it is publicly disclosed, will be harmful to national security. The judge's task is then to balance the harm to national security against the needs of the administration of justice.

In order to do that, the judge can do a variety of things: he can have the hearing in secret; he can put in place measures to protect the identity of a witness who is giving evidence; he can order that there should be disclosure of the gist of the information but not the actual document itself; he can order that a document should be redacted so part of it is disclosed; he can even order that there should be put in place a confidentiality ring so that there should only be restricted disclosure, perhaps to the claimant's lawyers. You can imagine a situation where, for example, there might be evidence given by a witness on behalf of the defendant that is outside the knowledge of the claimant, and where the barrister would want to cross-examine that witness and is able to do so if they have access to the secret material.

It is not a simple question of either having the material in or having it out. There is a whole range of tools, and that is why I think the analysis in the Green Paper is simply inadequate.

**Q10 Baroness Berridge:** To put it colloquially, I think the Government is saying, "In this case we took a hit. We could not release this information and we had to settle." In your view of the overall principles of justice—because the scales are going to end up somewhere in this balance—are you saying that: (a) you are not convinced that there are these situations; but (b) assuming the Government are right that they took a hit on this one and had to settle, in the overall scheme of things justice is better served by not introducing this procedure and having the minute number of cases where the Government take the hit and decide they are going to protect their operational security services over and above paying out this money?

**Dinah Rose QC:** Remember, the only situation in which the Government would take a hit in that way is one in which the judge decides that material is disclosable and the Government says, "We cannot accept that judgment, so we will settle rather than disclose it." That is something that happens to defendants every day in our courts; it is not special to PII. There are very many cases in which defendants are ordered to disclose documents and are so appalled by what those documents may reveal about their internal practices that they settle the case. That is one of the pressures of civil litigation; that is what happens.

The Government found themselves in a very embarrassing situation, where there was a risk that documents showing misconduct on the part of the intelligence agencies would be disclosed, so they settled the cases. In my view, it is unacceptable that their reaction to that is not to say, "The intelligence services should be held more accountable and held to higher

standards,” but instead to say, “We are going to change the rules of the game so that in future we can have a situation where we can fight these cases in secret without the claimant being able to pursue a claim against us.” That seems to me to be a very strange response.

**Q11 Baroness Berridge:** Just to move on to the question we were going to ask you—I think you have covered it—do you think PII is inadequate to deal with the disclosure of sensitive information?

**Tom Hickman:** This is the point that Dinah was talking about when she was talking about all the different options that are open to a court. I do not know if any of you have our paper in front of you, but we deal with this in paragraphs 23 and 24. There is a very important statement in the leading judgment of Wiley—Lord Woolf’s judgment. I have set it out in the paper and, basically, what he is saying is you go through the exercise of issuing a certificate; then you give that to the judge; representations are made on it by both parties; the judge looks at the material and he weighs the public interest in maintaining the secrecy of that information against the public interest in the administration of justice in disclosing it. He carries out a balancing exercise.

That is not the end of the process, and this is an often-overlooked aspect of the PII exercise. There is a further element to the process, which is described in this passage in Lord Woolf’s judgment. What he then says is, “You have the category of information”—let us say it is half of the documents in this folder here—“that I recognise is sensitive, but I think that some of this information can be given to the lawyers of the claimant, for example, who have entered into undertakings that they will not disclose it any further. We can also restrict the circumstances in which these documents are going to be inspected or we can gist the documents—we can take the material bits from them, put that in a separate document and give that to the claimant or to their lawyers.” There is a whole range of possibilities that can be employed at that final stage of the PII process.

That has never actually happened in any case yet because we have not had a situation where we have got through the PII process. We did in *Al Rawi* in respect of some limited documents, but they were disclosed with some redactions. We have never actually tested this mechanism and, for example, confidentiality rings—which we mention in paragraph 24 of our paper and which Dinah has mentioned—are used extensively in other areas of law. They are not addressed at all in the Green Paper, and the Government has not explained why these sorts of processes cannot be employed. It is time-consuming and it is of course difficult, but this is the administration of justice and potentially extremely serious allegations that need to be tested. So what we have said is that we find it very difficult to conceive of circumstances where, having done all of that, you are left with the prospect of having to strike a claim out because so much of the material remains undisclosable.

**Q12 Baroness Berridge:** In the balancing tests that you outline, obviously the level of sensitivity of the information is one factor, but am I right in assuming that how relevant the information is to the core of the allegations is a huge factor in the judge’s mind as to whether or not they can just be—

**Tom Hickman:** That is right.

**Baroness Berridge:** So it is not just a case on disclosure as to whether it is relevant; within relevant, you get a consideration of how relevant the information is that you have seen.

**Tom Hickman:** That is right. It is both relevance and also how damaging it would be to the national interest. You have to weigh both.

**Dinah Rose QC:** You would also be looking at the nature of the issue in the proceedings. For example, in *Binyam Mohamed*, when that case started Binyam Mohamed was in detention in Guantanamo Bay facing a potential capital charge. By the time the issue

of PII came to the fore, he had already been returned to the UK. One of the things that the divisional court said in that case is that they would have taken a different approach to the balancing of PII had he still been facing a capital charge because, obviously, the importance of disclosure is much greater in that case.

**Tom Hickman:** Can I also add a footnote, if you do not mind? When you compare a system that applies PII like we do in the civil justice system with what happens in control order cases or SIAC cases, there is a vast difference. In SIAC and control order cases, you basically do not get told anything. It is blanket secrecy; all the documents that you get given in a control order case, in so far as they refer to anything about the intelligence services, are completely blacked out, because anything that could cause any potential harm to the national interest or public interest, no matter how remote and no matter how important that material, is blanket redacted.

**Dinah Rose QC:** No balance.

**Tom Hickman:** There is no balancing of interests, and I think that is what the Government want to do here. They want to have this complete blanket of secrecy that would effectively close off the whole part of the civil trial. There would be no disclosure of anything; it would be blanket secrecy. That is why the fact that they are seeking to replace PII completely is so important.

**Chair:** Ms Rose, I do apologise. We should have thanked you for the memorandum you provided us with this morning. We place on record our thanks for that. That will be reported to both Houses, hopefully today, and it will be on our website tomorrow so the public can see it.

**Q13 Lord Dubs:** Are there any exceptional circumstances in which the availability of closed material procedures in civil proceedings could be an enhancing of human rights?

**Dinah Rose QC:** There is already an obvious example of a situation in which a closed proceeding can indeed enhance human rights. That is when you have what would otherwise be an ex parte process and you can use a special advocate to enhance the fairness of that process. The most obvious example of that is a situation in which an application has been made for PII. The normal procedure is that a certificate is signed by the Minister saying, "Disclosure of this particular evidence would harm national security," and the judge may then say, "Well, I would like to inspect the documents in order to be able to conduct the balancing exercise." Traditionally, that process was of course done in the absence of the claimant and the claimant's lawyers, because a claim for PII had been made, so only the judge and the defendant's lawyers would be present. But it is now well established that you can appoint a special advocate to represent the interests of the claimant in that process and to argue in that process that more material should be disclosed. That is a good example of how a special advocate can enhance fairness.

Essentially, in my view the right principle is this: a special advocate is a legitimate tool to enhance procedural fairness and to provide representation where otherwise there would be none. A special advocate is not a legitimate tool to reduce procedural fairness and to prevent a claimant from access to information. That is why the original concept behind SIAC was acceptable. Before SIAC—and, of course, this is what was examined in the *Johal* case—there was a wholly secret procedure where the decision was taken to deport somebody on national security grounds, and the original idea of the special advocate was to enhance procedural protection for the claimant. We now have a perversion of that concept, where the special advocate is being used to reduce procedural protections, and that is unacceptable.

**Tom Hickman:** I would accept that there are no circumstances that I can think of in which it could be said to be human rights enhancing, save in those respects that Dinah has mentioned. We have referred in our paper to some circumstances in which Lord Mance, Lord

Hope and Lord Clarke in *Al Rawi* said that there could potentially be some justification for a closed procedure, which is where a claimant brings a case against the security services in particular—it is difficult to imagine any other defendant—in which those claims would be struck out. Of course, in America you have a system of state secrets called the state secrets doctrine, and all the claims against the CIA that have been brought have been struck out on the grounds of state secret privilege. It would be unfortunate if we ended up in a situation such as that in this country.

We have looked at that suggestion in our paper, and we accept that there could potentially be justification for a closed process if the only option was that claims of that nature would be struck out and would fail. I think that is probably an example of what Dinah has said, which is that it is enhancing because it is a situation where otherwise there would be no justice at all. Given what I have said about Wiley and the fact that there is all this possibility for other arrangements in the PII process to be made, such as confidentiality rings, we find it difficult to accept that that would not adequately deal with those circumstances. Certainly, there is no case yet that justifies the Government's suggestion that closed material procedure is necessary in those circumstances.

**Q14 Lord Dubs:** In the answers to earlier questions, I think you indicated why the proposal in the Green Paper is different from the existing law on PII. Is there anything else you want to add to that?

**Tom Hickman:** There are certain key features of PII that, in the light of the question, it might be helpful to spell out. All of these would be done away with if the Green Paper were to become law. The first key feature is there has to be a ministerial certificate. That is a very important discipline and it is a very important protection. There have been examples of where the courts have come down very hard when those certificates have not been properly drawn up. One can think of the Scott inquiry and the Al-Sweady litigation. They provide a very important discipline and check. The second key feature is that you cannot use PII for class claims. You cannot just say this falls into a whole category of information and, therefore, there is PII.

The third key feature is that there is a balancing of interests: you balance the administration of justice against the need for secrecy, and so the administration of justice has a say, and we have already discussed that. The fourth key feature, as we have discussed in Wiley, is that at the end of the process, once you have decided that material cannot be properly disclosed, you try to find other ways to introduce it into the case in a manner that is acceptable. Finally, a key feature of PII is that, if having done all that, there remains some information that cannot be introduced into the trial, it is excluded altogether from the trial. They are the five key features of PII, and the Government in these proposals, apparently in order to meet only the last point, would do away with all five of them. That cannot be justified.

**Dinah Rose QC:** The only one I would add to that is that in PII it is the judge who makes the decision and not the Minister.

**Tom Hickman:** That is a very important point and we have addressed that in our paper at the Bingham Centre. We think the suggestion that it should be the Secretary of State who triggers this process is simply unjustified.

**Q15 Lord Morris of Handsworth:** Can you clear up something in my mind? I understood you to say that PII cannot be used to establish a class action situation. Can it, therefore, be used to pursue a situation where precedence has been established or indeed to set precedent?

**Tom Hickman:** Sorry, I am not entirely sure I heard the question. Would you mind just repeating it?

**Lord Morris of Handsworth:** What I have said is that I recognise that the PII cannot be used or should not be used to establish class actions going forward. Fundamentally, my question is: can it be advanced where precedence has already been established and you are making like-for-like comparison of the facts?

**Tom Hickman:** I see what you mean. There are obviously precedents that say, for example, Cabinet minutes are treated as very sensitive, and there are obviously precedents that refer to national security information. There are cases that have addressed different types of information. Therefore, when you are having an argument in court about PII and those are the cases to which the judge's attention is directed, the judge reads those cases and says, "Obviously, this case concerns Cabinet minutes—very sensitive. It would take some very weighty reasons of the administration of justice for there to be disclosure of them." The previous cases are not binding on him because the circumstances will always be different, but obviously the judge takes that very much to heart and it guides the decision.

**Lord Morris of Handsworth:** Does that work both ways?

**Tom Hickman:** Yes. It can work in favour of either party; it just depends.

**Q16 Baroness Berridge:** Can I just draw you back, Ms Rose, to your comments about ex parte proceedings and how they have been enhanced by the role of the special advocate? You started with the core principle that, in an adversarial procedure, this is what is necessary for full disclosure. How do you apply that principle that you have very eloquently stated to ex parte proceedings? Are not ex parte, as a class of proceedings, contrary to what you first outlined?

**Dinah Rose QC:** Ex parte proceedings are not the trial of an action; they will normally be an ancillary process that takes place during the proceedings. An obvious example will be a situation where there is an application for disclosure that is being met with a claim for PII. You are not trying the action; it is an ancillary issue that has arisen in the course of the proceedings that may be dealt with on an ex parte basis.

**Q17 Baroness Berridge:** Was it ex parte that all the super injunctions then happened under?

**Dinah Rose QC:** They would have originally been ex parte. I do not know the detail of the super injunctions, but there are of course many injunctions originally applied for on an ex parte basis, but what then happens is that there has to be a return date where the other side is allowed to come along and make their points. One of the interesting features of the case law on ex parte injunctions is that you are not allowed to rely, in support of an application for an ex parte injunction, on evidence that you are not prepared to disclose to the other side for the return date, which is quite an interesting point when you contrast it with what the Government is seeking to do here.

**Q18 Rehman Chishti:** I have a question to Ms Rose. I think we have touched on it, but just for clarification can you explain how what is proposed in the Green Paper is different from what was argued by the Government in the Al Rawi litigation?

**Dinah Rose QC:** It is actually quite similar to what was argued for the Government in Al Rawi; you can read this Green Paper as their revenge for losing Al Rawi. Certainly, some familiar arguments rear their heads here, including the argument that it is somehow fairer to have a closed process than a PII process. That is certainly an argument that was made in Al Rawi. The idea that the Minister would make the decision, and that it would only be

reviewable on judicial review principles by the judge, is something that is new and was not proposed in *Al Rawi*, and it is very radical.

**Rehman Chishti:** It is basically saying that the Secretary of State will decide if it should be a closed material procedure or not.

**Dinah Rose QC:** The defendant to the action will decide to invoke a procedure favourable to him.

**Rehman Chishti:** Rather than the court.

**Dinah Rose QC:** Yes. It is unprecedented.

**Rehman Chishti:** I think us lawyers would probably have some agreement on that.

**Dinah Rose QC:** I think you would, yes.

**Tom Hickman:** It is very important that the argument that was put forward in *Al Rawi* was rejected unanimously by the Supreme Court, and that does not come out in the Green Paper.

**Baroness Berridge:** Strange, that.

**Q19 Mr Shepherd:** This is for clarification in my mind, because when we come to PII's I go back to the Scott inquiry and the circumstances around that. First of all, the Attorney General insisted with the Secretary of State it was his duty to sign such an attestation: "I, Michael Heseltine, attest and affirm..." and it took 10 or 12 hours, or something, to convince Heseltine that he did, so I respect that element of it. Then came the question as to whether the judge is actually required to read the material in that because of the origins in Crown immunity—this was an absolute act of state that took it out. Of course, we then had a very big political battle over this, and you are now coming to tell me that the PII is actually a more secure way now than any alternative.

I believe in open courts as a general principle, but I recognise here that we are talking about the very security and safety of the state, we hope, although the Scott arms inquiry indicated that it was not about the security of the state but rather the security of ministerial decisions. You feel secure that the PII system is fairer than what was before in PII cases, where the judges did read, or, rather, they accepted the declaration, that in fact the Minister is not instructed to do that because it is a personal act of station by a Minister of the Crown. All of these are elements that in theory guaranteed the security of the old process. Do you think the PII is a secure process now? It used to be called Crown immunity, of course.

**Dinah Rose QC:** Of course. There were very significant developments during the 20th century, as you rightly say. Originally, the position was that, if a claim for Crown immunity was made, that was the end of the matter, and the material was excluded. Then the crucial step forward was made that there remained a balancing act to be taken by the judge, and the Crown could not simply oust evidence by making that claim. Post Scott—and Scott of course is a very important watershed, particularly because a statement was made in Parliament after the Scott inquiry about the approach that would be taken in future—it was acknowledged that there would not be class claims taken, and that the effect of the certificate is that the Minister is expressing the opinion that disclosure of the material would be harmful to national security. That is only the beginning of the inquiry, not the end of the inquiry, because it then becomes the duty of the judge to balance that claim and the extent of the harm identified against the need for the material to be disclosed. That is the crucial element of PII—that the judge is in charge of that exercise of balancing the conflicting interests.

It is right to say that there have been many cases where PII has been wrongly claimed. A very recent example was the *Al-Sweady* case, where claims for PII were made by the Ministry of Defence over material which then transpired to be already in the public domain. The judgment in that case is a swingeing criticism of the Minister and the witness who was

called by the MoD in that case. The fact that £1 million in indemnity costs were awarded against the MoD is an indication of how seriously courts take abuse of the PII process.

**Q20 Mr Shepherd:** The last point on this was that I remember from the Scott inquiry—I actually attended the evidence session—that the Attorney General assured Sir Richard Scott that he had not read the material and did not think it was appropriate to do so. If you remember, the Solicitor General said he had read the reasoning behind the application for it. It was this confusion, clearly, at the highest level of government—

**Dinah Rose QC:** There was certainly an issue there. Of course, Governments always struggle with the question of the difference between material that is damaging and material that is embarrassing. One of the real vices about this proposal is that all the power ends up in the hands of the Minister, who is a defendant to the action and may not take that much persuading that material showing his department, or people for whom he is responsible, involved in misconduct is damaging to national security.

Indeed, in the Binyam Mohamed case we had a number of instances in which PII claims were made, in particular over various paragraphs of one of the judgments, which then transpired to be paragraphs that contained material that was already in the public domain. One encounters this not infrequently. Another example is a control order case that I was acting in, where, on the day of the hearing, some material was produced by the Government that was heavily redacted; we objected to the redactions, and we were all sent away while they argued about them. We were called back in and the judge had written on in handwriting what had been redacted. What had been redacted was material that had no national security implications at all, but what it did show was that the Home Office had misdirected itself in law when imposing the control order. Somebody in the Home Office had thought it appropriate to redact that on national security grounds. That is the vice, and once you take the oversight of the judge out of the process, you will have no control over that.

**Q21 Lord Dubs:** I think you have actually just answered this question, but I am going to put it in case there is any more to the answer. The question is this: the significance under the Green Paper's proposals is that the decision of whether to use the closed material procedure should be made by the Secretary of State and not the court. I think you have answered that. Is there anything else you want to add to that?

**Dinah Rose QC:** No, except that you will already have gathered that I regard it as one of the most serious defects in the Green Paper.

**Lord Dubs:** Just about, yes.

**Q22 Baroness Berridge:** Would you say that it is a breach of separation of powers?

**Dinah Rose QC:** I do not think I would put it that way. I would say it is certainly a breach of the principles, first of all, that no one is a judge in their own cause and, secondly, that there should be equality of arms. Those are both basic principles of natural justice.

**Tom Hickman:** The justification that the Government puts forward for having a closed material procedure is supposedly fairness to itself and to the other side in being able to adduce information before the court. The judge is the arbiter of fairness, and even on the Government's own case, it should properly fall to the judge to make that decision.

**Q23 Lord Morris of Handsworth:** My question is to Mr Hickman. If provision is to be made for closed material procedures in civil proceedings in exceptional cases, as the Bingham Centre suggests, how do you suggest their use could be confined to wholly exceptional circumstances?

**Tom Hickman:** We certainly do not propose that there should be a closed material procedure in exceptional cases. That is not at all what we have said. What we have said is we examined the circumstances that were contemplated by several members of the Supreme Court in *Al Rawi*, who say there may be circumstances where they would have to strike claims out against the intelligence services because so much material is covered by PII. They have said that only in those circumstances the claimant should be given an option: “You can either go away and your claim will fail, or we could have some sort of procedure whereby we will see the material but you will not.”

I have to say that we find it very difficult to conceive of this being necessary because of all the things we have discussed today—confidentiality rings, the end of the Wiley process, et cetera—but we have said that potentially there could be a justification in those circumstances for giving a claimant the option to go forward with the claim or not. But in order for that even potentially to be justified there would need to be real checks on the use of such a mechanism, and we have set those out. None of these is reflected anywhere in the Green Paper. For example, we would say you would have to retain PII, so this should only even be thought of after you get to the end of the PII process. Of course, the government Green Paper would do away completely with PII; there would be no balancing exercise conducted by the judge at all.

We have also said that there are lots of unanswered questions here in the Green Paper about the potential scope of any power. We have set out in the paper, between pages 16 and 18, a host of different situations where, on the Government’s case, you might have a closed material procedure. None of these is really addressed in the Green Paper, and you simply could not have enacted a power that could be invoked in any of these situations. It would be quite unjustifiable. We would have to consider what proposals the Government might put forward, but at the moment they are completely limitless.

**Q24 Lord Morris of Handsworth:** Were your proposals offered pre-publication of the Green Paper?

**Tom Hickman:** No, I am sorry. We were simply responding to the Green Paper, and I hasten to add that they are not proposals in any sense of the word. We are simply examining the suggestion that was made by the Supreme Court in *Al Rawi*. As I said, that suggestion is not what the Government was arguing for in *Al Rawi* and is not what is in the Green Paper, because they want to completely get rid of PII.

**Q25 Lord Bowness:** I declare an interest as a holder of a solicitor’s practising certificate. Can I turn to the practical implications, some of which I think you have already dealt with? In fact the Green Paper proposes to take a statutory procedure designed to enable challenges, which could not otherwise be made, to state action and make it applicable to the trial of a civil claim. Could I ask, Ms Rose, what are the practical implications you have not already covered of introducing closed material procedures into civil proceedings?

**Dinah Rose QC:** The essence of any civil claim is that it is the determination of a dispute between two parties. In that situation, the solicitors and barristers will be constantly seeking to monitor the progress of the proceedings and to give their client advice on the strength of the case at the outset for a whole variety of reasons that will be essential if you are seeking funding, whether you are seeking funding from the Legal Services Commission, which must be given an assessment of the merits, or through after-the-event insurance or a conditional fee agreement. For all these funding methods, accurate advice on the merits, as far as it can be given, is essential.

During the proceedings, it continues to be essential. Just to give one example, settlement negotiations may take place and the defendant may make an offer of compensation

under Part 36 of the CPR. Whether that offer is accepted or rejected is a crucial decision for the claimant's lawyers, because if a Part 36 offer is rejected and then damages at or below that level are received, there are cost penalties. But it is quite simply impossible—not difficult, but impossible—to give advice on the merits of a case if, first of all, you do not know what the entirety of the defence is and, secondly, what evidence is being deployed in support of it.

I have had experience of closed proceedings in acting for the Home Office—acting as a special advocate and acting for an appellant. One of the things that has always struck me from contrasting those roles is how different an open case may look from a closed case. The case that an appellant thinks they are meeting may be not simply different in extent but wholly different in kind from the case they are actually meeting. You just cannot tell; it is a classic iceberg situation, where two-thirds is under the water. It seems to me again that this is an issue that has not been grappled with.

I have already given the problems that may arise at trial and how you test the evidence, so I will not go back over that. The final matter of great concern is that, in civil proceedings, there is a right of appeal, subject to permission, on issues of fact as well as issues of law. That raises the prospect of the Court of Appeal and even the Supreme Court being required to consider appeals from closed or partly closed judgments, hearing argument in appeals partly in closed, and of those appellate courts, even the Supreme Court, producing secret judgments. That is a very serious matter.

The idea that in a common law jurisdiction, where the law develops through the accretion of precedent and the application of legal principle to different facts, you might have a growing body of secret case law, accessible only to the Government and certain security-cleared advocates, is a very grave matter. It is already a problem arising out of the SIAC and control order cases; it is more contained because it is a limited area and because the right of appeal in those cases is only on an issue of law, but it is already a matter of concern to the senior judiciary what is to happen in relation to those cases. Extending that process to civil trials in general has very serious constitutional implications for the development of our law.

**Q26 Baroness Berridge:** The appeal thing was something the Committee raised very early on. Would it not be possible to have a safeguard that, in every case of this nature, there was an automatic right of appeal? I know that has cost implications for the Government. It may just be that I am not quite following, but why did you think the closed material procedures in SIAC and whatever were okay, and yet with this you are so vehement? Sorry, I just need that clarified.

**Dinah Rose QC:** Of course, I do not think SIAC is okay, but the problems are more contained: first, because it is a limited jurisdiction; and, secondly, because the right of appeal against the judgment of SIAC or a judgment in a control order case is limited to an appeal on the ground of error of law. That means that by their very nature the types of appeals that you get coming to the Court of Appeal tend to be purely on legal questions and, therefore, can be dealt with either wholly or mainly in open.

I still think there is a problem with secret judgments, but that problem will be magnified to a vastly greater extent by these proposals because you extend the secret process to a jurisdiction where you can appeal on fact and you extend it to common law jurisdictions, which depend on the development of case law and precedent. How can you develop common law when there are two parallel tracts of the common law, one of which is not accessible to the people? I just do not understand how that works.

**Q27 Baroness Berridge:** You talked in the lecture, and I think it is a really important point, of the “frustration and helplessness” you feel as a barrister. Could you give us some contrast between you as a professional in the barrister situation and then you as a professional

as a special advocate? What is it like being a special advocate and being cut off from the client and only really there as an officer to the court? What responsibilities do you hold in that situation? You have expressed the frustration, but what is the special advocate situation then?

**Dinah Rose QC:** The special advocate is an isolated figure because the special advocate has no access to the claimant. They cannot take instructions. Let me give you a simple example. Suppose an allegation is made that a particular individual attended a training camp in Afghanistan—this is a SIAC-type example—on a particular date, was seen there, and there is identification evidence that describes the individual as having a beard. If you are the special advocate, you cannot even take instructions to find out whether the claimant had a beard at that date or whether he might have in his possession any photograph of himself taken at that date showing that he did not have a beard. He might be able to rebut that identification evidence by something as simple as that, but you as special advocate cannot even investigate that question.

**Baroness Berridge:** So is it the same feeling of helplessness, with a sense of responsibility, but you do not have a client.

**Dinah Rose QC:** You do not have a client and you have no access to the client. You have no ability to get access to information to rebut the material that has been put against.

**Q28 Baroness Berridge:** Sorry, having been an advocate for a number of years but not to your level, let me ask: how do you do that then if you have no access to the client? The whole point of civil litigation is you have access to the client you are defending—

**Dinah Rose QC:** You cannot do it.

**Baroness Berridge:** You are saying it is impossible to be a special advocate.

**Dinah Rose QC:** I think that special advocates do a great job, but what they can do is severely limited. You will have heard from them—they have responded to this consultation—and you have heard from them on other occasions when they have made that point. To give you an example of what can happen, when I was a special advocate on a particular case, an individual's bail was revoked on wholly closed material that they had no opportunity to challenge. I, as special advocate, could not challenge it because I had no access to the material. The judge decided to revoke bail and send this individual to Belmarsh; he was called in and the judge said, "I'm revoking your bail." He turned to the judge and said, "Why are you sending me to jail?" to which the judge replied, "I'm sorry. I can't tell you that." How can this happen in an English court?

**Q29 Baroness Berridge:** When you are dealing with the claimants as a barrister—I know you personally feel frustrated and I know it is hard for us to understand without being in that situation—how do your clients react when all of a sudden you are going through this?

**Dinah Rose QC:** Utter incomprehension. You spend most of your time in the corridor. In one recent case we arrived for the beginning of the hearing and we were immediately told to go outside but not told why. We stayed outside until lunchtime and were then called back in, and we were told that in our absence the Government had made an application for an indefinite adjournment and the court had granted it. I said, "Could you not have at least told us that they were applying for an adjournment? How can that fact have a national security implication? Surely we are entitled to be told that so we could make submissions." The judge replied, "You didn't need to know that." I thought it was remarkable that we now have courts operating on a need-to-know basis; I thought I had a right to know.

One of the problems with a closed procedure is that that is what happens. The claimant and the claimant's lawyers become irrelevant to the process. They are seen by the judge as a distraction; most of the submissions they are making are probably irrelevant because they do

not understand what the real issues are in the case. You just do not know; you get up to make the submission and you have no idea whether it is on point or wholly off-target.

**Q30 Baroness Berridge:** You could never be sued, could you?

**Dinah Rose QC:** You cannot in any sensible way fulfil a professional obligation. I had another case where I was making submissions for my client and the judge criticised me for speculating. I thought, “I’m really not sure what I’m meant to do here. I have no information on evidence. Either I say nothing and my client could be at risk of torture, or I say everything I can conceivably think of that might be relevant in the hope that some of it is relevant.” Then I get accused of speculating.

**Q31 Baroness Berridge:** Is there any guidance from the Bar Council in terms of professional conduct when you are in a closed process?

**Dinah Rose QC:** In a closed process? Not to my knowledge.

**Baroness Berridge:** Do you think some of that would be helpful, particularly in terms of your client? It is obviously difficult: having to brief people to go and give evidence is one thing, but do you think it would help them handle what is going on in these procedures?

**Dinah Rose QC:** I do not see how it would assist much. One of the problems with this whole field is that there is a gulf between those who have experience of it and those who do not. It is partly a generational gulf, of course, because these processes are relatively recent. That means that none of the senior judiciary has any experience of being advocates operating in them. There has been a long process of trying to educate the judiciary into what it actually means to conduct a closed process. I found that very frustrating, and you cannot really put too much weight on what the special advocates say. They are the experts; they are the ones who are at the sharp end and understand this process, and it is striking that their opposition to it is so strong and concerted. The problem is that a lot of those who think it is a great idea and a solution to problems just do not know what it is really like.

**Q32 Lord Dubs:** Could I just ask you a question about something you said a moment ago? You talked about seeing whether a person actually had a beard or not in their photographs. Can one take that a bit further? Suppose the claimant had evidence that he was not in the country that he was alleged to be in at the time.

**Dinah Rose QC:** Absolutely—of course.

**Lord Dubs:** If he had clear evidence that he was not, would that be admissible in these circumstances?

**Dinah Rose QC:** It would be if you were able to take instructions, but you would not be able to ask him if he had any such evidence, so you would not be able to put it forward.

**Lord Dubs:** Even if there is clear evidence that he was in Birmingham, not Afghanistan, at the time?

**Dinah Rose QC:** He might have an alibi, but you would be in no position to get that information from him.

**Q33 Mr Shepherd:** Therefore, this cannot give confidence to the wider public that justice is—

**Dinah Rose QC:** Or to the individual.

**Mr Shepherd:** Indeed the individual, but a justice system depends on the confidence of the wider community. In these circumstances I think this is what the burden of the whole thing is about. You cannot attest that justice took place in that case. It is popular with the public in the sense that this is about—

**Dinah Rose QC:** Terrorists.

**Mr Shepherd:** It is about threats as they see it to national security when it might not even be a threat to national security.

**Tom Hickman:** Can I just make a point on that?

**Mr Shepherd:** Of course.

**Tom Hickman:** In my experience, one spends an awful lot of time when you are shut out of these closed hearings, and generally in control order and SIAC cases, trying to persuade your client to engage with the process because it is in their interest to engage with the process because they need to have faith in the justice system. It is extremely difficult to make the case to your client that they could succeed or they could gain from the process when, as Dinah has so vividly explained, everything that they can see about the process is fundamentally unfair.

**Dinah Rose QC:** Another point to make is that the rules that the common law has developed are rules developed over centuries by judges seeking to ensure fairness, an effective process and the balancing of conflicting interests. What is so troubling about this legislation is that it tears all of that up from what appears to be a position of very significant ignorance.

**Q34 Baroness Berridge:** Can I just ask you one short question of detail and then a much broader question? First, you have very vividly described the tools that are there, but I find quite appealing the suggestion to have jurors who are sworn to confidentiality in a coronial situation. Do you think that is a good suggestion in any of those situations?

The broader point is that you mentioned the Home Office person who redacted embarrassing information. As an outsider looking at this, because the secrecy is so testing and we have to be so trusting in the integrity of the individuals involved—I do not want to cast any aspersions—because it is so closed, do you think there is the possibility of wrong motivations and wrong decisions going on without any kind of—

**Dinah Rose QC:** Accountability.

**Baroness Berridge:** Yes.

**Dinah Rose QC:** I think that is inevitable because the people you are asking to make the decisions are people who are not neutral but have an interest in the outcome. With the best will in the world, however professional they are, they cannot look at it in the same way that a judge would look at it. I am not really qualified to comment on the inquest question because it is not my field. I know there has been a submission by INQUEST responding to the Green Paper and I think they would be the people to talk to.

**Baroness Berridge:** But this does have the potential to go awry in a big way without anybody knowing about it. Perhaps that is stating the obvious.

**Dinah Rose QC:** Yes.

**Q35 Lord Bowness:** Can you just briefly tell us what the implications of an extension of these procedures are for law reporting? How will cases be properly reported if the records are not accessible? In fact, how are they reported now? I do not know the answer to this, but what is the situation?

**Dinah Rose QC:** The answer is that there is already a problem and it is a problem that is getting worse. Indeed, the law reporters made submissions in the Binyam Mohamed case because they were so concerned about the closed judgments that had been produced in that case. We already have a problem where there are secret judgments and there is no procedure in place for what to do with those judgments. Is there to be some period of time after which they may be automatically opened, or should there be periodic consideration of whether they could be opened up wholly or in part? Are they to remain secret for ever? Nobody has even considered these questions in relation to the SIAC and control order judgments that we have

now. As I said earlier, that problem would be magnified immensely if these proposals become law.

**Q36 Lord Bowness:** Dealing with the cases that exist at the moment, is a record actually taken?

*Dinah Rose QC:* Yes, there is a secret transcript and there is a secret judgment.

**Lord Bowness:** Forgive me, but who holds all these?

*Dinah Rose QC:* I imagine it is the court.

*Tom Hickman:* The court and the Special Advocates Support Office, I believe, hold some of the judgments.

*Dinah Rose QC:* But there is no database.

*Tom Hickman:* No, there is no searchable database, but part of the problem with the Government's proposals is that they are so wide-ranging. Are they suggesting that there will be a whole load of secret cases about actions against the police, for example? In theory, their proposals could apply to civil actions against the police.

**Q37 Lord Bowness:** Do the court reporters in these existing cases have very high security clearance?

*Dinah Rose QC:* The court reporters are not permitted to report the secret judgments. There are simply transcripts of those judgments produced by the judges.

**Lord Bowness:** Because I have never done it, it is a sort of unreal world, isn't it? If nobody reports a secret judgment and it remains secret, who has it?

*Dinah Rose QC:* The court has it.

**Lord Bowness:** The judge writes it down, presumably.

*Dinah Rose QC:* Yes, it is written down. The Government will have it; the Treasury Solicitors Department will have it; the Special Advocates Support Office will have it; and the court will have it.

**Lord Bowness:** And the defendant does not get a copy.

*Dinah Rose QC:* The defendant, who would be the Government, would have it, but the claimant will not have it and the claimant's lawyers will not have it.

**Lord Bowness:** At the present moment in existing cases?

*Dinah Rose QC:* If it is a SIAC case, the appellant and the appellant's lawyers will not get it, but the Government will have it.

**Lord Bowness:** That is handy, isn't it?

**Q38 Lord Dubs:** Can I put this to you? Despite your very persuasive arguments, if the Government decide to proceed with the Green Paper and get Parliament to agree, where does that leave the courts? What can the courts do in that situation?

*Dinah Rose QC:* I think one would have to see the actual form of the legislation. Because this Green Paper is so half-baked and there is so little that you can concretely get hold of, it is very hard to see how they could simply legislate along these lines without, for example, very significantly amending the civil procedure rules and without starting to grapple with some of the problems about secret judgments—cost penalties and Part 36 offers. It is very hard to see how this is going to work. Apart from all the objections of principle, they need to produce legislation that is practical and workable. At the moment they show no signs of even having begun to understand that there is a problem.

**Q39 Baroness Berridge:** I know it is not directly applicable, but around the super injunctions and their secret nature, on the definition that we have of sensitive information at the moment in the Green Paper, would they be covered? Do you think there is an aspect of the

judicial activism there, to keep secret the lives of celebrities, having muddied or expanded the secret waters, so to speak?

**Dinah Rose QC:** There is obviously a problem of secrecy. I think the super injunction issue is different from that which is dealt with here, because even on the very broad language of the Green Paper you are looking at public interest and you are looking at Ministers. I think you would struggle to find a Minister to sign a certificate that Ryan Giggs's privacy was a matter of the public interest. I am not saying it would not happen, but I am not sure that is at the forefront of my concern.

**Baroness Berridge:** The concern for the public is that we had secrecy of those judgments.

**Dinah Rose QC:** Those judgments were secret but both parties knew what was going on. You have to distinguish between an open justice problem, which is about excluding court reporters and journalists, and a natural justice problem, which is what this is about—excluding a party.

**Baroness Berridge:** That is very helpful, thank you.

**Q40 Mr Shepherd:** On the example you gave of a celebrity, et cetera, and seeking a super injunction, it could not arise, in a sense, in as much as the judge has the power to say, "There are no PII issues in this document."

**Dinah Rose QC:** Yes, and you would never get a PII issue in that kind of case. It is unlikely that these proposals might cover that kind of stuff.

**Q41 Mike Crockart:** We turn now to one area that has not been covered but is mentioned in the Green Paper—the Norwich Pharmacal jurisdiction. Can I declare that I am not a lawyer? Therefore, could I ask if you could explain, first of all, what the Norwich Pharmacal jurisdiction is, and then could you go on to have a look at whether it does need reform?

**Dinah Rose QC:** All that a Norwich Pharmacal order is is an order that a court may give requiring a third party, who is not a party to any proceedings, to disclose documents or information. That will be done if that third party has become innocently mixed up in wrongdoing. The Norwich Pharmacal order was originally devised for cases where, for example, a party had come into possession of somebody else's confidential information—it had been passed to them by somebody else who was in breach of confidence—and knew the identity of the person who had breached confidence. They themselves had not done anything wrong, but they knew who the person who had done wrong was, and they could be ordered by a court to disclose the identity of that person. That is the origins of the Norwich Pharmacal.

What happened in the Binyam Mohamed case was that a barrister I was working with called Ben Jaffey had the very clever idea of using that procedural device, which was originally invented for commercial cases, to ask the court to require the UK Government to give disclosure of information about Binyam Mohamed on the basis that the UK Government had become mixed up in the wrongdoing of the US Government by being involved in his torture and rendition. It was an orthodox application of the principles that underlie Norwich Pharmacal jurisdiction, but on very unusual facts. That is all it was. We needed that information because Binyam Mohamed was facing a potential capital charge based on a confession made by him, he said, under torture. In order to defend himself, he needed to be able to prove he had been tortured. So we said, "If the UK Government has evidence that shows he has been tortured, they should be required to disclose it to help him because they were mixed up in the wrongdoing to which he was subjected."

**Tom Hickman:** Could I give an example of that? Let us say that somebody goes to a third country and they get arrested, and they are detained for three months, and interrogated

and tortured. During those three months, individuals turn up who say they are from the security services of this country, and the individual later wants to defend themselves in court and they say, “Everything I said was said under torture,” but that is being denied by the Government of that country. But they say, “The British Government can confirm this, because they were here.” The question is whether the courts can require the Government to corroborate the testimony, and that is a simplified version of what was at issue in Binyam Mohamed.

**Q42 Mike Crockart:** The second part of my question was: does it need reform? Obviously there are national security implications there of the types of evidence that would be asked for in this.

**Dinah Rose QC:** It is very difficult to understand why there needs to be legislation on this issue. The Government itself says in the Green Paper that this has only even been applied for in seven cases. That seems like a fairly slender basis on which to abolish a whole area of common law jurisdiction. The reason why there have been seven cases is simply that the Government got itself involved in torture and rendition, and that is why they have arisen. It is hard to see why there is need for reform. Of course, in the Binyam Mohamed case itself, ultimately no disclosure was given. What happened was that the court said the requirements for the Norwich Pharmacal order were met in principle, but upheld the Government’s claim for PII. Ultimately, what the fight was about in Binyam Mohamed was not about the Norwich Pharmacal order at all; it was simply about whether certain passages in the court’s judgment should remain secret or should be made public, which had nothing to do with the Norwich Pharmacal application.

One of the other oddities about this proposal in the Green Paper is that it is completely futile. In many of these cases, it is not a Norwich Pharmacal application that the Government will be facing; it will be a straightforward application for disclosure. Binyam Mohamed is a very unusual case because Binyam was not seeking to bring proceedings against the British Government. He was seeking to defend himself against proceedings brought against him by the Americans; that is why he was using the Norwich Pharmacal jurisdiction. Far more usual will be cases like the Al Rawi case, where individuals are suing the British Government for damages and will just be making an application for disclosure. I do not understand the rationale for saying that you should abolish the Norwich Pharmacal jurisdiction when people can still bring applications for disclosure. It does not make sense to me.

**Q43 Mike Crockart:** Your argument would be that Norwich Pharmacal procedure stands and is able to be dealt with effectively though the use of PIIs thereafter.

**Dinah Rose QC:** PII, normal processes, yes—as it was in Binyam Mohamed. It is a normal part of the weaponry of a court for obtaining disclosure, but is only ever going to be used in rare cases in this field. It seems like a bit of a sideshow. Again, without wishing to sound victimised, it sounds as though the Government again is just feeling sore because it lost the Binyam Mohamed case.

**Mike Crockart:** Because some documents were forced to be produced.

**Dinah Rose QC:** It was never forced to produce documents. All that ever happened was that seven paragraphs of the judgment, which had already been made public in substance in the US by a US judge, were made public by the Court of Appeal. It is a very odd, disproportionate response.

**Mike Crockart:** Does Mr Hickman have anything to add to that?

**Tom Hickman:** In PII, of course, the primary thing one is concerned with is whether the risk to national security outweighs the public interest. If there is a really weighty public interest reason for not disclosing the material, the courts will not disclose it. They have not

disclosed it in any case and they have not threatened to disclose it in any case, so I do not understand why they are bringing forward this reform. There is some reference to cases we have not seen, but I do not think it is really fair to ask us to comment on cases that we are unaware of.

*Dinah Rose QC:* Although that does rather illustrate the problem of secret judgments.

**Q44 Baroness Berridge:** In a Norwich Pharmacal order, do you have to prove as a first point that the person you are asking for the documents was mixed up in the wrongdoing? It is not just that they have the documents; they have to have been mixed up in the wrongdoing.

*Tom Hickman:* Exactly, yes.

*Dinah Rose QC:* You have to show that there was wrongdoing and that it is at least strongly arguable that they were mixed up in it.

**Baroness Berridge:** Right—not just, “We think you have documents we’d like to get hold of.”

*Tom Hickman:* No, exactly.

**Chair:** Thank you very much for your evidence today.