LEFT IN THE DARK: THE USE OF SECRET EVIDENCE IN THE UNITED KINGDOM

AMNESTY INTERNATIONAL

Amnesty International Publications

First published in 2012 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index: EUR 45/014/2012
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

Amnesty International is a global movement of 2.2 million people in more than 150 countries and territories, who campaign on human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. Our work is largely financed by contributions from our membership and donations

AMNESTY
INTERNATIONAL

CONTENTS

LEFT IN THE DARK: THE USE OF SECRET EVIDENCE IN THE UNITED KINGDOM

INTRODUCTION

"With secret evidence it's not just about you, in the end it's all our civil liberties which are being undermined. I mean the fact that it exists now you can only wonder where it will go in say five years, where it will spread to, how it will be applied, basically where the government will decide to take it next"

Daughter of an individual whose case is being heard using secret evidence, meeting with Amnesty International, 02 March 2012.

Over the past decade, there has been an ever increasing reliance on secret evidence by the UK government in the name of national security. Amnesty International believes that this growing resort to secrecy undermines basic standards of fairness and open justice, can result in violations of the right to a fair trial and the right to effective remedy for victims of human rights violations, as well as contributing to failures by the UK to meet its obligations to hold those responsible for human rights violations to account and to refrain from sending people to a real risk of serious human rights violations at the hands of another state.

This report examines the increased use of what is described as a "closed material procedure", which allows the government to rely on secret evidence presented to the court behind closed doors, in a range of non-criminal judicial proceedings in the UK. Closed material procedures are usually invoked in cases involving persons suspected of terrorism-related activity. Such a procedure allows a court or tribunal to sit in a closed (i.e. secret) hearing in order to consider material presented by UK authorities. Closed material is information that the government claims would be damaging to national security or otherwise harmful to the public interest if it were to be disclosed. This material is withheld for the entire case (and indeed perhaps forever) from the individual(s) whose interests are at stake in the case, her/his lawyer of choice, and the public, none of whom has access to the closed hearing.[1] As a result of their exclusion from the closed hearing, they do not know the content of that material, even though the court can rely on it to determine the facts and outcome of the case. "Closed material" is essentially a form of secret evidence and marks a radical departure from what traditionally are understood to be basic requirements of fairness in civil and criminal procedures.

The government has attempted to mitigate the unfairness inherent in the use of such secret evidence against a person through a system of Special Advocates, who are lawyers with security clearance appointed to represent the interests of the individual.[2] The Special Advocate can review the secret evidence and is tasked with representing the interests of the individual concerned in the closed part of the hearing. However, once the Special Advocate has seen the secret evidence she/he cannot communicate, except in very limited and narrow circumstances, with the individual concerned and her/his legal team and is completely

prohibited from discussing any part of the secret evidence with them.[3] Following findings by national courts that such procedures can violate the right to fair trial in at least some contexts, in certain proceedings a summary or "gist" of the secret material is now provided, but UK law currently does not require either the source of the information or the full content of the secret material reviewed by the court to be supplied to the affected person. Following the hearing the court may also issue a "closed" judgment in the case alongside an open one – that secret judgment is never given to the individual, her/his lawyer of choice and remains entirely hidden from public view.

Lawyers who spoke with Amnesty International have made it clear that they face profound difficulties in representing their clients effectively where a closed material procedure applies; raising serious questions about how such procedures can achieve any meaningful equality of arms between the parties. Difficulties raised by lawyers include: how to meaningfully respond to general allegations against your client; how to represent your client effectively when you simply do not have access to much of the evidence that underpins the government's case; problems developing legal strategy for the same reasons; the fear that adopting a certain line of questioning might result in negative consequences in the secret part of the hearing; challenges in maintaining the trust of their clients; difficulties properly advising their clients as to the likelihood of success in their case; a large disparity in terms of their ability, compared with the government lawyers, to effectively cross-examine witnesses; challenges instructing their own expert witnesses who are unable to access the secret evidence; not always understanding the reasons why a case has been lost because much of the reasoning is given in a closed judgment; and challenges in effectively appealing a case if part of the judgment is closed.

The ability of the Special Advocate to effectively represent the interests of the individual where closed material procedures apply is also severely limited. In addition to the effective prohibition on contact with the affected individual once the evidence has been seen, as mentioned above, other reasons given by Special Advocates for this include: the lack of any practical ability to call their own independent witnesses to challenge the government's case in the closed hearing; the inability to effectively challenge non-disclosure by the government; the admittance of second and third hand hearsay, or even more remote evidence where the primary source is unattributed and unidentifiable making it difficult for that evidence to be properly tested in the closed hearing. These factors have contributed to the overwhelming number of Special Advocates to publicly conclude that closed material procedures "are inherently unfair; they do not 'work effectively', nor do they deliver real procedural fairness".[4]

The first part of this report looks at the operation of closed material procedures in the context of national security deportations and in cases where the government is keeping those it deems a threat to the UK's national security under various forms of administrative control. The second part of the report examines the government's proposals to expand closed material procedures into civil cases where alleged victims of human rights violations are seeking damages against the government for the violations that they have suffered.

The government has argued that closed material procedures are necessary in the interests of national security. Amnesty International recognises that there are circumstances in which the government could legitimately restrict disclosure of certain information on national security grounds. A system for preventing disclosure of such information, through the use of "public

interest immunity" (PII) certificates has in fact already existed in the UK for many decades to protect such information; however, the PII system recognises the unfairness inherent in secret evidence, and does not allow the government to rely in a court proceeding on evidence that it is not willing to disclose to the other party.[5] The more recently-adopted closed material procedures thus represent a fundamental departure from standards of fairness and open justice that apply in most types of legal proceedings in the UK. Further, their growing use in judicial proceedings, combined with new legislation intended to extend the use of closed material procedures even further, gives rise to serious concerns that secret evidence is, and will be, relied on with alarming regularity. As a result, Amnesty International considers that closed material procedures undermine standards of fairness in the administration of justice; can deny individuals their right to a fair hearing, including with respect to claims that the government will expose them to the risk of serious human rights violations through deportation; and may prevent victims of human rights violations from accessing their right to an effective remedy.

Methodology

This report provides an analysis of the human rights implications of the use of secret evidence in the UK. In preparation, Amnesty International sought to arrange interviews with individuals currently or recently involved in cases where the government has relied on secret evidence. However, many individuals and their families declined the requests. Though the reasons for declining varied, and sometimes no reason was provided, a number of common issues can be identified which made it difficult for individuals to agree to meet with Amnesty International and allow their testimony to be used. Those involved in active legal proceedings were concerned about identification, as well as fearing that by contributing to the report, it might have a negative impact on their case. Those no longer involved in legal proceedings were reluctant to discuss the past and re-live the personal challenges they and their families had faced as a result of being subjected to procedures where secret evidence was used. Others noted that they had already discussed their case publicly, but doing so had not led to positive changes in either their case or in the cases of others. In several cases it was also difficult to properly follow the different and often complex procedural histories of their cases.

Despite these challenges, a number of individuals did choose to speak, as did family members of those involved in these types of proceedings, though their names have been withheld either due to an anonymity order from the court or at the request of the individual. Amnesty International believes that their testimonies are representative of a wider group of individuals in the UK subjected to procedures where secret evidence is used. Interviews were also conducted with 25 barristers and solicitors who have acted in cases where closed material procedures have been used and they discussed their experiences candidly. In addition, a meeting was convened with 3 Special Advocates who discussed in general terms their role and experience of acting in closed proceedings.[6] The Special Advocates Support Office declined to speak with Amnesty International. The President of the Queen's Bench Division, on behalf of the parts of the judiciary Amnesty International approached for interviews, also declined a request to meet on the grounds it would be inappropriate given Amnesty International's interest in past and potentially future cases and in light of the fact that the judiciary are not authorised to discuss any of the closed parts of the case.

Amnesty International requested meetings with a number of lawyers who have acted for the government in these procedures. Whilst many of these requests went unanswered, some did agree to speak. A request to the Treasury Solicitors Department was declined. However, Amnesty International delegates met with representatives from the Ministry of Justice, the Cabinet Office, the Foreign and Commonwealth Office, and the Home Office to discuss the UK's Justice and Security Green Paper, which includes proposals for the expanded use of closed material procedures.

Over the last ten years, Amnesty International representatives have attended a range of judicial proceedings where the UK government has relied upon secret evidence. These include: national security deportation and immigration appeals before the Special Immigration Appeals Commission (SIAC); certification appeals before the SIAC under Part IV of the Anti-terrorism, Crime and Security Act; control order proceedings; and other cases before the Court of Appeal of England and Wales and the Supreme Court where closed material procedures have been relevant to the case.[7] Amnesty International staff have spoken to a number of individuals involved in these cases and where appropriate that material has been utilised in this report.

To further support the research, court documents, government statements, and parliamentary reports were analysed, as well as evidence given before parliamentary committees, media reports, and information from other nongovernmental organizations (NGOs) working in this area. Responses to the recent consultation to the government's Justice and Security Green Paper have also been examined.

Where permission has been granted individuals and lawyers will be referenced or quoted by name, however, there are circumstances where a name has been withheld on request of the individual to preserve confidentiality.

Direct testimonies from affected individuals are included alongside other relevant information to illustrate and provide evidence of the impacts of the measures described and analyzed in this report. The inclusion of direct testimony from a person in this report does not mean that Amnesty International has concluded that any or all of the allegations made against that person by the government are necessarily untrue, or that the organisation condones any activity in which the person may actually have engaged. In keeping with relevant international human rights standards and our consistent approach to all countries, organizations and individuals, Amnesty International maintains a focus on seeking respect for the human rights of all, regardless of any acts of which a particular person may stand accused or for which he or she may in fact be responsible.

THE CREEPING SPREAD OF SECRECY IN THE UK

"[I]t is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it `is applicable only in exceptional circumstances' nonetheless often becomes common practice."

Lord Neuberger MR, *Al Rawi and Ors v Security Service and Ors*, [2010] EWCA Civ 484, 04 May 2010.

Closed material procedures were initially introduced in 1997 through the establishment of the Special Immigration Appeals Commission (SIAC) and the narrow and specific context of national security deportation cases.[8] Since then closed material procedures have spread to different parts of the UK's civil justice system, and can currently be applied in a wide range of different contexts, including in - appeals against the imposition of administrative controls (see below); asset freezing cases; employment tribunals; appeals against the proscription of organizations and certain parole-board hearings.[9] This expansion is set to continue following the publication of the Justice and Security Bill on 29 May 2012 which, if enacted, will extend closed material procedures throughout the UK's civil justice system for cases which the government alleges give rise to national security concerns.

The nature and spread in the use of closed material procedures represents the emergence of a parallel justice system in the UK for cases the government claims are related to national security. The defining characteristic of this alternative system is the ability of the state to subject individuals to judicial processes premised on secrecy, which places them at a significant disadvantage both in knowing and challenging the case against them and

understanding how their own case is refuted. In so doing, the "seepage" via increasingly widespread use of secrecy undermines principles of fairness and open justice which must be at the heart of a justice system committed to the protection of human rights and upholding the rule of law.

An important starting point for understanding the spread of secret evidence in the UK is the government's response to the attacks in the USA on 11 September 2001. Prior to that date three cases had been heard by the SIAC using a closed material procedure.[10] In the immediate aftermath of the September 2001 attacks the UK government introduced Part IV of the Anti-Terrorism, Crime and Security Act (ATCSA) which led to a critical shift in the frequency of the use of secret evidence and in the way the government relied on secret evidence. Operating between December 2001 and March 2005, the new powers granted by Part IV of the ATCSA allowed a government minister to order the indefinite detention in high-security facilities without charge or trial of any foreign national, who could not be deported or removed from the UK, believed to be an "international terrorist" and therefore a "threat to national security". Individuals were given the right to appeal against their detention to SIAC, where – as noted above - closed material procedures were first introduced. Reliance on secret evidence was a central feature of this regime of internment, which saw 16 foreign nationals interned at various times in harsh conditions that had a deeply negative impact on their mental and physical well-being.[11] The regime came to an end following a ruling in December 2004 by the Appellate Committee of the House of Lords (now the Supreme Court) that the indefinite detention without charge or trial of non-nationals on suspicion of terrorism under the ATCSA was unjustifiably discriminatory and, therefore, disproportionate and incompatible with their right to liberty.[12] This ruling was later reinforced by the European Court of Human Rights in February 2009, in the case of *A and others v United Kingdom,* which found that the detention of nine individuals under the ATCSA had violated their right to liberty.[13]

Following the ruling by the House of Lords, the government allowed the emergency legislation of the ATCSA to lapse and immediately introduced new temporary legislation, the Prevention of Terrorism Act 2005 (PTA), which created the control orders regime. This new regime provided a government minister with the ability to impose restrictions on an individual suspected of involvement in "terrorism-related activity" without formally charging that individual with a criminal offence, or as a way of imposing restrictions on a person who has been acquitted after a full criminal trial, but in respect of whom the government claimed that such measures were necessary "for purposes connected with protecting members of the public from a risk of terrorism".[14] Within hours of the PTA 2005 entering into force, 10 of the men who had previously been detained under ATCSA were placed under control orders. Like the ATCSA powers, the control order regime allowed the authorities to keep secret from the men and their lawyers much of the evidence on which the allegations of involvement in terrorism-related activity was based.

Following sustained criticism of the regime, control orders came to an end with the repeal of the PTA in December 2011. However, control orders were immediately replaced by a new regime of administrative restrictions for individuals suspected of terrorism-related activity: now named Terrorist Prevention and Investigation Measures (TPIMs). As with the control order regime, the procedures for imposing the new restrictions allow the government to rely on secret evidence to make determinations about the threat posed by an individual and thus the purported need for the application of controls on that person's movement, association

and other activities. Resort to secrecy, therefore, remains as much a feature of TPIMs as it was of the regimes that came before.

The use of administrative controls was not the only response by the UK to the ruling by domestic courts that internment under the ACTSA was unlawful. In August 2005 the then Prime Minister Tony Blair announced that there would also be a "new approach to deportation orders".[15] In practice this meant using unreliable and unenforceable "diplomatic assurances" to facilitate the deportation of individuals alleged to pose a threat to the UK's national security to states where the individual would face a real risk of torture and ill-treatment on return, despite the absolute prohibition of transfers to such risks under the European Convention on Human Rights and other international treaties. As a result, a number of men on control orders after their release from Belmarsh Prison under the ACTSA, were re-arrested and detained again, pending deportation to countries where they would be at real risk of torture and other ill-treatment, but in respect of whom the government claimed diplomatic assurances made the deportation permissible. Heard before SIAC, appeals in these cases are similarly characterized by routine resort to secrecy.

The case of "G": ten years of secret evidence

"G" is a 43-year-old Algerian torture survivor who is married and has three children.[16] He was initially arrested and detained in the UK in December 2001 under Part 4 of ATCSA. He was held at Belmarsh high security prison in south London without charge, until April 2004 when he was granted "release" on bail under strict conditions, including a 24-hour curfew. "G" had polio as a child and suffered a permanent weakening of his right leg as a result. While in Belmarsh and under "house arrest" the weakening of his leg worsened, reportedly as a result of poor access to appropriate healthcare and his inability to exercise. In March 2005, a control order under the PTA 2005 was imposed on him with some restrictions being relaxed and he was given more access to physiotherapy and to exercise. However, in August 2005 he was re-arrested and detained in Long Lartin prison, Worcestershire, under immigration powers pending deportation on national security grounds to Algeria – where he would be at real risk of torture and other ill-treatment if returned. During this second period of detention "G" made a serious attempt on his life. In October 2005, SIAC ordered "G"'s "release" on exceptional medical grounds under extremely restrictive immigration bail conditions, including a 22-hour curfew.

The national security case against "G" is largely based on secret evidence. Indeed as one of the applicants in the case of *A and others v UK,* the European Court of Human Rights noted that the open allegations against him "were of a general nature" and the "open evidence was insubstantial and that the evidence on which it relied against them was largely to be found in the closed material".[17] "G" has now formally waived his right to contest the Secretary of State's evidence as to the risk he presents to national security, on the express basis that he believes he cannot obtain a fair hearing on the national security issue. His stated wish was that the issue of his safety on return to Algeria be determined as soon as possible.[18]

Shortly after his release, in November 2005, Amnesty International representatives, including its then Secretary General Irene Khan, visited "G" and his wife at their home. "G" told Amnesty International that:

"The consequences of the state actions taken against me over the last four years, including the threat of deportation to Algeria, have been devastating to me and my family […] My wife and I live in a state of constant fear that the police will again come to our home unexpectedly, arrest me and deport me to Algeria […] I want justice: the opportunity to defend myself, in a fair trial. But given what has happened in the last four years I don't expect justice. I am not even allowed to know the evidence the state claims to have against me."

Over six years after this visit "G" remains subject to serious restrictions on his rights to privacy, movement, and association on the basis of evidence he has never seen. Though the conditions currently required under his immigration bail have been reduced, for example he is now under a 14-hour curfew, he remains subject to other conditions including: boundary restrictions; wearing of an electronic tag; Home Office clearance for visits to the home and for pre-arranged meetings outside the home; a ban on accessing the internet and reporting requirements. The cumulative effect of the conditions, and the period of time which he has been living under them, has had a deeply negative impact on him and the lives of his family members. In March 2012, while Amnesty International was awaiting clearance from the Home Office to speak with "G", his wife spoke with Amnesty International representatives, echoing many of the fears her husband had spoken of in 2005:

"In December last year we marked the ten year anniversary since my husband was first detained. We still don't know what he is accused of and we are still living under conditions which make life very difficult for us. You would think after 10 years that they'd make it easier, but we still always have to fight for the most basic things. It's that this is all indefinite that's the worst thing [...] Each time we hear the bell ring, especially in the morning, we are scared that they will come and take him away again. Mainly I just want to know when this will end. If they don't end this, I don't know anymore what will happen."

In April 2012, Amnesty International representatives were granted permission to meet with "G:

"It's been over 10 years, under three different laws. […] there are no words to describe it, it's a nightmare, it's darkness. In prison we were with people who had been charged, tried, sentenced, who had release dates, but for us you have no hope, no goal, no trial, no light and no evidence. After I was detained again for deportation, the judge granted me bail because of the mental and physical state I was in, but the conditions were very strict. […]Even now when I sleep at night any noise, any sound, any voice, anything ... I think they have come to take me away like last time I always have that fear. The effect has been huge on my family, my wife, on my kids. It's not as bad as prison, but it's like a prison because my whole family is kept under siege, kept under a great pressure. We have no options. Me and my family we are stuck here. It's either prison or the bail conditions. In all angles you feel humiliated. And you can't defend yourself and make this stop"

THE SPECIAL IMMIGRATION APPEALS COMMISSION: A FACADE OF FAIRNESS

"If the question is should the state have a procedure for deporting people? Yes of course. But if the question is whether the current process is fair and just? The answer is no. SIAC is the most Kafkaesque court environment I have ever been in or would want to be in."

Richard Hermer QC, meeting with Amnesty International, 22 July 2011.

As noted above, SIAC is the tribunal that hears appeals against decisions made to deport, or exclude, someone from the UK on national security grounds.[19] The government's reliance on secret evidence in SIAC cases, however, creates an almost insuperable barrier to a person's ability to challenge information reviewed by the tribunal in closed hearings. This report considers three separate types of deliberations where secret evidence may be considered in SIAC: (1) as the basis for government claims that a person is a threat to national security; (2) to support the government's claims that a person subject to deportation would not be at risk of human rights violations, including torture and ill-treatment, on return; and (3) as the grounds for detention in the course of deportation proceedings or the imposition of sometimes severely restrictive bail conditions in cases where a person might be released on bail in the course of deportation proceedings. In each phase of the case, SIAC's determinations have serious implications for the enjoyment of persons' human rights and for

their well-being and that of their families.

CHALLENGING THE NATIONAL SECURITY CASE

Individuals before the SIAC are often only provided with vague and broad allegations about the national security case against them, for example, that the individual concerned was raising money to support those involved in terrorism or is planning or has a strong intention to travel abroad to commit terrorist acts in the near future. The affected person can be denied meaningful detail about the allegations against him, and access to much of the evidence on which they are based; such individuals are effectively denied any chance to effectively respond to the national security case against them. This is compounded by the low standard of proof required in these cases, which focuses on the overall assessment of the Home Secretary as to the future risk posed by an individual.[20]

One lawyer has described acting in these cases as "shadow boxing" where "you are speaking into a black hole because you have no idea if your strategy and points are on the money or wide of the mark".[21] The degree of secrecy makes it difficult for lawyers to know how best to respond to the case against their client, as they are faced with the option of either providing the life story of their client, hoping that something they say may support his case, or self-censoring to avoid the risk that adopting a certain line of questioning might result in negative consequences in the secret part of the hearing that could be dispelled if the lawyer were aware of them.[22]

A further difficulty arises from not being able to directly cross-examine government witnesses who give evidence in closed sessions. Even when government witnesses give evidence in open sessions, lawyers who spoke with Amnesty International said that they often do not answer many of the questions put to them, responding that the matter can only be dealt with in a closed hearing. This inequality between the parties can be deepened further when the lawyer acting for the individual concerned introduces a witness who will not have access to the secret evidence, restricting their ability to give fully informed testimony.

Special Advocates, who can see the secret evidence, have admitted that their ability to challenge the government's case against an individual is often limited to identifying where allegations made by the Secretary of State might be unsupported by the evidence the government is relying on, or to checking that evidence for inconsistencies, rather than directly refuting or challenging the evidence as they would be able to in ordinary, open proceedings.[23] During a meeting with Amnesty International representatives, and subsequently in evidence given to the Joint Committee of Human Rights, Dinah Rose QC, who has acted as a Special Advocate, provided an example of the difficulties they face:

> *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 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 he did not have a beard. He might be able to rebut that identification evidence by something as simple as that, but you as a special advocate cannot even investigate that question….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.[24]

The case of "BB"

"BB" is a 47 year old Algerian national who is married and has three children. He has been living in the UK since 1995. On 15 September 2005, "BB" was detained after being served with notice of the intention to deport him on national security grounds. He remained in detention until April 2008 when SIAC ordered his conditional release on bail, having previously been denied bail on three separate occasions on undisclosed national security grounds.

In its judgment of 5 December 2006, SIAC found "BB" to be "a danger to national security". With respect to the case against him, SIAC simply stated that "We do not address the evidence given and arguments advanced in the open part of these proceedings, for the simple reason that they do no more than touch upon or set the context for the heart of the Secretary of State's case against "BB". Our reasons for reaching the conclusion broadly stated above can only be discerned from the closed decision."[25] In November 2007 some of the national security case against "BB" was publically disclosed when SIAC opened parts of a previously closed decision. This information stated that "BB" had "enjoyed ready access to Islamist extremists", that during a search of his home in September 2003 a *Dhamat Houmet Daawa Salafia* document stamp (an organization subsequently listed by the UN in November 2003 as having terrorist links) had been found and that "erasing programmes" had been used on his laptop .[26] It is unclear why this part of the judgment had initially been withheld from "BB" on grounds of national security. "BB"'s explanation for the possession of the stamp is that he "collected it inadvertently…and that when he discovered that he had it he did not realise he was doing anything wrong by keeping it". With respect to the erasing software he stated that he had "downloaded free software to see how it worked".[27] SIAC found these explanations not to be plausible. In any case, these two pieces of physical evidence in and of themselves would presumably not be sufficient to conclude that "BB" could be deprived of liberty and/or deported on grounds of national security, and to date much of the substance of the overall national security case against "BB" remains secret. Indeed, in an exchange between "BB"s counsel and Mr Justice Mitting, who was hearing an application to revoke "BB"s bail on 05 March 2009, the judge acknowledged that "BB" "knew nothing of the substance of the reasons for dismissing his appeal".

"BB" is currently living under restrictive immigration bail conditions while he continues to fight his deportation to Algeria where he will be at a real risk of torture and other ill-treatment if returned. These conditions - which have very recently been relaxed to some degree - include, an 8-hour curfew, boundary restrictions, permission for immigration officers and police officers to search his home at any time, reporting to a monitoring company whenever he leaves and returns to his home during his non-curfew hours, a ban on meeting named individuals on a Home Office list which can be added to at any time; wearing of an electronic tag at all times and a ban on the use of computers. He has described his deep frustration at being left in the dark about the full national security case against him:

"The case against me? It's just a glimpse I've seen. I've never seen enough things for me to explain anything. The closed hearings, I can't go in, my lawyer can't go in. My Special Advocate – it's like he doesn't really exist."

Legal and policy considerations in national security deportation cases

In deportation proceedings, not all of the fair trial guarantees that a person would enjoy in a criminal or civil proceedings necessarily apply. The European Court of Human Rights has held that deportation proceedings do not fall under Article 6 (fair trial) of the European Convention on Human Rights. However, Article 13 of the International Covenant on Civil and Political Rights (ICCPR) provides that a non-national "lawfully in the territory of a State Party

to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."[28]

In its General Comment on the right to equality before courts and tribunals and to a fair trial, the UN Human Rights Committee has said that where a court is entrusted with the task of deciding deportations (as is the case in the UK), guarantees of equality of all persons before the courts and tribunals, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.[29] The Committee did not explicitly address whether these principles apply, or whether they apply with equal force, in the exceptional circumstances "where compelling reasons of national security otherwise require" as per article 13 of the ICCPR.[30] However, it is clear that at minimum equality of arms should be respected to the maximum extent possible in individual proceedings to which the exception for "compelling reasons of national security" in article 13 might apply, ensuring as great a degree of transparency is provided as possible; any limitations on equality of arms, such as restrictions on disclosure, must be both demonstrably necessary and proportionate and not applied or invoked in a manner that would impair the essence of the right to a fair trial or any other applicable human rights.[31]

In addition, it should not be forgotten that in these cases what is at stake for the individual will generally affect a range of human rights (i.e. beyond the right to a fair process in relation to the fact of deportation in itself); as a result, additional rights to a fair process will generally arise from the fact these other rights are at stake, regardless of the national security character of the deportation.[32] For example, the proceeding might expose the person to a range of risks upon return including, torture or other cruel, inhuman or degrading treatment, a flagrantly unfair trial or arbitrary detention.[33] The proceeding may result in prolonged detention on immigration grounds, or to the imposition of stringent immigration bail conditions.[34] The proceeding may implicate the right to family life (where the individual would be separated from their family members who remain in the UK), or the proceeding may implicate the right to remain in one's 'home country' if the person has developed sufficiently strong personal and emotional ties.[35] It is also possible that a ruling in the case may have an impact on their personal reputation.[36]

Despite the potential serious consequences for their lives, individuals subject to SIAC deportation proceedings on national security grounds face severe restrictions achieving any kind of equality of arms. Unlike in some other types of cases where closed material procedures apply, in deportation proceedings individuals can be denied even a summary (the "gist") of the national security case against them (which at least in some cases may make it possible to provide more detailed instructions to a Special Advocate than would be possible without the summary). Given that nearly all, if not all, SIAC deportation proceedings that have occurred to date have been cases in which there were arguable claims that the deportations would affect one or more of the rights highlighted above, the need for such proceedings to be fair is reinforced and becomes all the more pressing.[37] Though the degree of procedural fairness required in relation to different types of proceedings may vary, some guarantees are always essential for any kind of proceeding to be fair and ultimately no proceeding can be described as fair if the affected individual is not able to know and have an

effective opportunity to respond to the allegations against him or her as a key element of the guarantee of equality of arms. [38]

The overbroad scope for keeping material secret in SIAC cases

Equality of arms generally requires the disclosure by the state of all evidence it intends to use against a person in the proceeding as well as, in criminal proceedings at least, any other information in the state's possession that might be useful to the individual in defending him or herself.[39] If in some proceedings, some such material might lawfully be withheld from the affected individual on the grounds of national security, this would be limited to circumstances where the state demonstrates that disclosure would likely cause an identifiable harm to a specific valid national security interest, that the restriction is necessary and proportionate to protect that interest, and that non-disclosure will not impair the essence of a right to a fair trial.[40] Restrictions on disclosure would also always have to be sufficiently counterbalanced by the procedures followed by the judicial authorities and subject to full and effective judicial scrutiny by an independent court or tribunal.[41] Thus, relevant information would only be permitted to be withheld if counterbalancing measures could be demonstrated in practice to "ensure that this does not prejudice the overall right to a fair hearing and to be aware of, and able to respond to, the case."[42] Restrictions would fail the requirement of proportionality unless they were "the least intrusive instrument amongst those which might achieve the desired result".[43] Even if evidence would likely cause an identifiable harm if disclosed, it should nonetheless be released if the public interest in disclosure, or fairness or other considerations in favour of the accused having sight of the evidence, are greater than the harm likely to flow from that disclosure.[44]

In proceedings before SIAC material can be kept secret from the individual concerned where disclosure is claimed by the government to be "contrary to the public interest"; such claims are subject to review by the judge in the case.[45] Under domestic law, the prohibition on disclosure of information that is "contrary to the public interest" has been broadly defined as any disclosure "contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."[46]

Not every kind of harm that a government may consider a threat to its *national interest* will qualify as a matter of *national security* as understood under international human rights law. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information for instance assert that, "A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government." The Principles also state that "In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."[47]

As a matter of policy "national security" is not defined in UK law.[48] The basis for any potential restriction to human rights on grounds of "national security" is therefore not precisely set out in UK law as required by the UK's international obligations, or constrained to apply only to "national security" within the meaning of article 13 of the ICCPR. There is also no balancing of competing public interests in SIAC cases. Evidence therefore can potentially be withheld from an individual indefinitely, however slight the putative harm that might be caused by its disclosure and no matter how important the material is to their case. This provides the government with a very broad scope for keeping material secret, the effects of which can then be further exacerbated by the deference the domestic courts acknowledge giving to the government on national security matters, combined with what has been described as an "institutionally cautious approach" to disclosure by intelligence agencies.[49] Special Advocates have made it clear that because of these factors their ability to secure substantive disclosure in a closed material procedure, particularly as it operates in SIAC, is in practice incredibly difficult.[50]

Some lawyers also raised concerns with Amnesty International that because "national security" was so easy to invoke it was open to abuse. They stated that the government appeared to resort to secrecy on national security grounds even for material that appeared to have little to do with compelling national security reasons. As one lawyer noted "sometimes it seems to us that national security is such an elastic concept that if someone were to sneeze in the Horn of Africa, the government would argue that it couldn't be disclosed on grounds of national security".[51]

Obviously, because by definition it remains secret, it is difficult to ascertain the extent to which evidence is being unfairly withheld from the individuals concerned in these cases in SIAC proceedings. However, based on statements from Special Advocates and lawyers (including as detailed above) and the procedures in SIAC, Amnesty International has serious concerns that the government may at least in some circumstances be invoking the need for secrecy in circumstances where it is not demonstrably necessary and proportionate to valid objectives as required to respect the rights of the affected individuals to a fair procedure. Furthermore, and crucially, in SIAC proceedings, the government is not required by UK law to satisfy the tests of strict necessity and proportionality that should normally be applied in those limited circumstances where restricting disclosure on national security grounds might be lawful under international human rights law.

SECRET EVIDENCE AND RISK ON RETURN

As has already been mentioned at the outset, in many of the national security deportation cases in SIAC individuals face being returned to countries where they will be at real risk of human rights violations, including torture or other ill-treatment. Initially, hearings before SIAC where they concerned safety on return were held fully in open. However, as the UK government promoted its policy of "deportations with assurances", resort to secrecy spread to the issue of safety on return as the government sought to rely on secret material to support its arguments that the individual would not be at risk of human rights violations if returned. The broad scope afforded to the government to keep material secret in these cases allows information about the basis for denying an individual's allegations of risk of human rights violations, for example of torture - a question of fundamental importance - to be kept from that person not just for reasons of national security, but also, for example, in the interest of international relations.

In its deportations with assurances programme, the UK has sought and is continuing to seek diplomatic assurances from foreign governments that a person returned to that country will not be tortured or otherwise ill-treated.[52] Diplomatic assurances are a dangerous and unreliable mechanism that allows a sending government to circumvent the absolute prohibition on sending a person to a place where he or she risks torture or other similar ill-treatment. The particular dynamics that arise in cases of torture and other ill-treatment lead to inherent deficiencies in assurances that prevent them from effectively and reliably mitigating against such risks. In particular, governments that practise torture and similar abuse routinely deny it, create administrative structures to support "plausible deniability", develop techniques of abuse designed to avoid detection, and conceal evidence of it. Torture is usually practised in secret, with the collusion of law enforcement and other government personnel, and often in an environment of impunity, as states, particularly where torture is widespread, routinely fail to investigate allegations of torture and bring those responsible to account. Those subject to torture and other ill-treatment are also often afraid to recount their abuse to their lawyers, family members and monitors for fear of reprisals against them or their families. Alongside these features of secrecy, deniability, and impunity in states where torture and other ill-treatment are practised, is the fact that such assurances are not legally binding and lack enforcement mechanisms.

The above factors have led Amnesty International together with a wide range of international human rights experts to oppose any reliance on diplomatic assurances against torture or other such cruel, inhuman or degrading treatment or punishment, as a matter of principle.[53] However, even those who have not rejected such assurances outright recognise that individuals facing deportation must have access to a fair and effective judicial procedure for challenging reliance on a diplomatic assurance in their case.[54]

SIAC has ruled that where diplomatic assurances are relied upon by the government, those assurances must be public and open to scrutiny.[55] However, SIAC still permits the government to rely on secret evidence to support its argument that the assurances will be effective and the individual concerned would not be at risk on return; such material can include further detail regarding the government's assessment about conditions prevailing in the country in question or possibly material relating to the personal circumstances of the individual concerned which may affect risk on return.

An example of the challenges in dealing with secret evidence in relation to safety on return was given by Tim Otty QC, counsel in a number of SIAC deportation cases, in reference to a national security deportation appeal: "The key evidence we provided was a lawyer, but he himself had not seen any closed material, and it was difficult for him to express a clear view on risks of prosecution and therefore the consequential risks on detention. This is also not a gap that can be filled by Special Advocates – they don't in practice have access to security cleared evidential resources on these issues". This reflects the concerns of Special Advocates who have highlighted that their practical inability to instruct and call upon independent expert witnesses obstructs their ability to challenge the government's case with respect to safety on return in closed.[56]

Amnesty International believes the spread of secret evidence into the safety on return aspect of national security deportation cases raises considerable concerns as it essentially ties the hands of the person subject to deportation; an individual cannot challenge effectively the

government's claim that there is no risk because that person cannot review all the relevant evidence.

The case of "Y" and safety on return

In many of the national security deportation cases before SIAC individuals are at risk of being returned to countries where they will be at real risk of human rights violations, including torture or other ill-treatment. One such case is "Y", a torture survivor, who was granted refugee status in the UK. He was amongst a number of Algerian nationals who were charged, tried and eventually acquitted in 2005 of all charges in the UK in connection with an alleged conspiracy to produce poisons and/or explosives. After his acquittal in 2005, "Y" was briefly released from custody, where he had been since January 2003, and began to try and re-build his life. Shortly afterwards he was re-arrested and held pending deportation to Algeria on national security grounds. He denies that he is a risk to the UK's national security, as the UK authorities assert, and has argued that he would face a real risk of torture if returned to Algeria.

Following, "Y"'s re-arrest, three of the jurors who had acquitted "Y" in the criminal proceedings publicly expressed their shock that, despite that acquittal, the government was essentially "disregarding [their] verdict" and preparing to return him to Algeria where he would "certainly be subjected to abuse, torture or worse." [57]

In August 2006 the SIAC ruled that "Y" was a threat to the UK's national security and that he could safely be returned to Algeria on the grounds that diplomatic assurances provided by the Algerian government would be sufficient to mitigate any risk of torture or ill-treatment he might otherwise face.[58] In reaching these conclusions SIAC relied on secret intelligence provided by the UK authorities that was withheld from "Y", his lawyers of choice and the public, both in relation to the national security case against "Y" and the issue of safety on return.

Unusually, three months later SIAC publicly released extracts from its closed judgment in the case.[59] These extracts focused on the absence of a provision for independent post-return monitoring of the diplomatic assurances in Algeria and included evidence from the Secretary of State that the Algerian government was purportedly in principle ready to sign the Optional Protocol to the Convention Against Torture. This evidence was part of the government's case regarding the future risk of human rights violations "Y" might face if returned to Algeria. In light of the fact that to date Algeria has still not signed, let alone ratified, the Optional Protocol, the information does not appear to have constituted very compelling evidence. It is not clear on what basis the government considered it could reasonably argue that the information was of such importance and sensitivity, that the government should be able to rely on it while keeping it secret from "Y"'s legal team. It appears then to be evidence of the overbroad invocation of secrecy by the executive on public interest grounds.

"Y" appealed the decision and in July 2007 the Court of Appeal ordered SIAC to reconsider the case. When SIAC did so, in November 2007, it once again reached the conclusion that he could safely be returned to Algeria. It did so despite accepting that there was "no doubt that he will be interrogated by the DRS [Department for Information and Security, Département du renseignement et de la sécurité – Algeria's intelligence agency], and little doubt that he will be detained for the maximum period of 12 days garde à vue detention," a form of detention under Algerian law that would be without charge and without access to a lawyer. The DRS specializes in interrogating people thought to possess information about terrorism-related activities. Those detained by the DRS are routinely denied access to the outside world, whether in the form of legal counsel, medical help or visits by families and by the judicial authorities, and are in effect held incommunicado, placing them at real risk of torture and other ill-treatment. Further, such individuals may also be at risk of being convicted on the basis of evidence obtained by torture. Despite the many concerns raised about the practices of the DRS the SIAC concluded, "for reasons which are more fully discussed in the closed judgment" – a judgment which Y has never been allowed to see – that there were no grounds for finding

that Y would face a real risk of torture or other ill-treatment if returned.[60]

Caught in a cycle of re-detention and release under restrictive bail conditions over much of the last nine years, Amnesty International delegates met with "Y" at his home in April 2012. He told them:

"You can't call it a life. Everything you do is controlled, apart from the air you breathe. It's not normal at all. It's social isolation. I don't feel like I was before. I don't feel like a normal person. You get tired from just thinking and thinking about things you shouldn't, tired of asking for your life from the Home Office […] I always tell my lawyers we're fighting ghosts. I gave up. I got tired of asking 'show me the evidence'. I know I have a Special Advocate but I don't think the Special Advocate can make a difference. If you can't speak to your Special Advocate and he can't speak to you or your legal team how can he fight a case on your behalf?"

Legal and policy considerations with respect to risk on return

Under international law states can exercise their discretion to exclude or deport non-nationals on grounds of national security only in conformity with their human rights obligations. One of those obligations is the absolute prohibition on deporting, extraditing or otherwise transferring any person to a country where he or she will face a real risk of being subjected to torture or other ill-treatment. This incorporates the obligation to provide individuals with access to a fair and effective procedure, originating with or including judicial review, in which they may raise a claim of such risks and have it adjudicated.[61] Because the prohibition of torture and other ill-treatment is absolute and non-derogable (not capable of suspension or limitation even in times of emergency), the prohibition on returning a person to risk of such abuse is also absolute and non-derogable, as are the procedural guarantees for protection against violations of these prohibitions.[62] Where there is a possibility of such a risk of torture or other ill-treatment on return, it is particularly concerning when individuals are deported on the basis of secret information, considered in secret sessions of the court from which they and their legal representatives have been excluded.

In 2012, the European Court of Human Rights, in the case of *Othman v UK*, found that SIAC's procedures and the use of closed material with respect to the question of safety on return was compatible with article 13 of the European Convention on Human Rights (the right to an effective remedy) on the facts of that case.[63] In *Othman*, the Court distinguished the case from *A and Others*, where similar procedures and use of closed material by SIAC had been found to violate the European Convention on Human Rights, on the basis that when arguing safety upon return the applicant is "advancing a claim", whereas in *A and Others*, the applicants were "detained on the basis of allegations made by the Secretary of State."[64]

The *Othman* ruling appears to leave, for the moment at least, European jurisprudence concerning the UK's obligations under the European Convention on Human Rights at odds with the UK's obligations under the ICCPR as interpreted by the Human Rights Committee. In the 2004 case of *Ahani v Canada*, a case concerning national security deportation and the question of risk of torture or other ill-treatment on return, the Human Rights Committee found as follows:

> Concerning the author's claims under the same articles with respect to the subsequent decision of the Minister of Citizenship & Immigration that he could be deported, the Committee notes that the Supreme Court held, in the companion case of *Suresh*, that the process of the Minister's determination in that case of whether the affected

individual was at risk of substantial harm and should be expelled on national security grounds was faulty for unfairness, as **he had not been provided with the full materials on which the Minister based his or her decision and an opportunity to comment in writing thereon** and further as the Minister's decision was not reasoned. The Committee further observes that **where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture. …**

10.7 In the Committee's view, **the failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of *Suresh*, on the basis that the present author had not made out a prima facie risk of harm fails to meet the requisite standard of fairness**. The Committee observes in this regard that such a denial of these protections on the basis claimed is circuitous in that the author may have been able to make out the necessary level of risk if in fact he had been allowed to submit reasons on the risk of torture faced by him in the event of removal, being able to base himself on the material of the case presented by the administrative authorities against him in order to contest a decision that included the reasons for the Minister's decision that he could be removed. The Committee emphasizes that, as with the right to life, the right to be free from torture requires that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties.

10.8 The Committee observes further that article 13 is in principle applicable to the Minister's decision on risk of harm, being a decision leading to expulsion. **Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question.** In the Committee's view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in Suresh on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities' case against him l and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. **The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7**.[65]

The stark difference between the result of the European Court of Human Rights judgment in *Othman* and that of the decision of the Human Rights Committee in *Ahani* may be explained in part by the fact that the United Kingdom to date remains the only European state to have neither signed nor ratified the 1984 Protocol no 7 to the European Convention on Human Rights, article 1 of which closely resembles article 13 of the ICCPR (which otherwise has no direct parallel in the European Convention on Human Rights) and concerns "the procedural safeguards relating to the expulsion of aliens".[66] The European Court of Human Rights accordingly could not directly apply the same treaty rights as would apply under the ICCPR. At the same time, the European Court of Human Rights could likely have reached a similar conclusion to that of the Human Rights Committee applying similar reasoning in relation to article 13 (right to remedy) of the European Convention on Human Rights. Amnesty

International hopes the Court will do so in any future similar cases. The reasoning of the Human Rights Committee in *Ahani* rests clearly on a foundation of basic principles of human rights. By comparison, the reasoning behind the heavy weight placed by the European Court of Human Rights on the distinction between the affected individual "advancing a claim" as opposed to responding to one is far less obvious or compelling. The obligations of the United Kingdom under the ICCPR are in any event no less binding as a matter of international law than those under the European Convention on Human Rights, and the SIAC procedures as currently applied seem clearly inconsistent with the UK's obligations under the ICCPR as articulated by the Human Rights Committee in *Ahani*.

Reliance on secret evidence on the issue of risks of violation upon return and the reliability of diplomatic assurances runs counter to the principles of fair, transparent and open judicial process required of such decisions under the ICCPR and UN Convention against Torture. Current jurisprudence of the European Court of Human Rights notwithstanding, Amnesty International believes the same should ultimately be found to be true with respect to the European Convention on Human Rights. The unfairness of such procedures is only exacerbated if the affected individual is denied a meaningful summary of the evidence or Special Advocates are prevented from taking effective instructions. Such procedures can make it incredibly difficult to mount any kind of challenge to refute the government's case, let alone the effective opportunity to do so contemplated by international human rights standards. Accordingly Amnesty International considers that evidence that the government intends to present to a court concerning the risk of human rights violations that an individual might face upon return, must not be kept secret from the affected individual and her or his counsel of choice.

IMMIGRATION BAIL CONDITIONS IN NATIONAL SECURITY DEPORTATION CASES

Individuals facing deportation on national security grounds are either detained pending deportation or released on immigration bail, where they are required to abide by a number of conditions. Any breach of these conditions can lead to the individual being re-detained. Individuals living under immigration bail pending deportation on national security grounds spoke with Amnesty International about the profoundly negative effect these conditions have, both on their lives and on the wellbeing of their families and in particular their children. Partially due to the secrecy around the proceedings, it is unclear whether the range, duration and severity of these impacts on the rights of others around the individual subject to bail is fully taken into account by SIAC and the courts when deciding whether the conditions, and the withholding of secret material, can be justified in the circumstances of the case in relation to the rights at stake.

Conditions under immigration bail in national security cases typically include: a curfew; boundary restrictions; wearing of an electronic tag; requirements to live at a specific address; restrictions on visitors and pre-arranged meetings; bans on contacting certain named individuals; partial or total restrictions on the use of mobile phones and the internet; employment and education restrictions; and limits on the use of bank accounts.

For all of the individuals Amnesty International spoke with who were directly affected by the procedures and their families, the fact they did not have a meaningful opportunity to challenge the national security case served to compound their sense of frustration with the situation and the resultant mental impact of living under the bail restrictions often for long

periods of time. Three individuals spoke of having tried to commit suicide, or of having suicidal thoughts as a result of the situation they were facing. Those with families connected the impact on their children and spouses lives with a feeling of powerlessness that they were unable to defend the rights of their families because they were unable to challenge the government's case against them. For those who had previously been detained, often for long periods in high-security prisons, they remained constantly fearful that they could be re-detained at any moment.

The significant impacts that immigration bail conditions can have not only on the individual upon whom they are imposed, but that person's spouse and children, were described to Amnesty International by "BB", who has been living under restrictive immigration bail conditions for the past four years, having previously been detained for over two years:

> *…myself, my kids, my family we all have to live this life. My kids, it's hard for them. I mean some restrictions are now lighter, friends of my wife and children they used to have to apply for clearance with photos and other details, but now they just have to give names and address – but its hard how do I ask for details from people? So it means the kids don't really see visitors in the house, only the police. ….. It's an event for them if somebody steps inside the house. This has been going on for years and years and it affects them. This tag is part of their life, it's their normality. This way of life has become normality, It's normal that their father phones the police every morning and night or that I've never been able to take them to the zoo.*[67]

Living under immigration bail – the wife of "G"

For the past six years "G" (see above page 9) has been living under restrictive bail conditions while he waits for a final determination in his case. In March 2012, the wife of "G" discussed with Amnesty International the daily struggle of living with someone subject to immigration bail conditions, including the resultant social isolation;

"To get [home office] clearance for visitors it's difficult, children up to 14 can now come to the house, so the children's friends can finally come. But anyone else has to be cleared, and the Home Office often doesn't give clearance. It's hard too to ask people to go through clearance, to ask them to give details to explain everything. So if a friend comes to the door I can't let them come inside the house, that's hard. The midwife, after I had my youngest daughter, she couldn't come to the house so I had to go to the centre for check-ups for the baby. Even the doctor if you want a house visit they can't do that, I can't just pick up a phone and ask the doctor to come – even though my husband has medical problems. Everything needs clearance and we don't always get it […] My husband wears a tag, but we all have an invisible tag. We all need to be freed, so the kids don't have to live with these conditions. The children they think this is normal, for them this life is normal but it shouldn't be. They should live a full life, not living like this seeing people come and search your house, seeing their father with his tags, controlling the hours he can take them to school. The fights to get small things changed [….] I hope they'll relax things – make it easier for the doctor, for women to visit. You just have to accept it and try to be strong, that is all you can do. If I'm not strong, everything would fall apart. My husband is not well. This is on my shoulders and I have to carry it and be strong for my children."

She also spoke of her frustration not being able to know the full reasons why she and her children must live under these conditions:

"What's worse in this situation is that I have no power over this. All I can do is stand and watch. You should be able

to see the evidence. Even our solicitor can't see it; that is a nonsense, it's just 'secrecy, secrecy, secrecy' and if your lawyer asks any questions they [the government] just say 'I can't comment'. For ten years we've lived with this. I'm just very angry. I'm angry with them about what they have done to us. The people who do this they don't see behind all the conditions, behind these laws and realize that it is actually a human being who is living with them. They don't understand what their controls and their laws do. We are humans. How are we supposed to deal with this all? We live inside a big question mark. If they have the evidence then put my husband in court, then if he is guilty put him in prison show what he has done. At least then we know this evidence is something. But don't destroy our lives for nothing."

Legal and policy considerations in immigration bail proceedings in national security cases

Some of the same concerns that are discussed above in relation to national security deportation hearings also apply in the context of immigration bail proceedings before SIAC. When bail on conditions is granted in a particular case, it essentially recognises that detention of the person in custody is not justified because lesser measures can achieve the objectives that such a complete deprivation of liberty would otherwise serve. The right to liberty, as enshrined in Article 5 of the European Convention on Human Rights and article 9 of the ICCPR, includes the procedural right to "take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful";[68] a proceeding for a judicial order for release on bail with conditions should be subject to this same procedural right. These articles incorporate elements of fair trial safeguards, at least to the extent that the procedure must have "a judicial character and be appropriate to the type of deprivation of liberty in question."[69] This includes the right to access a lawyer, and to equality of arms and proceedings of an adversarial nature.[70] Further to this, the application of immigration bail conditions must respect the individual's dignity; must comply with the principles of legality, necessity and proportionality, and non-discrimination; and must be subject to judicial review.

In the case of *A and others v UK*, the European Court of Human Rights found that this procedural right had been violated with respect to four individuals who had been detained under the now lapsed ATCSA regime, because the decision to detain them was based "solely or to a decisive degree" on secret evidence and so they were unable to effectively challenge the case against them.[71] In light of this judgment, domestic courts have now ruled that where the government wishes to deprive an individual of her/his liberty, the individual concerned must be given sufficient information about the national security reasons relied on by the Secretary of State to enable effective instructions to be given to the Special Advocate (also referred to as the "gist" of a case).[72] As a result there has been some improvement to the procedure in terms of disclosure which now occurs in SIAC bail proceedings where the government is seeking to detain or where domestic courts have concluded that a specific bail condition or conditions would amount to a deprivation of liberty.[73]

There are however a number of individuals who are required to live under very restrictive immigration bail conditions, often for very long periods of time, and are not provided with even with this limited amount of disclosure, because the domestic courts do not consider that the conditions amount to a deprivation of liberty. Amnesty International considers that in some cases the constellation of restrictive immigration bail conditions, when evaluated as a whole, itself constitutes a deprivation of liberty. But in any event, the restrictive nature of immigration bail conditions in national security cases, particularly when considered cumulatively, nonetheless have a profound and negative impact on the individuals concerned

and on their families; the imposed restrictions can constitute a violation of the right to freedom of movement, and the right to respect for private and family life. Individuals in these cases and their family members often live under these conditions for a period of many years on the basis of evidence they will never see. Indeed, lawyers for "BB" are currently arguing before the domestic courts that because of the profound and negative impact living under immigration bail is having on "BB"s right to respect for his private and family life (article 8 of the European Convention on Human Rights), further disclosure of the national security case against him should be provided in order to allow him to have a fair hearing.[74]

In these cases the lives of those concerned and their families are often deeply and negatively impacted and as such they must be afforded robust procedural safeguards. As the European Court of Human Rights has held "the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake."[75]

Even if, then, the authorities could demonstrate that particular evidence in a bail proceeding before SIAC might lawfully be withheld on national security grounds, including that it is demonstrably necessary and proportionate to do so, given the impact these conditions have on the individuals and their families, then at the very least a sufficient summary of the national security allegations on which the bail conditions are based should always be provided to allow effective instructions to be given to the Special Advocate in the case.[76] It is also unclear in what circumstances the national security risk allegedly posed by a person could at the same time be so imminent and grave that it might arguably justify an exceptional departure from the ordinary requirements of fair trial, and yet be of such a non-imminent and non-grave character that it is capable of being managed by controls falling short of deprivation of liberty (and, yet further, still not capable of being managed by means that would not require court proceedings imposing restrictions in the first place, i.e. ordinary surveillance). The application of bail conditions of such a nature and in such circumstances would be much more akin, and subject to substantially the same considerations, as discussed in relation to control orders/TPIMs and other administrative controls below.

ADMINISTRATIVE CONTROLS AND RELIANCE ON SECRET EVIDENCE

"I have had experience of closed material procedures 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 these roles is how different an open case may look from a closed case. The case that an appellant thinks they are meeting may not be 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 underwater."

Dinah Rose QC, uncorrected transcript of oral evidence taken before the Joint Committee on Human Rights, 24 January 2012.

The criminal law of the UK provides for a wide-range of offences which can be used to prosecute involvement in terrorism-related activity.[77] In numerous cases, however, instead of turning to the UK's ordinary criminal justice system, the UK government has utilised closed material procedures and a very low standard of proof against individuals it deems a threat to the UK's national security to keep them under various forms of administrative control. The

effect of these measures has been to create what is, to a large extent, a parallel justice system for many individuals who are still essentially being formally accused of involvement in terrorism-related criminal activity.[78]

THE CONTROL ORDER REGIME

The control order regime, now replaced by a new, but similar regime of terrorism prevention and investigation measures (see below) allowed a government minister to impose restrictions on an individual suspected of involvement in terrorism-related activity. The type of restrictions that could be imposed under a control order was open-ended. Those actually imposed varied from case to case, but typically included a combination of: curfews of between 8 and 16 hours a day; forced relocation to another city or town, sometimes in another part of the country; electronic tagging; restrictions on visitors, meetings with others, employment, movement and communication; bans on the use of mobile phones and internet; and restrictions on having a bank account or other financial restrictions. Alone or in combination the imposition and operation of such controls can infringe a range of human rights of the affected individual, including particularly his or her rights to liberty, freedom of movement, expression, association, and to protection of privacy, family, home and correspondence. The restrictions imposed by control orders have had, in some cases, a profound effect on the mental health of those who were subjected to the orders and on the wellbeing of their families.[79]

Despite the serious restrictions on the rights of individuals subjected to a control order, the regime allowed the authorities to keep secret from the affected individuals and their lawyers much of the evidence on which the allegation of involvement in terrorism-related activity was based. This central feature has been retained by the replacement regime of terrorism prevention and investigations measures and the experience of control orders deeply informs the challenges faced in its replacement regime.[80]

As in national security deportation cases, lawyers representing clients subjected to control orders spoke of their deep frustration in trying to defend their clients without having access to the evidence on which allegations against their client were based, placing them at a profound disadvantage. For example, the difficulty in responding with specific evidence to an allegation that a client is associated with another suspected terrorist without further detail (for example the dates and times they allegedly were in contact or the nature of the alleged association), or access to the evidence on which the allegation was based. Even if the name of the alleged associate was provided (as would normally occur in cases concerning the imposition of administrative controls, in contrast to national security deportation cases where reference might only be made, for example, to association with "known extremists") in the absence of such details, a person and his representatives would only be able to deny the allegations without effectively refuting them. A person who in fact had no association with the person would find it difficult if not impossible, for example, to provide an alternative explanation for any of the secret evidence, or adducing evidence to demonstrate the allegation to be untrue (given the acknowledged practical difficulties of proving a negative in the abstract).[81]

The difficulty in determining and developing legal strategy when faced by secret evidence was also repeatedly raised by lawyers who acted in these cases as a factor deepening the inequality between parties by hindering the ability of the person's lawyer of choice and the

Special Advocate to collectively defend the person's interests to the standards of competency normally expected for a fair hearing. Tom de la Mare QC explained the problem that arises from the fact that the Special Advocate cannot say anything to the affected person or his lawyer without prior approval of the government's lawyers for the content of the communication: "There will be circumstances in which the closed material dictates that an ordinary competent lawyer should follow this strategy as opposed to that strategy and yet you cannot communicate that in any way to the open lawyers unless you disclose those very issues of strategy, or indeed legal privilege, to the very party that you are meant to be acting against", i.e. in requesting government permission for the communication, "and one has to question whether that is compatible with their rights to effective representation and the protection of legal privilege."[82]

In addition to commonly relying on secret evidence, control order proceedings also applied a particularly low standard of proof and a wide scope of grounds: judges hearing challenges to control orders were required to uphold the order if they were satisfied that the Secretary of State had reasonable grounds for suspecting that the requirements for making an order were satisfied. This is not the same as the court requiring proof – even to the normal civil standard of a 'balance of probabilities', still less to the criminal standard of 'beyond reasonable doubt' – demonstrating that the controlled person has, in fact, at any stage actually been involved in any "terrorism-related activity", let alone that the person has engaged in criminal activity that poses a concrete threat to the lives or personal safety of the public.[83]

The case of "AN"

"AN" is a British citizen born in the Midlands who moved with his wife and son to Syria in September 2005. According to his statement the move was in order to continue his studies in Arabic. He was detained by Syrian intelligence agencies in December 2006 and held incommunicado for three months, during which time he states he was tortured and ill-treated. He was released on 31 March 2007 and returned to the UK that day. On 4 July 2007, "AN" was made subject to a control order, which required him to relocate to an unfamiliar location. Suffering from the effects of his experience in detention in Syria, including post traumatic stress disorder, according to his lawyers "AN" struggled to cope with life under a control order, which "destroyed what was left of his own strength mental and physical".[84] Medical professionals also expressed the view that the "control order served as a reminder of the imprisonment in Syria and worsened his mental condition".[85]

In September 2007, "AN" tried to abscond to avoid the restrictions of the control order – which as a breach of his control order is a criminal offence under UK law. He was arrested and held on remand in HMP Belmarsh for two years where his detention took a further toll on his mental well-being, causing him to try to commit suicide before being transferred to a high security mental health unit at the prison.

From the outset "AN" and his lawyers were provided with limited information about the national security case against him, initially being told simply that the Secretary of State believed that he had an intention to travel abroad for terrorism related purposes. A second statement of the allegations against him, served a few months later, simply added that he had attempted to abscond from his control order. A third statement served to "AN" following a disclosure hearing in December 2007 set out further allegations of a general nature, and still without any additional substantiating evidence for the allegations. These allegations included that he had acted as a link between London based-extremists and Al-Qaeda linked overseas extremists; that he had been involved in attack planning, likely to have taken place in the Middle East, to which he had travelled repeatedly; that he had facilitated extremists to participate in terrorist-related activities overseas; and that he had openly advocated support for violent extremist

activities.[86]

"AN"s case eventually reached the Appellate Committee of the House of Lords, then the highest court in the UK, who ruled in June 2009 that "AN" had not been provided with sufficient information about the allegations against him and ordered that his case be remitted for further consideration by the lower courts.[87] As Lord Hope of Craighead stated in the judgment, "If the rule of law is to mean anything, it is in cases such as these that the Court must stand by principle. It must insist that the person affected be told what is alleged against him."[88]

Despite this ruling "AN"'s control order was renewed by the government. Rather than provide further disclosure to "AN" and his lawyers, the Secretary of State for the Home Department decided to withdraw reliance on the secret evidence that made up the essence of their case, arguing that the control order could still be justified by reference to other open material. The High Court, however, held that the decision of the Secretary of State to make the control order was flawed and gave directions for the control order to be revoked.

In response to the ruling, the Secretary of State decided immediately to make a new control order against "AN", despite the fact "AN" was in fact still in Belmarsh Prison being detained for breaching the conditions of his first control order.[89] Once again very limited information was provided about the reasons for the new control order and once again "AN" and his lawyers had to go to the High Court to appeal against the new control order. In an open note to the High Court, the Special Advocates acting for the interests of "AN" recorded "their profound concern" about the conduct of the Secretary of State for the Home Department in the case, in particular the failure to provide substantive responses to the Special Advocates submissions for further disclosure and late serving of material, which had compromised their ability to act in the case.[90] In March 2010, the High Court revoked the second control order against "AN" ruling that there was insufficient evidence to justify that its imposition was necessary.

Even though "AN" had successfully won both appeals against his control orders he continued to face a criminal conviction and potential imprisonment for breaching the conditions of the initial control order – the threat of which continued to take a toll on his mental health. His lawyers went back to the domestic courts and successfully argued that the first control order should be quashed as it was unjustified, meaning he could no longer be subject to prosecution.[91]

The effect on "AN" of his experience of being subject to the control order regime and his protracted legal battles has been profound, leaving him with deep mental scars and damage to his family. One of his lawyers, Gareth Peirce, told Amnesty International:

"With his case you are looking at the most appalling situation - a torture victim who is returned to the UK and reunited with his family - who is seeking therapeutic help in a context where he is basically hanging on by his fingernails. For the government to take him out and put him in a lonely isolated situation and not tell him the reasons why, for anybody in the world that would be the most extravagant nightmare you could construct. It completely destroyed him and his family and has a continuing effect of the most enormous and catastrophic kind. That is as much as I can say, simply that it is very difficult for a family unit and an individual to survive all that."

Improvements to the procedures for control order hearings

Following substantive and complex litigation in the UK there were some improvements to the procedures for control order hearings. The culmination of this litigation was the case *AF (No3)* which concerned three individuals, known as "AF", "AN" (see above text box) and

"AE" who were all subjected to control orders which severely restricted their right to liberty. They appealed to the Appellate Committee of the House of Lords on the grounds that they had been denied the right to fair hearing because of the reliance on secret evidence in their cases.

On 10 June 2009, the Law Lords, citing jurisprudence from the European Court of Human Rights, held that: a person against whom a control order was sought "must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations"; where "the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be"; and that "where the interests of national security are concerned in the context of combating terrorism, it may be acceptable not to disclose the source of evidence that founds the grounds of suspecting that a person has been involved in terrorism-related activities" but "non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order."[92]

The impact of *AF (No 3)* on the disclosure of information to individuals subjected to administrative controls has been mixed, as the question as to how much disclosure is necessary to enable someone to mount an effective challenge continues to be grappled with.[93] The judgment does provide a new tool - referred to as "the AF test" or the "AF (No 3) Test" by practitioners - in the arsenal of the Special Advocate in trying to secure further disclosure; however, reports from lawyers, including Special Advocates, suggest that the impact on disclosure has in practice been limited. In large part the reason for this appears to be that further disclosure of closed material on AF (No. 3) grounds is considered by the government to be disclosure which necessarily would be harmful to the public interest.[94] As a consequence, the government has often chosen to reduce the evidence base rather than disclose further evidence or detail of allegations which the government claims may harm national security. In some cases this appears to have led to the collapse of the evidence base and the revocation of the control order. As Tim Otty, QC who has acted in several control order cases, including for "AF" himself, explained:

> *"AF (No. 3) certainly has made a difference as some control orders have had to be abandoned because the government could not comply with the disclosure requirements the decision imposed. We can also assume that some others haven't been made. So it definitely provided a brake on control orders being imposed and maintained. As to whether in those control orders that have been made and maintained - has it triggered further disclosure so to render it possible for the individual to participate fairly?, I just don't know. To me it's still very much an open question as to whether it was significant in delivering "fairness" – I do struggle to see how it can be fair for decisions of this significance to be made on the basis of evidence the individual affected has not seen and which are then reflected in a Court or Tribunal decision which will never be shown to him. I also think that there is a real risk of damage to the reputation of the Courts through their being drawn into procedures of this kind."*[95]

TERRORIST PREVENTION AND INVESTIGATION MEASURES

In December 2011, the Terrorist Prevention and Investigation Measures Act 2011was

passed, bringing the control order regime to an end. Nine individuals - all British nationals - who were subject to control orders were served with a notice stating that they were being made subject to Terrorist Prevention and Investigation Measures (TPIMs).[96]

The range of restrictions that can be imposed on an individual with these new measures is slightly narrower than in the control orders regime.[97] Some measures that the Home Secretary has described as the "most restrictive" under the control order regime are no longer available under a TPIM, for example, individuals can no longer be relocated away from their home in the way that was allowed by a control order. The Home Secretary still retains the power, however, to subject an individual to a range of different permutations of the measures— including to various levels of severity— depending on the "terrorism-related risk" that she assesses the individual to present. In addition, the government has published draft legislation that it says it would introduce in Parliament for speedy passage in the event of an undefined future emergency situation, which would establish an "enhanced" version of TPIMs that would re-introduce the most severe restrictions found in the control order regime.[98]

The standard for imposing a TPIM on an individual has been changed from a "reasonable suspicion" for the imposition of a control order to a "reasonable belief" for a TPIM. However, Amnesty International remains concerned that in practical application, this standard will make little difference.[99] In essence, the government will continue to be able to impose highly restrictive administrative measures, in some cases potentially amounting to a deprivation of liberty, without having to prove even that it is more likely than not (i.e. the ordinary civil law standard of proof "on the balance of probabilities") that the person is preparing for or contributing to the carrying out of an attack, or otherwise committing a terrorism offence that would pose a concrete threat of death or physical injury to anyone.

Notably the procedures for imposing a TPIM continue to allow the government to rely on secret evidence to make determinations about the threat posed by an individual and thus the purported need for the application of controls on that person's movement, association and other activities. In this regard, TPIMs are in essence a re-branding of the control orders regime under the PTA, and the individual concerned continues to be denied effective equality of arms in challenging the imposition of administrate controls on them which significantly restrict their rights to liberty, association, movement and privacy, and can in some cases deprive them of effective enjoyment of some or all of these rights entirely.

In the first review hearing by a court of a TPIM, the High Court made it clear that previous decisions concerning disclosure in control order proceedings were "equally binding" in relation to TPIMs.[100] However, though the new legislation provides that the courts should ensure that TPIM proceedings operate compatibly with the right to a fair trial, it does not explicitly require that all individuals served with a TPIM must be provided with sufficient disclosure to allow them to give effective instructions to the Special Advocate, as established by *AF(No 3)*. This absence of an explicit statutory provision recognising this requirement raises concern that the government will seek to limit the cases in which this minimal guarantee is secured. The current Independent Reviewer of Terrorism Legislation has, for example, noted that it cannot "be excluded that the Government may seek to argue (despite discouraging High Court Precedent) that AF (No. 3) disclosure is not required in the case of a "light-touch" TPIMs."[101] By "light-touch" TPIMs, the Independent Reviewer appears to be referring to cases where the individual potentially would be subject to restrictions that are, in

relative terms, less than the maximum theoretically available under a TPIM. As the descriptions below suggest, however, even controls considered not to constitute a "deprivation of liberty" can still have serious psychological impacts on the person concerned undermining arguments that such regimes should be allowed to provide lesser fair trial protections than would normally apply.

Life under administrative controls

Mohammed (a pseudonym), who spoke with Amnesty International on the condition of anonymity, and Cerie Bullivant both have experience of living under administrative controls and described their experiences to Amnesty International:

Mohammed: "*People may argue since you're free it's easier than being in prison. But you're stuck between two worlds, between freedom and imprisonment. You live amongst society but you're detached – it's like you're in a movie or in a theatre play, watching yourself. Your whole life is controlled by someone else, how you move, breathe, sit, talk or walk – you feel like you can't do it without someone else's permission. […] You're also not the only one suffering. People like family that you love and care about suffer too. They don't know why their son or husband or brother or loved one is going through this, they don't know the crime I am supposed to have done. If they get an explanation, then they may be content and then they know the state has to do this. But they don't get that content.*"

Cerie Bullivant:[102] *"I actually don't think anyone in the Home Office really understands what a control is and what it does. It's so hard to explain what impact these 10 conditions can have on your life […] the way they merge together and interplay. Written down they don't seem like a big deal, but they become all-encompassing, all-pervasive in your life. I was becoming very distant from everyone. I felt like everything I touched died. I had this reverse Midas touch. […] Your mind runs circles around you. That's probably the worst of it all, because you don't know the evidence or what you are accused of, you run through every single conversation you have had, everything you have done, again and again. You become almost paranoid, trying to remember, to double guess. […] I came close to losing my sense of who I was."*

Legal and policy considerations

The right to a fair trial generally includes at a minimum – in both civil and criminal cases - the right to equality of arms, respect for the principle of an adversarial process, the right to a public hearing and the issuing of a public judgment, including the essential findings, evidence and legal reasoning.[103] In the counter-terrorism context, however, governments, including the UK, have sought to chip away at those fundamental guarantees, invoking national security as purported justification for restricting such fundamental fair trial safeguards.

An adversarial process is one in which both parties in a case have knowledge of and can comment on the evidence and argument presented by the other side, in order to challenge it and establish by contrary evidence that it is wrong.[104] The right to equality of arms complements this, requiring that everyone who is party to proceedings has a reasonable opportunity to present his or her case under conditions that do not place one party at a substantial disadvantage vis-à-vis his or her opponent.[105] The further principle that justice be open to public scrutiny acts as an essential safeguard of the fairness and independence of the judicial process, which in turn provides a means of protecting and maintaining public confidence in the justice system.[106] As noted by Lord Phillips in case of *AF(No3)* "If the wider public are to have confidence in the justice system, they need to be able to see that

justice is done rather than being asked to take it on trust".[107]

If international human rights law might allow for some restrictions on these elements of the right to a fair hearing in some kinds of civil cases, including for reasons of national security, any such limitations would be subject to the requirements that they be demonstrated to be strictly necessary and proportionate to a valid national security concern in the particular case, that there should be sufficient counterbalancing of any restrictions within the judicial process, and that non-disclosure will not impair the essence of a right to a fair trial.[108]

While articles 6 of the European Convention on Human Rights and 14 of the ICCPR explicitly provide for the exclusion of the press and public from a hearing on a range of grounds including "national security in a democratic society", they make no explicit provision for the exclusion of litigants or their counsel from any proceeding to which the articles apply, for any reason or any period of time. Though the case law of the European Court of Human Rights has found the European Convention on Human Rights to allow for the exclusion of litigants and their counsel in certain cases and circumstances, including on grounds of national security, it has held that the onus is on the state to demonstrate that it is strictly necessary, proportional and does not in its effect deny the individual their right to a fair hearing.[109] The Court has underlined that there may only be "restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest".[110] As regards obligations under article 14 of the ICCPR, on the other hand, Amnesty International is unaware of anything in the jurisprudence or General Comments of the Human Rights Committee that would hold it consistent with the right to a fair hearing to allow the government and court to rely on secret evidence (i.e. by excluding the litigant and his or her lawyer from the hearing of evidence against him) in a proceeding to which article 14 directly applies.[111]

While partially addressing some shortcomings of the control order regime, the precedent set in the case of *AF (No 3)* did not address broader concerns regarding the principle of open justice or the right to equality of arms which still obtain in closed material procedures in TPIM proceedings. Much of the evidence supporting the allegations still remains secret - limiting the opportunity of the individual to mount an effective challenge against the allegations leveled at him or her. As one lawyer said about more minimal disclosure per *AF (No 3)* "In my experience it doesn't help – all you have is a bit more of what they did wrong, but no evidence of it. They won't give the evidence – multiple hearsay from security services can be very persuasive. They can say we have information about association with known extremists, buying literature, etc. What you want to know is the source – for example it may actually be an old school-friend giving the bad information. It can all look much less persuasive when you get to the source."[112]

Reliance on intelligence material

Where closed material procedures apply in a statutory context, such as in TPIM or SIAC cases, the government can rely on a range of intelligence material that would not always be accepted in other civil and criminal proceedings in the UK. This includes information from unidentified informants; intercepts; foreign intelligence services -including in countries with poor human rights records; data mining (a method that looks for hidden patterns in a data set that can be used to predict future behaviour); and second or third hand hearsay. Special Advocates have stated that the primary source for this type of remote intelligence material is often "unattributed and unidentifiable and invariably

unavailable".[113] As a result their ability to challenge the reliability of such information can be limited.

The former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has raised serious concerns that "where States begin preferring to use undisclosed evidence gathered by intelligence agents in administrative proceedings over attempts to prove guilt beyond reasonable doubt in a criminal trial" this marks "a 'shift' which can ultimately endanger the rule of law, as the collection of intelligence and the collection of evidence about criminal acts becomes more and more blurred."[114]

The robustness of the intelligence material relied upon by the government can be particularly relevant where the case against an individual does not involve a standalone allegation, but is rather comprised of information drawn from a variety of sources and combined in various ways to create a mosaic justifying the assessment that an individual is a risk to national security. [115] This is illustrated in an example given by Special Advocates in a written submission to the Constitutional Affairs Committee of how cross-examination of a witness in a closed hearing can run:

Special Advocate: Do you accept that document A, though consistent with the sinister explanation you attribute to it, is equally consistent with another completely innocent explanation?
Witness: Yes.
Special Advocate: So, the sinister explanation is no more than conjecture?
Witness: No. Document A has to be considered alongside documents B, C, D and E. When viewed as a whole, on a global approach, the sinister explanation is plausible.
Special Advocate: But you have already admitted that documents B, C, D and E are in exactly the same category: each of them is equally consistent with an innocent explanation and with a sinister one.
Witness: Yes, but when viewed together they justify the assessment that the sinister explanation is plausible and form the basis of a reasonable suspicion.[116]

The US courts have criticized this approach to evidence, with one judge stating that "it must be acknowledged that the mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together just as a brick wall is only as strong as the individual bricks which support it and the cement that keeps the bricks in place. Therefore, if the individual pieces of a mosaic are inherently flawed or do not fit together, then the mosaic will split apart, just as the brick wall will collapse."[117] The former Special Rapporteur on Human Rights and Counter-Terrorism, has also criticised the use of intelligence material as evidence in this manner, particularly when based on foreign intelligence gathering, stating that "sanctions against a person should not be based on foreign intelligence, unless the affected party can effectively challenge the credibility, accuracy and reliability of the information".[118]

In a closed material procedure the problems of relying on intelligence material as evidence in this way is exacerbated as the individual and his or her legal team can be denied the possibility of seeing all of the parts of the supposed mosaic and so cannot robustly challenge the way the government claims the pieces of the mosaic must be regarded amounting to more than the sum of their parts, or the individual elements that have been used to create an overall picture of risk that someone allegedly poses.

LOOKING FORWARD: THE EXPANSION OF CLOSED MATERIAL PROCEDURES

"[I]t is helpful to stand back and consider not merely whether justice is being done, but whether justice is being seen to be done. If the court was to conclude after a hearing, much of which had been in closed session attended by the defendants but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants but not the claimants or the public, that the claims should be dismissed, there is a substantial risk

that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater."

From a 2010 judgment of Lord Neuberger, Master of the Rolls, referring to claims by the plaintiffs that British intelligence agencies were complicit in their detention and ill-treatment at locations including Guantánamo Bay[119]

On 28 May 2012, the government published the Justice and Security Bill (the Bill) which, if enacted, will extend closed material procedures throughout the civil justice system for use in cases which the government claims give rise to national security concerns.[120] Though the government has stated that it is intended to apply to cases involving "spies and national intelligence", as currently drafted the Bill could potentially affect a much broader range of cases including, for example, civil actions against the police and law enforcement agencies, cases relating to detention by the military abroad, and negligence actions against the Ministry of Defence when a solider is killed.[121] This unprecedented extension of secret procedures risks violating fair trial rights and the rights of victims of human rights violations to an effective remedy.

Though the Bill provides for judicial oversight as to whether a closed material procedure can be used in a particular case, limits the legislation would place on the role and discretion of the judge give real reason to fear that in practice even this promised safeguard will act merely as a rubberstamp, in effect giving the government carte blanche to introduce greater secrecy into civil damages cases. As it currently stands the Bill would allow for the introduction of a closed material procedure through a two-stage process.[122] In the first stage the government (and only the government) can apply to the relevant court for a declaration that a closed material procedure should be used in a given case.[123] The judge may review that material, but the Bill requires that the court *must* grant such a declaration if there is *any* material which if disclosed would be "damaging to the interests of national security". In considering the application the judge must ignore whether the material would actually be relied on during the proceedings and whether there are fairer ways for the case to proceed using existing alternative mechanisms.

Once a declaration has been granted the second part of the process allows the government to apply for material to be placed into closed sessions of the proceedings. The court again can see the material but has no option but to grant these applications if it considers that disclosure would be harmful to the interests of national security. The court can provide a summary of that material, but is not required to do so and indeed the statute would require the court "to ensure that the summary does not contain material the disclosure of which would be damaging to the interests of national security".[124]

The UK government argues that this extension of closed material procedures across the civil justice system is necessary because the current system for dealing with sensitive material in civil proceedings, Public Interest Immunity ("PII"), is inadequate in cases which concern national security. Under the PII system, the government can apply to the court for permission to withhold certain material relevant to the case on the grounds that disclosure would be harmful the public interest.[125] In determining whether the material can be legitimately withheld the court applies what is known as the "Wiley Balance" test, which requires the court to balance the public interest in withholding the material, for example on national

security grounds, and the public interest in ensuring the proper administration of justice, such as a fair trial.[126] This test recognizes that sometimes maintaining secrecy over sensitive information would on balance not be in the public interest even if its release might cause some damage to a state interest such as national security. In other words, the "Wiley Balance" test recognises that "national security" is one among a much broader range of public interests; and that where for instance release of information would cause damage to national security of an exceedingly slight nature, and another element of public interest would hugely favour disclosure of the information, "national security" should not be permitted automatically to trump all other public interest considerations.

That recognition is crucial in cases where the state is alleged to have been involved in human rights violations, including for instance torture or other cruel, inhuman or degrading treatment, enforced disappearance, or extrajudicial execution. In such cases there is a high risk of government officials' invoking national security interests in order to shield those responsible, and the government as a whole, from accountability. Further, even where national security interests are invoked with legitimate motivations, there is in such cases clearly a hugely weighty, indeed in most if not all cases *overriding*, interest of the public in exposing human rights violations, holding the state and individual perpetrators accountable, and ensuring victims have access to a fair procedure for obtaining a remedy.[127] Indeed, as will be described in greater detail below, under international human rights law these matters are not merely "interests" to be taken into account in a balancing exercise – they constitute specific legal obligations binding on the UK.

In applying the "Wiley Balance" test under the PII system the court may inspect the documents and can also consider other ways to protect the sensitive material which would still allow disclosure of the documents to the other party in the proceedings, for example, by withholding names of sources, allowing certain redactions of the material or requesting confidentiality agreements from the other party. If, after the application of the balancing test and the consideration of alternative mechanisms, the court determines that the material should not be disclosed it must be excluded from the case.

The government argues that this exclusion of evidence which can occur in the PII system makes it an inappropriate mechanism for dealing with so called "sensitive" cases where there is a great deal of relevant material, disclosure of which the government claims would be damaging to national security. The government's claim is that as a consequence these cases will either have to be settled or struck out by the courts, so the introduction of closed material procedures is necessary to allow these types of cases to proceed. Such arguments rest on flimsy evidentiary foundations, to date the government has only provided one example of a case that was struck-out as a result of the exclusion of material under PII, and other cases involving settlement before judgment are not unusual – settlement of civil cases of all kinds often comes as a result of a rational decision by one party that they simply prefer to avoid protracted litigation, do not want certain material scrutinised, that they don't have much of case to respond with, or for a mix of other reasons. Finally, the argument neglects the considerable flexibility as to the nature of the protection that may already be given to sensitive material in the PII process.

One of the key differences between the Bill as it currently stands and the PII process is the role of the judge. As noted above under PII the judge balances the competing public

interests: for example, the interest in open, adversarial justice and any immediate national security interests. It is for the judge to determine where the public interest lies. Under the proposals in the Bill, on the other hand, the judge is explicitly prohibited from assessing any balance between competing interests. The judge must introduce closed material procedures where there is any material at all which would be damaging to however slight a degree to the interests of national security if disclosed; the judge appears to have no discretion to consider alternatives, or whether it is strictly necessary or proportionate to allow the government to rely on the secret evidence. This would appear to apply even where the evidence in question is conclusive evidence of the most serious of human rights violations, a matter in which the public interest in disclosure should as a matter of international human rights law be presumed always to be overwhelming. "National security" is also not defined in the Bill leaving open the potential for it to be very broadly interpreted.

There has been widespread criticism from NGOs, lawyers and media organisations of the government's proposals to expand closed material procedures.[128] On 4 April 2012, the Joint Committee on Human Rights (JCHR) published a report in which it emphasised the inherent unfairness of closed material procedures and found the proposed expansion to be "unjustified" and "unnecessary".[129] The Committee emphasised that "It is most unlikely to be possible to tell in advance of a Public Interest Immunity exercise whether the outcome will be that the issues in the case are not capable of being determined fairly without the withheld material. The whole purpose of the Public Interest Immunity exercise is painstakingly to look at each piece of evidence to determine how the balance should be struck and that exercise must be gone through with all the various means of facilitating some form of disclosure in mind."[130]

The overwhelming majority of Special Advocates have also publicly criticised the government's proposals, stating that closed material procedures are "inherently unfair" and that "the Government would have to show the most compelling reasons to justify their introduction; that no such reasons have been advanced; and that, in our [the Special Advocates] view, none exists."[131]

ENSURING ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

"The idea that you could go to court having had the most terrible things happen to you to sue for justice and be excluded from the proceedings and at the end just be told you've lost without being given the reasons for that decision runs contrary to all notions fairness, the rule of law and open justice"

Richard Hermer QC, meeting with Amnesty International, 22 July 2011.

Amnesty International is concerned that the government's plans to expand closed material procedures will fundamentally undermine the UK's ability to satisfy its obligations to ensure that anyone who credibly alleges UK responsibility in relation to human rights violations such as enforced disappearances and torture or other ill-treatment has access to a fair and effective procedure for establishing their claims and obtaining an effective remedy. The primary case put forward by the government as demonstrating the need to introduce closed material procedures more widely is that of *Al-Rawi and others v the Security Services and others*. The case concerned men who had formerly been detained by the USA at Guantánamo Bay, all of whom where UK nationals or residents, who brought civil law suits against the UK authorities for alleged involvement in the human rights violations the men described as

having suffered in their apprehension, transfer to detention centres in various countries, treatment in detention, and eventual incarceration at Guantánamo Bay.[132] The men challenged the UK's failure to institute an inquiry and sought redress, including compensation, for the wrongs they had suffered at the hands of the US and other foreign agents, and as a result of alleged acts or omissions of MI5, MI6, the Foreign & Commonwealth Office, the Home Office and the Attorney-General (the latter being sued only in a representative capacity). Each of the defendants was alleged to have caused or contributed to the detention of each claimant and his alleged torture or other ill-treatment by foreign authorities. Each claimant maintained that he was subjected to illegal rendition and to torture or other ill-treatment during the course of his detention.

From the outset the UK government argued for the introduction of a closed material procedure, which would result in a claim concerning serious allegations of complicity in torture by the UK being heard in closed proceedings from which the claimants were excluded, with secret defences they could not see, secret evidence they could not challenge, and secret judgments withheld from them and from the public.[133] Lawyers for the claimants strongly opposed the introduction of closed material procedures in the case, arguing that it would be detrimental to the fundamental principles of fairness and open justice.

It should also be noted that concerns were also raised by the claimants' lawyers in the case about the government's approach to disclosure, both with respect to the over-redaction of material that the claimants' lawyers thought could not legitimately be said to present a risk to national security, as well as reluctance by the government to provide prompt disclosure of material they considered to be vital to the claim. Examples given by the lawyers included: letters from the claimants' solicitors had been returned redacted, as had documents already in the public domain; instances of the same document had been redacted in different ways; copies of interview reports were provided where the remarks and comments made by the claimants themselves had been redacted; many documents had been heavily redacted leaving less than 30% of the original text remained.[134]

The negotiation of a confidential settlement between the government and 16 individuals who had been held at Guantánamo Bay brought an end to the claim for damages in the case of *Al Rawi and others*. The separate question as to whether the courts could order a closed material procedure in a civil case for damages, however, went to the Supreme Court.[135] In its judgment of 13 July 2011, the Supreme Court found that in the absence of parliamentary authorisation to do so, the courts had no power to order a closed material procedure as to do so would "cut across absolutely fundamental principles such as the right to a fair trial, the right to be confronted by one's accusers and the right to know the reasons for the outcome" and, "The court has for centuries held the line as the guardian of these fundamental principles."[136] Challenging the government's arguments about fairness, Lord Kerr, one of the Supreme Court judges, also emphasized that, "The central fallacy of the [Government's] argument … lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial."[137]

In April 2012, a report of the UK Parliament Joint Committee on Human Rights stated, "The only actual case cited by the Government [as an example of situations that could not be dealt with unless closed material procedures ("CMP") were implemented in civil cases] is the *Al Rawi* litigation itself, and that case simply cannot bear the weight being placed upon it by the Government. The claims to compensation in those cases were settled by the Government before the PII process had been exhausted, and before it had been finally decided whether the court had the power to order a CMP to take place. In our view, the *Al Rawi* cases are clearly not examples of cases which the Government had no choice but to settle because they would have been untriable without a CMP. Rather they appear to be examples of cases in which the Government would have preferred to have a CMP rather than the usual PII process."[138]

As the government has acknowledged, there are a number of other civil cases for damages pending before the courts where the UK is alleged to have been involved in serious human rights violations. Indeed in an impact assessment of the Bill, one of the potential benefits of the introduction of closed material procedures was described as being that it would "reduce the reputational costs and damage caused by open disclosure of sensitive material" in such cases.[139] It is therefore likely, if the Justice and Security Bill is passed, that the government will try to invoke its authority under the Bill to require that these cases be heard with the use of closed material procedure. Such cases potentially include that of two Libyan nationals, Abdel Hakim Belhaj and Sami al Saadi.[140]

In the case of Abdel Hakim Belhaj, it is alleged that UK authorities provided information which led directly to him and his wife being detained at Bangkok airport in March 2004. Abdel Hakim Belhaj has said that he was interrogated and ill-treated in detention by Thai and US authorities before being rendered to Libya, where he was subsequently detained for some six years and allegedly subjected to torture and other ill-treatment by Libyan intelligence services. Sami al Saadi's case is similar; it is alleged that UK authorities were involved in the unlawful rendition of Sami al Saadi, his wife and four young children from Hong Kong to Tripoli, Libya. He alleges he was tortured during his detention in Libya, where he was held for more than six years without charge or trial. Both men allege that UK intelligence agents visited them in detention in Libya for the purpose of questioning.

Both men and their families are taking separate civil actions against the UK for alleged involvement in their rendition to Libya in 2004 and the subsequent torture and mistreatment they say they suffered there.[141] (There are also ongoing criminal investigations into both cases.)[142] If these cases are heard using a closed material procedure, there is genuine concern that evidence concerning human rights violations could be withheld from the individuals, their lawyers and the wider public, potentially shrouding these cases in a clock of secrecy that might never be fully lifted. As Sapna Malik, one of the lawyers acting for both men, publically noted:

> *We can't help but make the link between our clients' cases and the current obsession by this Government on closed trials which offend the fundamental principles of justice in this country and would succeed in hiding the truth behind these allegations and similar accusations of illegal activity by the security services on the instruction of politicians.*[143]

Legal and policy considerations

"Refusing disclosure of key information about the alleged participation of UK officials in extraordinary rendition runs the risk of promoting impunity for state officials of the UK who may have been party to grave human rights violations […] Transparency is key not only to bring to justice those officials who may have participated in crimes of this kind but also in dispelling unjustified suspicions. The unjustified maintenance of secrecy, on dubious legal grounds, only delays efforts at establishing the truth."

Special Rapporteur on Counter-Terrorism and Human Rights, Ben Emmerson QC, at a public hearing of the European Parliament concerning the involvement of EU states in secret detention and rendition, 12 April 2012

The right to an effective remedy and reparation for victims of human rights violations is enshrined in, among other sources, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.[144] International law requires that remedies are available not only in law but are accessible and effective in practice and include the right to the following: 1) equal and effective access to justice and fair and impartial proceedings, 2) adequate, effective and prompt reparation for harm suffered and 3) access to relevant information concerning those violations.[145] Inherent to this is the right of victims to know and have publicly recognised the truth about the violations that they have suffered; society as a whole also has a right to know about whether and how government officials have been involved in human rights violations like torture and enforced disappearance.[146]

The right to an effective remedy includes the right of anyone who alleges to have been the victim of a human rights violation to have access to a meaningful procedure in which his or her claim can be fairly adjudicated. This is true even where the case raises national security considerations. Even in situations of emergency that threaten the life of the nation, in which derogations from obligations under the ICCPR might otherwise be allowed, the Human Rights Committee has said:

> *Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies [for violations of the Covenant], the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.*[147]

This passage implies that, without a valid derogation in a state of emergency, States cannot introduce such "adjustments to the practical functioning of its procedures governing judicial or other remedies".[148]

More broadly, everyone has the right to a fair trial in the determination of any of his or her civil rights and obligations.[149] The Bill does make clear that it should not be read as requiring a court or tribunal to act in a manner that is inconsistent with article 6 (the right to a fair trial) of the European Convention on Human Rights. This provision essentially stresses the existing duty of the courts under the Human Rights Act 1998 and in that regard is a welcome reminder of the need of domestic courts to act compatibility with the European Convention on Human Rights. However, given the approach of the Bill appears to make non-disclosure the starting point of the court - which does not reflect the case-law of the European Court of Human Rights which emphasises that the any restrictions on the right to a fair trial must be minimal to ensure as fair a hearing as possible - this provision in and of itself may not be sufficient to ensure the protection of the right to a fair trial both under the

European Convention on Human Rights and the International Covenant on Civil and Political Rights.

Ultimately, in allowing the government not only to withhold information from the claimant (as might be the case in some contexts under the existing PII framework), but also then rely on it as secret evidence during the proceedings, a closed material procedure will undermine the right to an effective remedy, as well as potentially denying individuals their right to a fair and public hearing.[150]

Evidence that would tend to prove allegations of human rights violations such as torture or other cruel, inhuman or degrading treatment, enforced disappearance, or extrajudicial executions or other unlawful killings, should never be capable of being kept secret from a person who alleges he or she was a victim of the human rights violations (or family members claiming on behalf of an alleged victim) or his or her legal counsel of choice, in civil proceedings in which a remedy for the violation is sought.[151] Under the existing PII system, proceedings might in some circumstances already be taken before a court *ex parte* in order to allow the government to argue that a particular item of evidence is not relevant to the claim of human rights violations and/or subject to public interest immunity. However, once a court has found evidence to be probative of the claimed human rights violation then there should be no circumstances in which the claimant or his or her counsel can be totally deprived of meaningful access to that evidence (at least so long as the government contests the claim and fails to provide a full remedy). This would not necessarily preclude more precise measures short of keeping the evidence entirely secret from the claimant and/or his or her counsel, such as concealing the identity of a witness where there was clear evidence that to reveal his or her identity would put his or her life directly at risk, as happens under the current PII process. The right to an effective remedy also means that claimants and their counsel must similarly have an effective means of challenging government evidence that is intended to deny allegations that the government has been responsible for human rights violations. In short, neither the concealment of evidence of human rights violations on purported grounds of national security, or reliance by the government on secret evidence of any kind, has any legitimate place in proceedings in which a remedy for such violations is sought.[152]

Amnesty International does not believe the government has demonstrated that the extension of closed material procedures is necessary, particularly given the existence of alternative mechanisms available to handle sensitive material in civil cases for damages. However, in light of the above, even if the government were able to demonstrate that some changes to the civil justice system were needed, the Justice and Security Bill cannot be considered a proportionate or appropriate response; this is especially so given the potential consequences for the right of individuals to access a fair and effective means of remedy for alleged human rights violations in cases deemed to be of a national security sensitive nature, including in respect of enforced disappearance, torture and other ill-treatment, and no matter how strong the claim. In addition to being inconsistent with the UK's human rights obligations, the expansion of closed material procedures would only more broadly undermine the rule of law and notions of fairness and open justice in the United Kingdom.

CONCLUSION

In allowing the government to rely on secret evidence presented to a judge behind closed

doors, closed material procedures run directly counter to ordinary principles of fairness long recognised in UK law and fundamental to international human rights standards. For people caught up in these secret procedures the consequences can be profound, from being deprived of their liberty, to being separated from their family to be returned to a country where they are at real risk of serious human rights violations, to having virtually every aspect of their daily life (and those of their family members) directly controlled by authorities of the state. Despite the serious consequences at stake, closed material procedures make it incredibly difficult for individuals faced with the secret evidence to effectively respond to the government's case. Closed material procedures inevitably fail to properly respect principles of open and adversarial justice and give rise to a fundamental inequality of arms between parties in a case. Despite this, the creep of these procedures in the UK legal system continues. If the Justice and Security Bill becomes legislation in its current form it risks normalizing a procedure which can result in violations of the right to a fair trial and the right to effective remedy for victims of human rights violations. It also potentially allows evidence of serious human rights violations to be forever withheld from the individual concerned and the public at large making genuine accountability all the more difficult to achieve. Ultimately closed material procedures serve to undermine those principles of fairness and open justice that should always be at the heart of any justice system committed to the protection of human rights and upholding the rule of law.

Recommendations:

Amnesty International urges the UK immediately to take the following steps in relation to the use or prospective use of secret evidence in the courts:

- Abandon plans to expand closed material procedures in the UK's civil justice system; and

- Refrain from invoking closed material procedures in the other contexts where they are currently available under UK law as described in this report, and repeal any legislation that authorizes such procedures.

The UK government has to date refused to accept that its current reliance on closed material procedures contravenes its international human rights obligations. For so long as it continues to seek to rely on secret evidence in the range of proceedings described in this report, Amnesty International will continue to oppose such procedures. However, Amnesty International underscores that there is any event no legitimate basis for the UK government to refuse proposals for reform that have been made by UK civil society including by immediately:

- allowing Special Advocates in all cases to communicate in fulsome manner with the individuals whose interests they are appointed to represent, and those individuals' lawyer of choice, after the Special Advocate has seen the closed material;

- conceding in all cases before the courts that the government and the court must, whenever a closed material procedure operates, ensure the individual concerned is provided with at least such disclosure of the closed material as was held to be required in the case of AF(no3);

[1] As a matter of domestic law, some civil and criminal procedures already permit the exclusion of the public or one of the parties from a portion of the proceedings. An *in camera* hearing is one from which the public and press are excluded, but both parties to the case may still be present. In an *ex parte* hearing one party is absent; however, evidence presented *ex parte* that is not subsequently disclosed to the absent party cannot normally be used in the ultimate determination of the facts in the case (*ex parte* proceedings are exceptional and typically occur only at preliminary states of a trial procedure, where for instance a party urgently seeks an order from the court to preserve evidence or restrain conduct by the opposite party, and where prior knowledge of the application might be expected to result in the destruction of the evidence or in further damaging conduct). The "closed hearings" discussed in this paper are both *in camera* and *ex parte* and the evidence presented in them may be used in the ultimate determination of the facts of the case even if the evidence is never disclosed to the other party. "Closed hearings" thus mark a radical departure from traditional procedures.

[2] The Attorney General maintains a panel of Special Advocates, and appoints them to specific cases. It has, however, become practise that an appellant may nominate their preference as to the Special Advocate they wish to have appointed to their case. For further detail about the operation of Special Advocates see: *A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO)*, Open Manual, Treasury Solicitors Office, accessible here: http://www.attorneygeneral.gov.uk/ABOUTUS/Pages/SpecialAdvocates.aspx.

[3] There are some limited exceptions to this prohibition, where a Special Advocate may seek permission to send a written communication to the open legal team (normally on procedural matters and not in reference to the substance of the secret evidence), but that communication must go through a lengthy approval process, is subject to scrutiny by the Secretary of State and must be approved by the court. Due to these restrictions, not least the real "disadvantage and unfairness of revealing such communication to the opposing party and the court", Special Advocates rarely seek to communicate through this procedure, see *Special Advocate submission to the Justice and Security Green Paper*, January 2012, page 11, paragraph 28. Also oral evidence from Tom de la Mare QC before the Joint Committee on Human Rights, *Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009–10*, 23 February 2010. It should be noted that the individual concerned and his or her open legal team are able to pass information to the Special Advocate on a one way-basis.

[4] *Special Advocates submission to the Justice and Security Green Paper*, January 2012, paragraph 15.

[5] This is not to say that the PII system is without its own human rights concerns, for example, the scope for withholding evidence raises issues in relation to the right to effective remedy of those alleging to be victims of human rights violations. The system has also been open to abuse by the government, as was the case, for example, in *(R)Al-Sweady v* SSD [2009] EWHC 1687 where the Divisional Court gave a separate judgment dealing with its significant concerns about the non-disclosure of material relating to permissible limits of the techniques of tactical questioning and found what it described as the "disturbing failures" by the Ministry of Defence in its handling of the process for putting Ministerial PII Certificates and Schedules before the Court.

[6] The three Special Advocates who attended the meeting were Angus McCullough QC, Martin Goudie and Charles Cory-Wright QC.

[7] This includes cases before the Appellate Committee of the House of Lords, which was replaced by the Supreme Court on 1 October 2009.

[8] SIAC was established following the European Court of Human Rights ruling in the case of *Chahal v UK,* (App no 22414/93), 15 November 1996. The case is perhaps better known for its ruling that the right to freedom from torture under article 3 of the European Convention on Human Rights (ECHR) prohibited the UK from returning the applicant to India where he faced a real risk of torture, notwithstanding the fact that the applicant was deemed to be a threat to national security. However, the Court also found that the system of appeals provided in national security deportation cases, which consisted of appeal to a special Home Office advisory Panel known as the "Three Wise Men", lacked effective judicial oversight so was in breach of article 13 (taken

in conjunction with article 3) of the ECHR. In its judgment the European Court of Human Rights also noted that Amnesty International, alongside a number of other NGOs, had drawn the Court's attention to a procedure applied in Canada under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), which the Court described as involving "a security-cleared counsel instructed by the court" to test the government's evidence; SIAC was in part subsequently based on the Court's description of this procedure, see paragraph 144. With respect to Amnesty International this statement by the European Court of Human Rights is inaccurate as the organization never made such a reference to the Canadian system in its submission to the Court in this case. It also appears that the Court's description of the Canadian procedure was not entirely accurate, in that the security-cleared counsel were not in fact used before the court in national security deportation cases, but only on an ad hoc basis by the Security Intelligence Review Committee (SIRC) an independent non-judicial review body that monitored the Canadian intelligence agency more generally and had an advisory role in the national security deportation process (a role which was effectively ended by legislative amendments in 1988). Indeed, in 2007 the relevant court procedure in national security deportations, effectively a closed material procedure without any such court appointed security-cleared counsel, was ruled by the Supreme Court of Canada to be an unconstitutional breach of the rights of the affected individual to fundamental justice: *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9. In considering whether "less intrusive alternatives" existed (in order to determine whether the breach could be a "justified" limit within the Canadian constitutional framework), the Supreme Court noted the former SIRC procedure and the existence of the Special Advocates procedures in the UK. Without necessarily endorsing these procedures from a human/constitutional rights point of view, the Court found that their existence as "less intrusive alternatives" for the protection of national security meant that the existing procedure could not be justified. In response, the Canadian Parliament enacted legislation providing for special advocates, modelled on the UK system: *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate)*, Statutes of Canada 2008, c 3. The Supreme Court of Canada has not yet ruled on the constitutionality of the special advocate provisions; a request for leave to appeal to the Supreme Court from a lower court ruling that the scheme was constitutional (*Harkat v Canada (Citizenship and Immigration)*, 2012 FCA 122), was pending as of 24 September 2012.

[9] According to a letter from David Hanson MP, Minister of State, Home Office, dated 7 January 2010 there are currently at least 21 different contexts where secret evidence and Special Advocates can be used. Though the government has stated that it is only aware of them actually being used in 14 of these 21 contexts. See *Joint Committee on Human Rights, Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010,* 23 February 2010, HL 64/HC 395, page 51-53 and *Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In,* 25 March 2010, HL 86/HC 111, page 21-22. See also Justice's report *Secret Evidence*, September 2009, for a comprehensive examination of the use if secret evidence in the United Kingdom.

[10] The three cases heard by SIAC between its establishment in 1997 and 11 September 2001 were: *Secretary of State for the Home Department v Shafiq Ur Rehman* (2000)*; Secretary of State for the Home Department v Mukhtiar Singh* (2000); and *Secretary of State v Paramjit Singh* (2000).

[11] See *United Kingdom: Human Rights: A Broken Promise,* AI Index EUR 45/004/2006, page 20-22.

[12] *A & others v. Secretary of State for the Home Department* [2004] UKHL 56, 16 December 2004.

[13] European Court of Human Rights, *A and Others v United Kingdom,* (App no 3455/05), 19 February 2009.

[14] For further detail of the control orders regime see *United Kingdom: Human Rights: A Broken Promise* AI Index EUR 45/004/2006 and *United Kingdom: Five years on time to end the control orders regime* AI Index: EUR 45/012/2010.

[15] Prime Minister's press conference, 5 August 2005.

[16] The case of "G" also features in Amnesty International's report *UK: Human Rights: A Broken Promise*, AI

Index: 45/004/2006.

[17] European Court of Human Rights, *A and Others v United Kingdom,* (App no 3455/05), 19 February 2009, paragraph 224.

[18] *W and others v Secretary of State for the Home Department*, [2010] EWCA Civ 898, paragraph 2. Alongside a number of other related cases, questions relating to the issue of safety on return in "G"s case are currently being considered by the SIAC following a ruling by the Supreme Court in *W and others v Secretary of State for the Home Department,* [2012] UKSC 8.

[19] It should be noted that, if enacted, clause 12 of the Justice and Security Bill will provide for certain exclusion, naturalisation and citizenship decisions to also be heard by SIAC.

[20] In the first national security deportations case before the SIAC a 'high civil balance of probabilities' was applied. However, on appeal both the Court of Appeal and the House of Lords found that this was too high a standard of proof for these cases. As Lord Woolf at the Court of Appeal stated: "in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion." See *Secretary of State for the Home Department v Rehman* [2000] EWCA Civ 168, paragraph 44.

[21] Tessa Gregory, Public Interest Lawyers, meeting with Amnesty International 11 July 2011.

[22] This was raised with Amnesty International by many of the lawyers representing clients before SIAC, and was clearly illustrated by Sean McLoughlin in oral evidence given before the Joint Committee on Human Rights: "It's difficult; we're faced with allegations which are very vague and very broad. You can respond to a direct specific assertion, but it's very difficult to respond to: "you know extremists, you hold extremist views, and you're a danger to the UK." Some people's response has been to not respond. The other approach is to respond with the individual's life story – but the danger is you don't know how what you're saying is going to be used by authorities when you send it to them – it might be used to against someone else or you might incriminate yourself unknowingly. With no specific allegations you can't respond in a meaningful way so it is really difficult to advise clients as to what they should say", *Joint Committee on Human Rights report, Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009–10*, 23 February 2010, HL 64/HC 395.

[23]Uncorrected transcript of oral evidence taken before the Joint Committee on Human Rights, 24 January 2011, for its report "The Justice and Security Green Paper", HL 286 HC 1777 published on 04 April 2012, page 14. See also Lord Kerr in the case of *Al Rawi and Others v The Security Service and Others,* [2011] UKSC 34 (13 July 2011) paragraph 94, "The challenge that a special advocate can present is, in the final analysis, of a theoretical, abstract nature only. It is, self evidently and admittedly, a distinctly second best attempt to secure a just outcome to proceedings". Another example was given by Martin Chamberlain in his article *Special Advocates and Procedural Fairness in Closed Proceedings* (2009), Civil Justice Quarterly, Volume 28, Issue 3, "Disclosure of the records of intercept to the affected person might allow that person to produce alibi evidence showing that he was not the person involved in the conversation, or, if he was, to explain that it was incorrectly transcribed or wrongly translated or wrongly interpreted or to provide an alternative context or meaning. Without instructions from the affected person, the Special Advocate can tentatively suggest innocent explanations, but no more."

[24] Uncorrected transcript of oral evidence taken before the Joint Committee on Human Rights, 24 January

2012, for its report "The Justice and Security Green Paper", HL 286 HC 1777 published on 04 April 2012.

[25] *BB v Secretary of State for the Home Department* [2006] SC/39/2005, paragraph 1.

[26] "Opened parts of the closed judgment on national security". *BB v Secretary of State for the Home Department,* SC/29/2005/ released November 2007. "BB" was arrested on 30 September 2003 and sentenced to three-months imprisonment for the possession of a false passport and identity card. It was following this arrest his house was searched.

[27] "Opened parts of the closed judgment on national security", *BB v Secretary of State for the Home Department,* SC/29/2005/ released November 2007, paragraph 6-7.

[28] International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, in force 23 March 1976, article 13. A similar provision is included in Article 1 of Protocol no 7 to the (ECHR); however, the United Kingdom has not signed the Protocol. (It is the only Council of Europe member state not to have done so – Germany, Netherlands, and Turkey have signed but not ratified it).

[29] UN Human Rights Committee, General Comment No 32, UN Doc CCPR/C/GC/32 (2007), para 62.

[30] See however *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002 (2004) and *Alzery v Sweden,* UN doc CCPR/C/88/D/1416/2005 (2006).

[31] See the general constraints set out by the Human Rights Committee in its General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13, including paragraph 6: "States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."

[32] This may arise from the right to an effective remedy and protection against violations of the rights in question (as provided for under, e.g., article 13 of the ECHR and article 2 of the ICCPR), or because the provision recognising the right specifically incorporates procedural rights (see examples below – art 5(4) ECHR / 9(4) ICCPR; art 8 ECHR / 17 ICCPR; 12(4) ICCPR).

[33] Under for example article 3 of the ECHR, article 7 of the ICCPR, and/or article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, in force 26 June 1987. See, e.g. European Court of Human Rights, *Chahal v the United Kingdom* (App no 70/1995/576/662), 11 November 1996, paragraphs 147-155; Human Rights Committee, *Ahani v Canada* paragraphs 10.6-10.8 and *Alzery v Sweden* paragraph 11.8; Committee against Torture, *Agiza v Sweden*, UN Doc CAT/C/34/D/233/2003 (2005), paragraph 13.7. See also UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the General Assembly on refugee law and asylum, UN Doc A/62/263 (15 August 2007), paragraph 53: "The Special Rapporteur also notes that States have sought to carry out security-related deportations of persons with little or no possibility for them to challenge such deportations before an independent and impartial body. He underlines that, despite the exception clause on security grounds set out in article 13 of the International Covenant on Civil and Political Rights, the Human Rights Committee has clearly stated that the possibility for such review of deportation decisions is an inherent part of article 7 of the Covenant." As the prohibition on return to risk of torture or other ill-treatment is absolute and non-derogable, in principle the purportedly "national security"-sensitive evidence presented for purposes of establishing whether an individual would be *in principle subject to deportation* (leaving aside the question of risk on return), may not necessarily be relevant to the determination of their claim concerning *risk on return*. In practise, however, the evidence on these two issues may not always be considered in complete isolation from one another, and in any event concerns arise in practice with respect to the invocation of secrecy over evidence specifically concerned with risk of torture or other abuse on return (see the discussion under "risk on return" below). With respect to facing a flagrantly unfair trial on return see, e.g., European Court of Human Rights, *Othman (Abu Qatada) v the United Kingdom*, (App no 8139/09), 17 January 2012, paragraphs 226-227.

[34] Under for example article 5(4) of the ECHR and article 9(4) of the ICCPR. See e.g. European Court of Human Rights, *A and others v the United Kingdom* (App no 3455/05), 19 February 2009, paragraphs 193-224. The national security case against a person will generally if not always in deportation cases be bound up with the question whether detention pending deportation is lawful.

[35] The right to family life is recognised by article 8 of the ECHR and article 17 of the ICCPR, "1. No one shall be subjected to *arbitrary* or unlawful interference with his privacy, family, home… 2. Everyone has the right to the *protection of the law* against such interference..." emphasis added. See e.g. Human Rights Committee, General Comment 15 on The Position of Aliens under the Covenant (1986), reproduced in UN Doc HRI/GEN/1/Rev.9 (Vol.I), "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and *respect for family life* arise." emphasis added. Again, the national security case against a person will inherently be bound up with the determination whether any effects of deportation on the right to family life of the person would be lawful and non-arbitrary: see for example European Court of Human Rights, *CG and others v Bulgaria*, (App No 1365/07), 24 April 2008, a case involving national security expulsion where the complainant argued that he had not had access to an effective means as provided for by article 13 for seeking a remedy for what he argued was a violation of his right to family life under article 8 of the ECHR; the Court held that as "the applicant was initially given no information concerning the facts which had led the executive to make such an assessment [that he posed a risk to national security], and was later not given a fair and reasonable opportunity of refuting those facts" that it followed that the proceedings could not be considered an effective remedy (paragraph 60). Where the deportation affects the right to remain of a UK resident who, though not a national of the UK, has nevertheless acquired a particularly strong personal and emotional relationship to the UK such that it constitutes his 'home country' for the purposes of human rights, see, e.g., article 12(4) of the ICCPR ("No one shall be *arbitrarily* deprived of the right to enter his own country") emphasis added, in relation to which the Human Rights Committee has stated "The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. … The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.": General Comment no 27 on Freedom of Movement, UN Doc CCPR/C/21/Rev.1/Add.9 (1999), paragraphs 19 and 20. Again, the national security case will be inherently bound up with the determination whether the effects of deportation against such a person would be arbitrary or not.

[36] See, e.g., article 17 ICCPR, "1. No one shall be subjected … to unlawful attacks on his honour and reputation. 2. Everyone has the right to the *protection of the law* against such … attacks." emphasis added; European Court of Human Rights, *Užukauskas v Lithuania*, (App. No. 16965/04), July 2010, paragraphs 34, 35, 39 [finding the potential impact on the applicant's reputation as implicating article 8 of the ECHR and counting among the reasons for fair trial rights under article 6(1) to apply to the administrative proceeding in question].

[37] Even in a SIAC deportation proceeding in which no rights other than under article 13 of the ICCPR might theoretically be at stake, equality of arms should in any event be respected to the maximum extent possible. In most cases, whether or not national security is invoked as *the basis for the deportation*, the state will not necessarily have demonstrated that in the individual case "compelling reasons of national security … *require* [emphasis added]" that *the procedural guarantees* ordinarily applicable to an expulsion decision be ignored; in the absence of such proof respect for the ordinary procedural rights remains required by article 13. The

importance of placing the burden on the state to demonstrate this in each case was underscored by the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010. In finding a violation of article 13, the International Court of Justice stated at paragraph 74: "In principle, it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside. It is for the State to demonstrate that the 'compelling reasons' required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure. In the present case, no such demonstration has been provided..." As noted above, even in an individual case where the high threshold for the "national security" exception in article 13 were demonstrably satisfied (and no other rights were at stake), equality of arms should in any event be respected to the maximum extent possible and, if there remains scope for limitations then any such restrictions would need to meet the general constraints set out by the Human Rights Committee in its General Comment No 31. See further footnote [29] above.

[38] For instance, international instruments outline a number of specific guarantees that must be respected in criminal proceedings, which may not always apply to non-criminal administrative proceedings. See e.g. article 14(2) ICCPR; article 6(3) ECHR. However, General Comment no 32, paragraphs 8, 9 and 13 states: "The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party."

[39] General Comment no 32, paragraphs 8, 9, 13 and 33.

[40] Article 14 of the ICCPR does not explicitly allow for limitations on the rights provided for within it, except insofar as it expressly permits the exclusion *of the public* [as distinct from the parties] from all or part of a trial in circumstances including "national security in a democratic society". It is therefore not clear whether *any* limitations on the right to "fair hearing" in the "determination … of rights and obligations in a suit at law" are permitted in the absence of a valid derogation by the state under article 4. No mention of such a possibility is made in the Human Rights Committee's 2007 General Comment no 32 on fair trial, UN Doc CCPR/C/GC/32. The Committee has held that even *in situations of emergency threatening the life of the nation*, in which some derogation may be permitted under article 4, certain elements of article 14 can never be limited or suspended see General Comment no 29 on states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), paragraph 15 "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights." and paragraph 16 "The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency." and General Comment no 32, paragraph 6. If article 14 nevertheless includes some implicit scope for limitations to its guarantees of fairness, on grounds of national security, any such limitation would be subject to the general principles set out by the Human Rights Committee in its General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13, paragraph 6. See also relevant case law of the European Court of Human Rights, *Rowe and Davis v the United Kingdom*, (App No 28901/95), 16 February 2001, paragraph 61; *Užukauskas v Lithuania*, (App. No. 16965/04), July 2010, paragraph 46. See also the 1995 Johannesburg principles on national security, freedom of expression and access to information, Report of the Special Rapporteur on Freedom of Expression, UN Doc E/CN.4/1996/39 (22 March 1996), Annex ,Principle 11.

[41] See, for example, European Court of Human Rights, *Jasper v. the United Kingdom*, (App no. 27052/95), 16 February 2000, paragraphs 51-53 and 55-56; European Court of Human Rights, *A and others v the United Kingdom*, App no 3455/05, 19 February 2009, paragraph 205.

[42] UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the General Assembly on right to a fair trial, UN Doc A/63/223 (6 August 2008), paragraph 45(f), and see paragraphs 35-36.
[43] See similarly: General Comment no 34 on Freedom of Expression, UN Doc CCPR/C/GC/34 (2011), paragraph 34; General Comment no 27 on Freedom of Movement, CCPR/C/21/Rev.1/Add.9 (1999), paragraph 14;
[44] European Court of Human Rights, *Užukauskas v Lithuania*, (App. No. 16965/04), July 2010, paragraph 47.
[45] In a closed material procedure the Special Advocate may challenge the Secretary of State's objections to disclosure of the closed material. SIAC may uphold or overrule the Secretary of State's objection. If it overrules the objection, it may direct the Secretary of State to serve on the appellant all or part of the closed material which she/he has filed with the SIAC but not served on the appellant. In that event, the Secretary of State is not required to serve the material if she/he chooses not to rely upon it in the proceedings.
[46] Part 1.4 of The SIAC (procedure) Rules 2003, see also similar provision in part 76.1(4) of the Civil Procedure Rules.
[47] Johannesburg Principles, Principle 2. See also the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annexed to a note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands. UN Doc E/CN.4/1984/4 (1984), Principles 29-31: "National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. … National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. … National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse."
[48] See https://www.mi5.gov.uk/output/protecting-national-security.html, accessed 29 July 2012; "The term 'national security' is not specifically defined by UK or European law. It has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances." See also, however, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, paragraph 15-19;
[49] *Joint Committee on Human Rights, Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010,* 23 February 2010, HL 64/HC 395. See also *Special Advocates submission to the Justice and Security Green Paper*, January 2012, page 7, *Secretary of State for the Home Department v AF and another* [2009] UKHL 28, paragraph 105, and Martin Chamberlain in his article *Special Advocates and Procedural Fairness in Closed Proceedings* (2009), Civil Justice Quarterly, Volume 28, Issue 3.
[50] This difficulty was raised in the meeting with Special Advocates and Amnesty International representatives. See also the Special Advocates submission to the Justice and Security Green Paper, January 2012.
[51] Gareth Peirce, meeting Amnesty International 03 August 2011.
[52] To date the UK has concluded 'memorandums of understanding' (MoUs) with the governments of Lebanon, Jordan, Libya, Ethiopia and Morocco, that apply to transfers of detainees on an ongoing basis. In some cases, the MoU also contemplates 'monitoring' of these assurances by a local organization. After the UK tried and failed to secure a MoU with the Algerian authorities, the UK and Algerian government agreed to negotiate bilateral assurances, in the form of an exchange of letters, promising humane treatment (and among other things, fair trial) on a case by case basis. For further information see *UK: Deportations to Algeria at all costs*, AI Index: EUR 45/001/2007 and *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture*, AI Index EUR 01/012/2010.
[53] See Amnesty International's report, *Dangerous Deals: Europe's reliance on 'diplomatic assurances' against torture*, AI Index EUR 01/012/2010.
[54] See European Court of Human Rights, *Rustamov v Russia*, (Application no 11209/10), 3 July 2012,

paragraphs 120-121; European Court of Human Rights *Othman (Abu Qatada) v United Kingdom*, (App no 8139/09), 17 January 2012, paragraph 189(xi); Human Rights Committee Concluding Observations, for instance on the UK, UN Doc CCPR/C/GBR/CO/6 (2008), paragraph 12, Russia, UN Doc CCPR/C/RUS/CO/6 (2009), para 17 and Sweden, UN Doc CCPR/C/SWE/CO/6 (2009), paragraph 16 [in each case referring to, among other things, the need to "exercise the utmost care in the use of such assurances and adopt *clear and transparent procedures allowing review by adequate judicial mechanisms* before individuals are deported"] and Kazakhstan, UN Doc CCPR/C/KAZ/CO/1 (2011), para 13 [adding reference to the need to "ensure that all persons in need of international protection receive appropriate and *fair treatment at all stages*, in compliance with the Covenant"], emphasis added. The Committee against Torture appears to take a more categorical line in opposition to assurances concerning torture, but also recognises the importance of judicial supervision more generally. See Concluding Observations on Morocco, UN Doc CAT/C/MAR/CO/4 (2011), paragraph 9; Germany, UN Doc CAT/C/DEU/CO/5 (2011), paragraph 25;

[55] *Abid Naseer and Others v Secretary of State for the Home Department*, [2010] SC/77/80/81/82/83/09, paragraph 36.

[56] Written evidence submitted to the Constitutional Affairs Committee, 7 February 2005. See also *Special Advocate's submission to the Justice and Security Green Pape*r, January 2012. The reasons for lack of practical effect of the procedural amendments are also explained in an open note submitted to the House of Lords at the hearing of the appeal in *OO (Jordan) v Secretary of State for the Home Department* [2008] EWCA Civ 290 by the Special Advocate in the case. So despite changes made to the relevant procedural rules providing Special Advocates with the right to call witnesses, the view of the overwhelming number of Special Advocates is that in practice it still remains almost impossible for them to instruct and call upon an expert witness to challenge the evidence relied upon by the government and to Amnesty International's knowledge to date no Special Advocate has done so.

[57] "Jury anger over threat of torture" The Guardian, 21 May 2005. The three jurors also wrote to Amnesty International in April 2005 expressing their concern: "Since January 2003, Y has been persecuted by our government beyond all realms of imagination. We were three jurors on Y's criminal trial (the 'no-ricin trial') and after seven months listening carefully to the evidence and arguments from the prosecution and defence, we, as a jury, acquitted him of all charges and expected that, on his release, he could begin to rebuild his life in this country." See also a book co-authored by one of the jurors: *Ricin! The inside story of the terror plot that never was,* Lawrence Archer and Fiona Bawdon, 2010.

[58] *Y v Secretary of State for the Home Department*, [2006] SC/36/2005.

[59] Passages from Y closed judgment made open, 14 November 2006, SC/12/2005.

[60] *Y, BB and U v Secretary of State for the Home Department*, [2007] SC/32,36,39/05, paragraph 28.

[61] Under for example article 3 of the ECHR, article 7 of the ICCPR, article 3 of the UN Convention against Torture. See, e.g., European Court of Human Rights, *Chahal v the United Kingdom* (App no 70/1995/576/662), 11 November 1996, paragraphs 147-155; Human Rights Committee, *Ahani v Canada* paragraphs 10.6-10.8 and *Alzery v Sweden* paragraph 11.8; Committee against Torture, *Agiza v Sweden*, paragraph 13.6 to 13.8. See also UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the General Assembly on refugee law and asylum, UN Doc A/62/263, 15 August 2007, paragraph 53.

[62] See, e.g., European Court of Human Rights, *Saadi v Italy*, (App no. 37201/06), 28 February 2008, paragraphs 124-149; Human Rights Committee, General Comment no 29 on States of Emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), paragraph 15 "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights."; Committee against Torture,

Agiza v Sweden, paragraph 13.8 "The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasise the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3's requirements of effective, independent and impartial review." See also the sources cited in the footnote preceding this footnote.

[63] European Court of Human Rights, *Othman v UK*, (App. No. 8139/09), 17 January 2012.

[64] European Court of Human Rights, *Othman v UK*, (App. No. 8139/09), 17 January 2012, paragraph 223.

[65] *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002 (2004), paragraphs 10.6 to 10.8, emphasis added.

[66] Germany, Netherlands, and Turkey have signed but not yet ratified the Protocol.

[67] Meeting with "BB", 19 March 2012.

[68] Article 5(4) of the ECHR and article 9(4) of the ICCPR; see also art 5(3) ECHR and article 9(3) ICCPR.

[69] European Court of Human Rights, *A and Others v United Kingdom,* (App no 3455/05), 19 February 2009, paragraph 203.

[70] European Court of Human Rights, *A and Others v United Kingdom,* (App no 3455/05), 19 February 2009, paragraph 204.

[71] European Court of Human Rights, *A and Others v United Kingdom,* (App no 3455/05), 19 February 2009, paragraph 220.

[72] See *R (Cart) v Upper Tribunal, R (U) and (XC) v Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin) and *The Queen (on the application of BB) and the Special Immigration Appeals Commission and the Secretary of State for the Home Department*, [2011] EHWC 336, 25 February 2011.

[73] Domestic courts have stated that there is no "bright line" separating deprivation of liberty from a restriction of liberty, meaning that the court must assess the impact of the measures on a person in the situation of the person subject to them. The starting point or "core element" of this assessment however has been the length of curfew, with 16 hours being viewed as the point beyond which a person is "deprived" of their liberty. However, UK courts acknowledge a grey area between 14-hour and 16-hour curfew cases, where in exceptional cases other restrictions than mere confinement can tip the balance in deciding whether the restrictions taken overall result in a deprivation of liberty rather than a restriction. See *Secretary of State for the Home Department v JJ and others*, [2007], UKHL 45, 31 October 2007; *Secretary of State for the Home Department v AP,* [2010] UKSC 24, , 16 June 2010; *BB, R (on the application of) v Special Immigration Appeals Commission & Anor* [2011] EWHC 2129 (Admin)..

[74] At the time of writing the case was pending before the Court of Appeal of England and Wales. See also *BB, R (on the application of) v the Special Immigration Appeals Commission and the Secretary of State for the Home Department*, [2011] EWHC 2129 (Admin).

[75] European Court of Human Rights, *Liu v Russia No 2*, (App no 29157/09), 26 July 2011, paragraph 87; see also European Court of Human Rights, *Al-Nashif v Bulgaria*, (App No 50963/99), 20 June 2002, paragraphs 123-124.

[76] See European Court of Human Rights, *Liu v Russia No 2*, (App no 29157/09), 26 July 2011, paragraphs 90-91.

[77] Indeed, the scope of possible grounds under UK law for pursuing criminal proceedings against persons suspected of involvement in terrorism has become so sweeping that it has become a human rights concern in its own right. Amnesty International has had longstanding serious concerns about the definition of terrorism-related offences in UK domestic law, particularly as set out in the Terrorism Act 2000 (as amended). The definition of "terrorism" itself, as well as particular offences such as "encouraging support" or simple possession of information (or anything else) "of a kind likely to be useful to a person committing or preparing an act of terrorism" without any requirement that the person actually intend to so use it, are so broad and vague that they infringe the principle of legal certainty, and are thereby inconsistent with article 7 of the European Convention

on Human Rights and article 15 of the International Covenant on Civil and Political Rights. Amnesty International has expressed concern about the definition of "terrorism" in the Terrorism Act 2000 since that Act was first introduced in Parliament; see, for instance, *UK: Briefing on the Terrorism Bill,* AI Index: EUR 45/043/2000, and *UK: Human rights: a broken promise,* AI Index: EUR 45/004/2006. Amnesty International has also expressed concern about amendments to this definition in subsequent legislation; see, for instance, *United Kingdom: Amnesty International's briefing on the draft Terrorism Bill 2005* AI Index: EUR 45/038/2005.

[78] The reasons the government cites vary, but often includes that there is insufficient evidence to secure a criminal conviction, or that key evidence would be inadmissible in criminal proceedings as is currently the case under UK law for intercept material. These assertions are however themselves difficult for the public to evaluate, particularly given the secrecy around such proceedings.

[79] See *United Kingdom: Five years on time to end the control orders regime*, AI Index: EUR 45/012/2010

[80] The lack of disclosure in part is a result of the principles applied generally applied by the courts in relation to disclosure of closed material, which – as set out in *State for the Home Department v AF and another* [2009] UKHL 28 – include the following: "(a) Issues of relevance and materiality are irrelevant. There is no balance to be struck between the harm to the public interest if disclosure were to be made and the harm to the interests of justice flowing from non-disclosure: the interests of justice play no part in disclosure decisions on the routine application of CPR Part 76. (b) The fact that closed material may contain documents that are exculpatory is not relevant in seeking to contend for disclosure to the controlled person. (c) Any disclosure is assumed to be not just to the controlled person, but to the world at large; (d) The test is met by mere contemplation by any party of the nature of the primary source of the information, rather than that person's actual identification of that source of information. Therefore disclosure of information is harmful where it may lead to a suspicion in the mind of the controlled person, or a hardening of an existing suspicion, even falling short of actual knowledge or information. Accordingly, for example, the fact the respondent may already suspect that his landline or principal mobile phone has been intercepted would not of itself justify disclosure of that fact. (e) National security concerns advanced by the Security Service are within its particular expertise and accordingly very convincing material is required before such powerful considerations can be overcome."

[81] It appears that this problem was raised in the case of "*BC"*, a so-called "light-touch" control order case in which one of the conditions of "BC"'s control order was not to associate with a named person without permission from the Home Office. According to the judgment in the case, "BC" stated that "he has never heard of that individual", asserting that he required further disclosure notably the circumstances of the association to allow him to properly refute the purported association. See *Secretary of State for the Home Department v BC and BB* [2009] EWHC 2927 (Admin), 11 November 2009, paragraph 58.

[82] Oral evidence by Special Advocates before the Joint Committee on Human Rights, See *Joint Committee on Human Rights, Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010,* 23 February 2010, HL 64/HC 395.

[83] As one judge explained: "it is that *belief* [of the Secretary of State] and not the issue of whether [the controlled person] was *actually* involved in that activity with which I am concerned. The test of ascertaining whether the Secretary of State had reasonable grounds has a low threshold […] the court is not seeking to discover what [the controlled person] did or did not do" *Secretary of State for the Home Department v AE* [2008] EWHC 585 (Admin), paragraph. 51.

[84] Quote from "AN"'s lawyer, Gareth Peirce who met with Amnesty International, 3 August 2011.

[85] *The Queen on the Application of AN and Secretary of State for the Home* Department, [2009] EWHC 1921, paragraph 85, evidence of Dr Robertson.

[86] See *Secretary of State for the Home Department and AN* [2008] EWHC 372 for the open case against "AN". In the open judgment Mr Justice Mitting stated that "For reasons set out in the closed judgment on disclosure, I

am satisfied that i) AN has not had disclosed to hum a substantial part of the grounds for suspecting that he has been involved in terrorism related activity and that. Without further disclosure, he personally will not be in a position to meet aspects of her case" (paragraph 3).

[87] *Secretary of State for the Home Department v AF and another,* [2009] UKHL 28 (the case has come to be known as "AF no 3").

[88] Lord Hope of Craighead, *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28.

[89] "AN" was released from prison on bail in October 2009.

[90] A copy of this note can be found in the *Joint Committee on Human Rights, Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010,* 23 February 2010, HL 64/HC 395.

[91] *Secretary of State for the Home Department v AN* [2010] EWCA Civ 869, 28 July 2010, paragraph 31, in particular Lord Justice Maurice Kay: "I cannot escape the conclusion that it is unlawful for the Secretary of State to begin to move towards the making of a control order if, in order to justify it, he would need to rely on material which he is not willing to disclose to the extent required by AF (No 3) regardless of his understanding of the law at the time. If I were wrong about that it would mean that the Secretary of State could lawfully place significant restrictions on a person's liberty without that person ever being able to discover the basis for the Secretary of State's decision."

[92] *Secretary of State for the Home Department v AF(no3)* [2009] UKHL 28, paragraphs 59, 65-66, and referring to European Court of Human Rights, *A and others v the United Kingdom*, (App no 3455/05), 19 February 2009.

[93] In oral evidence given before the Joint Committee on Human Rights, Helen Mounfield QC, a Special Advocated, noted that "What AF decided was that somebody has the right to know the essence of the case against them. What that means in practise is quite difficult to determine in an individual case". See *Joint Committee on Human Rights, Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010,* 23 February 2010, HL 64/HC 395 for further discussion on the impact of AF (No3).

[94] *Joint Committee on Human Rights, Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010,* 23 February 2010, HL 64/HC 395.

[95] Meeting with Amnesty International, 25 July 2011.

[96] As of 31 August 2012, 9 individuals all British citizens were subject to a Terrorist Prevention and Investigation Measure. See the Secretary of State for the Home Department's report to Parliament as required under Section 19(1) of the Terrorism Prevention and Investigation Measures Act.

[97] For further information about the restrictions available under a TPIM see Amnesty International briefing, *United Kingdom: The Terrorism Prevention and Investigation Measures Bill 2011: Control Orders Redux*, AI Index. EUR 45/007/2011, 30 June 2011.

[98] Draft Enhanced Terrorism Prevention and Investigation Measures Act, accessible here: http://www.parliament.uk/business/bills-and-legislation/draft-bills/. It should also be noted that clauses 26 and 27 of the Terrorism Prevention and Investigation Measures Act provides for a temporary power to allow Enhanced Terrorism Prevention and Investigation Measures to be imposed even when parliament is not sitting.

[99] Though see the High Court judgment in *Secretary of State for the Home Department v AY [2012]* EWHC 2054 (admin), paragraph 20 which states "The test of "*reasonable grounds to suspect"* that apply to Control Orders is a lower threshold than "*reasonable belief*", the test applied to TPIM notices".

[100] *Secretary of State v BM,* [2012] EWHC 714 (Admin) paragraph 4.

[101] The Independent Reviewer of Terrorism Legislation, David Anderson QC, *Report on Control Orders in 2011,* March 2012. In November 2009, the High Court ruled in the context of control orders that the imposition of what it described as "light obligations" still requires that the controlee is provided with sufficient information

about the central allegations against him in order to be able to give proper instructions to the Special Advocate, see *Secretary of State for the Home Department, R (on the application of) v BC & Anor* [2009] EWHC 2927 (Admin).

[102] Cerie Billivant is a UK national, subject to the control order regime, between June 2006 and January 2008

[103] ECHR, article 6 and ICCPR, article 14. See UN Human Rights Committee, General Comment no. 32, UN Doc CCPR/C/GC/32, 23 August 2007 stating that these guarantees apply both to criminal and civil proceedings. See also case law of the European Court of Human Rights: *Ruiz-Mateos v Spain*, (App no. 12952/87), 23 June 1993, *Lobo Machado v Portugal,* (App no. 15764/89), 20 February 1996; *B and P v United Kingdom,* (App No 36337/97; 35974/97), 24 April 2001, paragraph 36. *Vanjak v Croatia 2010 Jan 14 App no 29889/04.* It should also be noted that the fact that proceedings may not be labelled 'criminal' by national law does not mean they cannot fall within these terms under the ECHR and thereby attract additional fair trial guarantees, see for example, *Engel and Others v. the Netherlands*, (application no. 5100/71 5101/71 5102/71 5354/72 5370/72) 8 June 1976, paragraphs 82-83.

[104] European Court of Human Rights, *Ruiz-Mateos v Spain*, (App no. 12952/87), 23 June 1993, paragraph 63; European Court of Human Rights, *Lobo Machado v Portugal,* (App no. 15764/89), 20 February 1996, para 31; European Court of Human Rights, *Uukauskas v Lithuania*, (App. No. 16965/04), July 2010. See also Human Rights Committee Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*,

[105] See, e.g., European Court of Human Rights *De Haes and Gijsels v Belgium* (App no. 19983/92), 24 February 1997, paragraph 53; European Court of Human Rights , *Ankerl v. Switzerland*, (App no. 17748/91), 23 October 1996, paragraph 38. See also Human Rights Committee Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, paragraph 8.2; European Court of Human Rights, *AB v Slovakia 2003 App no 41784/98*. See also UN Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, 23 August 2007, paragraph. 13.

[106] UN Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, 23 August 2007, paragraph. 67. Also relevant ECHR case law: *Pretto and Others v Italy* ((App. No 7984/77), 08 December 1983, paragraph 27; *Malhous v Czeck Republic,* (App No 33071/96) 12 July 2001, paragraph 55; *Bakova v Slovakia*, (App No 47227/99), 12 November 2002, paragraph. 30.

[107] *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28, paragraph63. See similarly European Court of Human Rights, *Romanova v Russia*, (App No 23215/02), 11 October 2011, paragraph 155, where an entire criminal trial had been held in camera, with only part of the judgments having been delivered in public (it appears the defendant and her lawyers were not excluded from any part of the trial). In finding the exclusion of the public in the circumstances to have violated article 6 of the Convention, the Court observed: "it may be important for a State to preserve its secrets, but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity."

[108] Article 14 of the ICCPR does not explicitly allow for limitations on the rights provided for within it, except insofar as it expressly permits the exclusion of the public [as distinct from the parties] from all or part of a trial in circumstances including "national security in a democratic society". It is therefore not clear whether any limitations on the right to "fair hearing" in the "determination … of rights and obligations in a suit at law" are permitted in the absence of a valid derogation by the state under article 4. No mention of such a possibility is made in the Human Rights Committee's 2007 General Comment no 32 on fair trial, UN Doc CCPR/C/GC/32. The Committee has held that even in situations of emergency threatening the life of the nation, in which some derogation may be permitted under article 4, certain elements of article 14 can never be limited or suspending: see General Comment no 29 on states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) and General Comment no 32, paragraph 6. If article 14 nevertheless includes some implicit scope for limitations to its guarantees of fairness, on grounds of national security, any such limitation would be subject to the general principles set out by the

UN Human Rights Committee in its, General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13, paragraph 6. See also relevant case law of the European Court of Human Rights, *Rowe and Davis v the United Kingdom*, (App No 28901/95), 16 February 2001; *B and P v United Kingdom,* (App No 36337/97; 35974/97) 24 April 2001; *Doorson v. the Netherlands*, (App No 20524/92) 26 March 1996; *Vanjak v Croatia*, (App. No. 29889/04), 14 January 2010, paragraph 55; *AB v Slovakia* 2003 App no 41784/98; *Užukauskas v Lithuania*, (App. No. 16965/04), July 2010, paragraph 46.

[109]The government, for example, frequently cites the European Court of Human Rights decision in *Kennedy v the United Kingdom,* (App. No 26839/05), 18 May 2010 in this regard, where the court also emphasized as relevant its understanding that where the IPT found there had been wrongful interference it could in fact disclose the otherwise sensitive documents and information to the complainant, even over objections of the government that they should remain secret. Amnesty International does not necessarily agree with the reasoning or conclusions of the Court in the *Kennedy* case. See also on this case Lord Kerr in *Home Office v Tariq* [2011] UKSC 35 paragraphs 97-135. See also European Court of Human Rights *Uukauskas v Lithuania,* (App. No. 16965/04), July 2010 and European Court of Human rights *Rowe and Davis v United Kingdom* , (App No 28901/95), 16 February 2001, paragraph 61.

[110] European Court of Human Rights, *A and Others v United Kingdom,* (App no 3455/05), 19 February 2009, paragraph 205.

[111] See also discussion and sources under footnote 106.

[112] Imran Khan, meeting with Amnesty International, 22 August 2011.

[113] *Special Advocates Submission to the Justice and Security Green Paper*, January 2012. See also Special Advocates Written evidence submitted to the Constitutional Affairs Committee, 7 February 2005, "As to reliability, it may not be clear to the Special Advocates whether the information is direct or indirect evidence. The person called to give evidence on behalf of the Security Service may not necessarily have been involved in the intelligence gathering process, so the original format of the intelligence may also be a matter of conjecture. The Government's assessment of the reliability of the information may be presented at a high level of generality. The result is that, save for those cases where the material produced can be shown to be unreliable by reference to other closed material, the court's assessment of reliability is necessarily dependent on the Government's own assessment."

[114] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc: A/HRC/10/3, 4 February 2009. The Eminent Jurists Panel on Terrorism, Counter terrorism and Human Rights, has also criticised the practise of treating this type of material as evidence stating that "raw intelligence starts to substitute for evidence, to the detriment of individuals and the criminal justice system." *Assessing Damage, Urging Action*: *Report of the Eminent Jurists Panel on Terrorism Counter-Terrorism and Human Rights* (February 2009), page 161.

[115]*Secretary of State for the Home Department v AF* [2008] EWCA civ 1148 paragraph 24. In argument before the court Counsel for the Home Secretary supplied a written note describing the 'normal control order case' as containing "a mosaic of different elements of intelligence, some of them fragmentary, regarding the controlled person's pattern of behaviour that together establish the reasonable grounds for suspecting that he is or has been involved in terrorism-related activity. This mosaic of information is likely to have been drawn from the following, in varying combinations depending on the particular case: (1) Intercept evidence; (2) Covert surveillance evidence; (3) Source and/or agent reporting (which may be wholly or predominantly single sourced or multi-sourced); (4) Information from foreign intelligence liaison".

[116] Special Advocates Written evidence submitted to the Constitutional Affairs Committee, 7 February 2005.

[117] In May 2009, in a habeas corpus case of a Guantanamo Detainee before the District Court, Judge Gladys Kessler heavily criticised the government's attempts to rely on a mosaic theory of intelligence to show that Alla Ali Bin Ali Ahmed had justifiably been detained. https://ecf.dcd.uscourts.gov/cgi-

bin/show_public_doc?2005cv1678-220

[118] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/10/3, 4 February 2009, paragraph 74.

[119] *Al-Rawi and others v Security Services and Others*, [2010] EWCA Civ 482, paragraph 56. An appeal by the government from the Court of Appeal's ruling on this issue was discussed by the UK Supreme Court ([2011] UKSC 34).

[120] The Justice and Security Bill also provides for changes to the oversight of intelligence and security activities (Part one) and clauses 13 and 14 of the Bill in essence ends the ability of UK courts to order the disclosure of certain information under the so called *Norwich Pharmacal* jurisdiction, a civil law action available in English courts under which individuals can currently bring proceedings against the UK government seeking disclosure of information which would assist them in a case against a third party. For comprehensive briefings of the Bill as a whole see, amongst others, *Justice and Security Bill House of Lords Committee Stage Briefing*, by Justice, July 2012 and *Liberty and Reprieve Second Reading briefing on the Justice and Security Bill in the House of Lords*, June 2012. See also *Amnesty International UK's response to the Justice and Security Green Paper*, January 2012.

[121] Comments made during the Today Programme, 29 May 2012, by the former Secretary of State for Justice, see also *Minimum Safeguards: A Briefing paper on the Justice and Security Bill* by the Bingham Rule of Law Centre that references these comments and discusses the scope of the Bill. With respect to a claim against the Ministry of Defence, see the hypothetical example given by the House of Lords Select Committee on the Constitution, *3rd Report of Session 2012-13, Justice and Security Bill*, 15 June 2012, HL paper 18 at paragraph 23. It should also be noted that Clause 11 of the Bill allows the government to extend the application of closed material procedures by secondary legislation, for example to inquests, without the full scrutiny of parliament.

[122] For a detailed examination of the Bill see briefings by: Justice, *House of Lords Committee Stage Briefing*, July 2012; the Bingham Rule of Law Centre, *Minimum Safeguards: A Briefing paper on the Justice and Security Bill* and Liberty, *Committee Stage Briefing on Part 2 (Closed Material Procedure) of the Justice and Security Bill*. See also an article by Tim Otty QC, *The slow creep of complacency and the soul of justice – some observations on the Justice and Security Green Paper Cm 8194, and on the proposal for English Courts to be able to adopt "Closed Material Procedures" for the trial of civil damages claims,* EHRLR, issue 3, 2012.

[123] It should be noted that before making an application to the court for a closed material procedure, the government should "consider" whether to make a PII application; this is however a limited requirement as the Bill presents the alternative options of whether to apply for PII or a closed material procedure entirely at the election of the government. See Clauses 6 to 10 of the Justice and Security Bill for the proposed expansion of closed material procedures.

[124] Justice and Security Bill, Clause 7(1)e.

[125] Civil Procedure Rules 31.19.

[126] See *(Wiley) v Chief Constable, West Midlands* [1995] 1 AC 274.

[127] The value of this balancing exercise in cases where the state is accused of involvement in human rights violations is perhaps exemplified in the Divisional Court's fourth decision in the Binyam Mohammed case which states "the issue which arises here is not the balance between the public interest and fairness to a litigant by making material available to him to enable a fair trial to take place. . . It is a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability." *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) paragraph 18.

[128] See for example, responses by Justice, Liberty, Reprieve, Human rights Watch, CAJ and the Equality and Human Rights Commission. See also responses to the Justice and Security Green Paper consultation from

lawyers and media organizations accessible here: http://consultation.cabinetoffice.gov.uk/justiceandsecurity/

[129] Joint Committee on Human Rights, *The Justice and Security Green Paper*, *Twenty-fourth Report of the Session 2010-12, HL paper 286, HC 1777,* 4 April 2012.

[130] Joint Committee on Human Rights, *The Justice and Security Green Paper*, *Twenty-fourth Report of the Session 2010-12, HL paper 286, HC 1777,* 4 April 2012 paragraph 16.

[131] See Special Advocates' *Memorandum on the Justice and Security Bill, Submitted to the Joint Committee on Human Rights following the publication of the Justice and Security Bill*, page 2, signed by 51 Special Advocates. See also *Special Advocates Submission to the Justice and Security Green Paper,* January 2012 which states that "closed material procedures represent a departure from the foundational principle of natural justice" and that the government's proposals to introduce the procedures across the civil justice system were "insupportable".

[132] The initial claimants were Bisher al-Rawi, Richard Belmar, Omar Deghayes, Binyam Mohamed, Jamil elBanna, Moazzam Begg and Martin Mubanga

[133] See also the Court of Appeal judgment which described the process as follows: "Thus at least on the face of it, during the period prior to trial, there would be parallel open and closed pleadings, parallel open and closed disclosure and inspection, parallel open and closed witness statements, and parallel open and closed directions hearings. Similarly, at the trial, the hearing would be in part open and in part closed, no doubt with some documents and witnesses being seen and heard in open hearing and others in the closed hearing (and some witnesses conceivably giving evidence at both hearings). After trial, there would be a closed judgment and an open judgment." *Al Rawi & Ors v Security Service and Ors* [2010] EWCA Civ 482, paragraph 7.

[134] For further information and detail see fourth witness statement of Louise Christian, dated 12 April 2010 and the fourth witness statement of Sapna Malik, 12 July 2010.

[135] The settlement, the terms of which are confidential, was announced by Ken Clarke, Minister for Justice, before Parliament on 16 November 2010.

[136] *Al Rawi and Others v The Security Service and Others,* [2011] UKSC 34, paragraph 7. See also paragraph 89 and paragraph 92 by Lord Kerr: "[T]he right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process […]The right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness" […] "The seemingly innocuous scheme proposed by the appellant would bring to an end any balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the appellant would have it. It would be, at a stroke, the deliberate forfeiture of a fundamental right which, as the Court of Appeal has said … has been established for more than three centuries."

[137] *Al Rawi and Others v The Security Service and Others,* [2011] UKSC 34, paragraph 93.

[138] Joint Committee on Human Rights, *The Justice and Security Green Paper*, *Twenty-fourth Report of the Session 2010-12, HL paper 286, HC 1777,* 4 April 2012, paragraph 68. It should also be noted that though the government puts forward the case of *Al-Rawi and others* as an example of a case which could not be tried fairly without a closed material procedure, it did not seek to have the case struck-out, but instead chose to settle before even fully exhausting the PII process.

[139] Impact Assessment of the Justice and Security Bill, 18 October 2011 accessible here: http://services.parliament.uk/bills/2012-13/justiceandsecurity/documents.html

[140] For further detail about both these cases see Reprieve's website: http://www.reprieve.org.uk/secretprisons and Human Rights Watch's report *Delivered into Enemy Hands: US-led abuse and rendition of opponents to Gaddafi's Libya,* September 2012.

[141] Both men are bringing legal action against the UK government, the former director of counter-terrorism at

MI6, Sir Mark Allen and former Foreign Secretary Jack Straw. Further detail and copies of some of the claims can be viewed on Reprieve's website: http://www.reprieve.org.uk.

[142] See Joint Statement by the Director of Public Prosecutions and the Metropolitan Police Service, 12 January 2012, accessible here: http://www.cps.gov.uk/news/press_statements/joint_statement_by_the_director_of_public_prosecutions_and_the_metropolitan_police_service/index.html

[143] Press Release from Leigh Day, *High Court Awaits Jack Straw Defence in Libyan Rendition Case*, 10 October 2012, http://www.leighday.co.uk/News/2012/October-2012/High-Court-Awaits-Jack-Straw-Defence-in-Libyan-Ren.

[144] See, for example, Article 2(3) ICCPR, Article 13 ECHR; Articles 13, 14 and 16 UNCAT.

[145] See UN Human Rights Committee, General Comment no 31, concerning article 2(3) of the ICCPR which says that states "must ensure that individuals also have accessible and effective remedies to vindicate" the rights protected by the ICCPR (paragraphs 14 and 15). The Committee has noted even when the legal systems of States parties are *formally* endowed with powers to grant an appropriate remedy, this will be insufficient if the remedy procedures fail to function effectively *in practice* (paragraph 20). See also UN Human Rights Committee, General Comment no 20, concerning prohibition of torture and cruel treatment or punishment (10 March 1992), paragraphs 14 and 15. See similarly European Court of Human Rights *Aydin v Turkey, (*App No 57/1996/676/866), 25 September 1997, paragraph 103 and similar jurisprudence. Basic Principles on the Right to a Remedy and Reparation, 60/147; UN Human Rights Committee General Comment no 31, paragraph 16.

[146] The United Nations has also formally recognized "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", see UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005; Basic Principles on the Right to a Remedy and Reparation, 60/147, article 22(b).

[147] Human Rights Committee, General Comment no 29, paragraph 14.

[148] In certain judgments the European Court of Human Rights, on the other hand, appears to have been more willing to tolerate elements of non-disclosure in procedures for obtaining effective remedy under article 13 of the ECHR, for instance in cases such as *Kennedy v the United Kingdom*, (App No 26839/05), 18 May 2010; and *Othman (Abu Qatada) v the United Kingdom*, (App No 8139/09) 17 January 2012. See however *CG and others v Bulgaria,* (App No 1365/07), 24 April 2008, a case involving national security expulsion where the complainant argued that he had not had access to an effective means as provided for by article 13 for seeking a remedy for what he argued was a violation of his right to family life under article 8 of the European Convention; the Court while saying some alterations of procedure might be permitted on grounds of national security (paragraph 57), held that as "the applicant was initially given no information concerning the facts which had led the executive to make such an assessment, and was later not given a fair and reasonable opportunity of refuting those facts" that it followed that the proceedings could not be considered an effective remedy (paragraph 60). For the reasons outlined earlier in this document, Amnesty International respectfully hopes the Court will revisit the approach taken in the *Othman* and *Kennedy* cases in future, particularly given how the Court in *Othman* appeared, with little explanation, to place such great weight on a purported distinction within article 13 between situations where a person alleging to be a victim of a human rights violation is advancing a point as opposed to responding to a point raised by government. In any event, such rulings relate specifically to the UK's obligations under the ECHR and do not directly address whether the procedures in question comply with the UK's obligations under other treaties such as the ICCPR or UN Convention against Torture.

[149] Article 6 ECHR, Article 14 ICCPR.

[150] See also the discussion as regards article 14 of the ICCPR on pages 29 to 30 above.

[151] The exception to this is perhaps in cases where the government is willing to concede or otherwise formally acknowledge the facts of the violation to the degree of specificity required by the right of a victim of human rights violation to the truth about the violation or otherwise to the satisfaction of the victim.
[152] It should be recalled that under UK law the courts already have various means for dismissing claims that are wholly without merit before proceeding to the stage of disclosure, see part 24 of the Civil Procedure Rules, supplemented by Practice Direction 24 – the summary disposal of claims, which the government would no doubt invoke if such claims were ever brought.

Amnesty International
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW

www.amnesty.org

AMNESTY
INTERNATIONAL