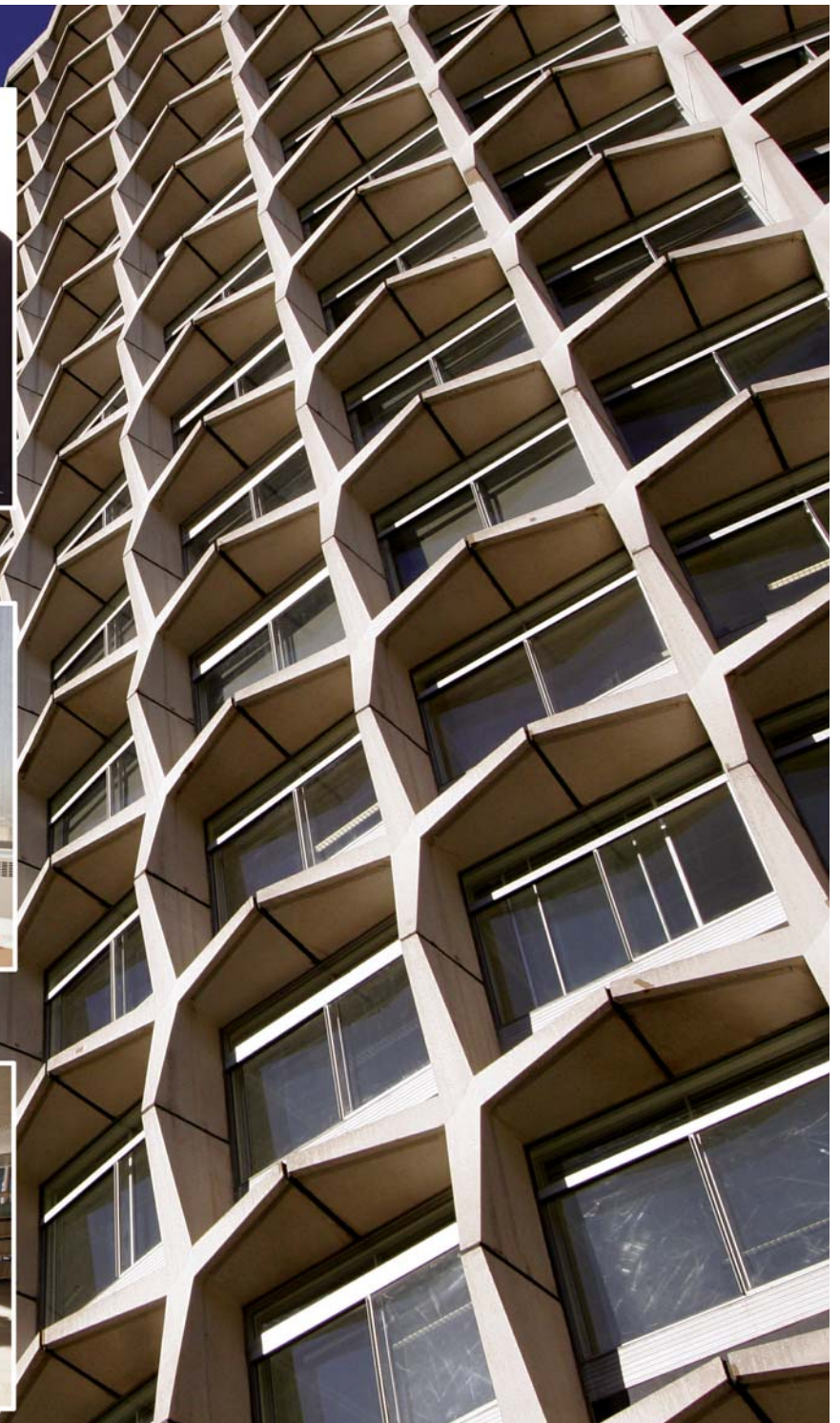


Special Advocates

A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO)

Open Manual



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Introduction

This document is primarily intended as a guide to those who have been appointed as Special Advocates by a UK Law Officer or for those who are considering undertaking such a role. It sets out, in some detail, the legal framework and practical considerations underpinning the work of the Special Advocate system. It attempts to deal with the most usual aspects of the role but does not purport to answer all questions that may arise.

The system of Special Advocates has existed for only a relatively short period of time, and the scope of their role in proceedings is still evolving. The role can give rise to novel legal, procedural and ethical issues.

This manual consists of two parts: the Open Manual sets out the origin of the role, the legal frameworks underpinning it, the duties and responsibilities of the Special Advocate and practical guidance on procedure applicable to Special Advocates.

The Closed Manual, which is only available to those with security clearance, provides guidance on 'closed' material, markings and acronyms commonly encountered and practical guidance on the procedures followed by the relevant Courts when dealing with closed evidence. It should be noted that the Open and Closed Manuals are intended to provide detailed guidance on civil proceedings involving Special Advocates and do not deal in depth with 'Special Criminal Counsel' in criminal cases.

The words 'him' and 'his' are used throughout when referring to the Special Advocate and Appellant. This is simply for convenience and should be understood to connote 'her' and 'hers' equally. No gender preference is intended.

Both Parts of the manual provide contacts and direction as to where to go for further information or assistance. Feedback on the content of either manual is more than welcome.

Special Advocates Support Office (SASO)
November 2006

1. The Origin of the Role of Special Advocate

1. Prior to 1997, there was no mechanism in England and Wales for material withheld from an applicant/ appellant in proceedings to be considered and challenged on his behalf by an advocate appointed for that purpose.
2. In the context of immigration deportation decisions, a decision to deport a person from the United Kingdom on grounds of national security was taken by the Home Secretary personally on the basis of all relevant material, some of which at least would be material which could not be disclosed to an applicant because to do so would potentially compromise national security. As this material could not be disclosed to an appellant, arrangements were made for the decision taken by the Home Secretary to be reviewed by a panel (known as the "Three Wise Men") who looked at all the material before the Home Secretary and made recommendations about whether the deportation decision should stand.
3. One obvious difficulty with the process existing prior to 1997 was that the panel's recommendations were only that: the Home Secretary did not have to abide by them if he did not wish to do so. Furthermore, only the panel got to see any evidence withheld from the applicant/ appellant on the basis of national security concerns – this material was never seen by the applicant, his lawyers or anyone appointed on his behalf.
4. The position changed following the case of *Chahal v. UK* 23 EHRR 413. Mr Chahal was an Indian national with indefinite leave to remain in the UK. He was subject to a notice of intention to deport him in 1990 on the grounds that his presence in the UK was not conducive to national security. His asylum appeal failed and having failed to overturn the deportation order in front of the Panel, he took his case to the European Court of Human Rights (ECtHR). One of the claims made by Mr Chahal at the ECtHR was that his detention was unlawful since any detention could only be with a view to deportation – if the Home Secretary actually deported Chahal, however, he was liable to be subject to breaches of his Article 3 ECHR rights, in that he would face torture and/or inhuman and degrading treatment at the hands of the national authorities to whom he was returned.
5. The Court in its judgment (at paragraphs 121-133) held that the existing arrangements in the UK were not Convention compliant because there was no mechanism for the Applicant's asylum claim to be considered by a Court in cases where national security was at stake, and there was no mechanism for anyone acting in the Applicant's interests to challenge the evidence against the Applicant. The Court also found that detention of asylum-seekers in these circumstances could only be justified if it was a prelude to deportation. It followed that since in the present case the Home Secretary could not deport Chahal without breaching his Art 3 rights, he could not be deported. The detention ceased therefore to be lawful. The Court in giving judgment accepted that in some circumstances it might be necessary to rely on material which could not be seen by an Applicant, but cited with approval a system employed in the Canadian Courts which allowed lawyers appointed to represent an Applicant to make representations on his behalf based upon material they, but not the applicant himself, had seen concerning their case. The procedures applying in England were not considered to be acceptable. The Court did not, in terms, however, recommend that the system be adopted in the UK.

6. In response to the *Chahal* decision, Parliament passed the Special Immigration Appeals Commission Act 1997. This Act set up a new body, the Special Immigration Appeals Commission (SIAC), to consider asylum and immigration appeals in cases where the grounds for the decision were based on national security. The Commission is a Superior Court of Record, chaired by a High Court Judge with many of the powers of the High Court. The Commission consists in each case of a High Court Judge (or holder of other high judicial office) chairing the panel, an immigration member who is either the Chief Adjudicator or a member of the AIT and a lay member with detailed knowledge of intelligence and the intelligence community. (The latter is not a statutory requirement but see Schedule 1 paragraph 5 of the 1997 Act and Hansard HC Vol. 299 Col 1055.) Appeal lies from a final determination of the Commission to the Court of Appeal on a point of law.
7. The Special Advocate was first introduced in this Act. The role of the Special Advocate in a SIAC appeal, as will be elaborated in Section 2 below, is to act in an Appellant's interests in relation to any material which an Appellant is prevented from seeing as a result of the Secretary of State's national security and public interest objections. The Act is careful to set out that a Special Advocate acts only in the best 'interests' of an Appellant to whom he is appointed. He does not 'act' for the Appellant and the Appellant is not his client. He owes an Appellant no duty of care in relation to the role he undertakes. This is an important point to bear in mind as it has implications for the Special Advocate in relation to the taking of what could be considered to be 'instructions' and represents a significant departure from what counsel or solicitors will be used to in so far as their professional and ethical duties as concerned.
8. Shortly after *Chahal, in Tinnelly and Others v. UK* (10th July 1998) the ECtHR rejected any attempt to distinguish *Chahal* in relation to certificates issued by the Secretary of State for Northern Ireland ending cases before the Fair Employment Tribunals in the Province. As a result, the Secretary of State also introduced a system of appeals to a Tribunal in these cases and provided for the appointment of Special Advocates.
9. Since 1997, the use of Special Advocates in domestic law has increased, particularly following the introduction of Part IV of the Anti-Terrorism, Crime and Security Act 2001. This Act was passed by Parliament in response to the terrorist attacks of 11 September 2001 and provided for a system of certification by the Home Secretary of foreign nationals whom the Home Secretary reasonably suspected of being international terrorists. Any individual so certified could be detained under the Immigration Acts notwithstanding that he could not be deported and an appeal against such certification lay to the Special Immigration Appeals Commission (SIAC). Although Part IV was repealed by the Prevention of Terrorism Act 2005 with effect from 14 March 2005, the principles developed in those cases and the practices developed with respect to Special Advocates are likely to continue to influence other proceedings in this area. SIAC appeals continue under the 1997 legislation in immigration cases where the grounds for the immigration decision are based on national security.
10. Since 2001, the Special Advocate system has also evolved in several other contexts, both statutory and non-statutory. These other jurisdictions are considered below.

2. Special Immigration Appeals Commission (SIAC)

11. As noted above, the Special Immigration Appeals Commission was set up by the Special Immigration Appeals Commission Act 1997 (1997 Ch. 68). Its jurisdiction initially was to hear immigration and asylum appeals when the Secretary of State certified, under what is now s.97 Nationality, Immigration and Asylum Act 2002, that the decision had been taken:
 - a) in the interests of national security;
 - b) in the interests of the relationship between the United Kingdom and another country; or
 - c) otherwise in the public interest.
12. Once an immigration or asylum decision is so certified, appeal against it lies only to SIAC and from there (on a point of law) to the Court of Appeal and beyond. The normal immigration appeals system no longer applies.
13. As will be apparent, the number of ordinary immigration and asylum appeals containing an element of national security or international relations was very low. Between 1997 and 2001 only a handful of such appeals occurred. Such appeals continue however, and are unaffected by any repeals of later legislation.
14. Section 6 of the Act provides:–
 - 6.– (1) The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.
 - (2) For the purposes of subsection (1) above, the relevant law officer is: –
 - a) in relation to proceedings before the Commission in England and Wales, the Attorney General,
 - b) in relation to proceedings before the Commission in Scotland, the Lord Advocate, and
 - c) in relation to proceedings before the Commission in Northern Ireland, the Attorney General for Northern Ireland.
 - (3) A person appointed under subsection (1) above –
 - a) if appointed for the purposes of proceedings in England and Wales, shall have a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,
 - b) if appointed for the purposes of proceedings in Scotland, shall be:
 - i) an advocate, or
 - ii) a solicitor who has by virtue of section 25A of the Solicitors (Scotland) Act 1980 rights of audience in the Court of Session and the High Court of Justiciary, and
 - c) if appointed for the purposes of proceedings in Northern Ireland, shall be a member of the Bar of Northern Ireland.
 - (4) A person appointed under subsection (1) above shall not be responsible to the person whose interests he is appointed to represent.

15. Once an Appellant appeals to SIAC against the immigration decision, the Secretary of State must decide whether or not the appeal is likely to require material to be placed before the Commission which he will object to the Appellant and his lawyers seeing. Almost inevitably if the matter has been certified under s.97 this will be the case. In those circumstances, the Secretary of State must notify the relevant law officer of this fact; and that law officer must consider, in accordance with s.6 whether to appoint a Special Advocate.
16. In practice, although the legislation provides that the law officer 'may' appoint a Special Advocate to act in the interests of any Appellant, the law officer will invariably agree to appoint a Special Advocate in any case where it is proposed to withhold material. Once the law officer has agreed to appoint a Special Advocate, the Special Advocates Support Office (SASO) is instructed to proceed with instruction of counsel as a Special Advocate. Although SASO is located in, and part of, the Treasury Solicitor's Department, it operates separately and distinctly from other members of the Treasury Solicitor's Department who are instructed by the Secretary of State for the Home Department (the respondent to such appeals). SASO writes to the Appellant's solicitors, enclosing a list of security-vetted counsel who have been appointed to the Attorney General's panel of Special Advocates. The Appellant is invited to nominate his preference of Lead (not necessarily Queen's Counsel) and Junior Special Advocates. The Appellant's choice of Special Advocate(s) is then submitted to the Attorney General for approval, and the Special Advocate(s) is instructed by SASO, subject to availability and there being no conflict of interest. If the Appellant's choice has previously had access to closed material in a related matter, that person will not be permitted to speak to the Appellant or the Appellant's representatives and is said to be tainted. In these circumstances, the Appellant may wish to make another choice. Alternatively, they may agree to confirm their original choice but accept the limitations on communication. For more detail on tainting, see Section 9 below. The instructions received by a Special Advocate will therefore emanate not from the Attorney General or Solicitor General directly, but from SASO.
17. It should be noted that a person may be detained, pending deportation on the grounds of National Security. Where this is the case, SIAC has jurisdiction to grant bail (see Immigration Act 1971, Schedule 2; Nationality Immigration and Asylum Act 2002, Parts 4 and 5; and Special Immigration Appeals Commission Act 1997, s.3 and Schedule 3). Representing the interests of Appellants on closed matters in bail applications is therefore an important function of the Special Advocate. Where possible, one of the Special Advocates representing the interests of the Appellant in the substantive appeal will deal with a bail application, although on occasions a Special Advocate may be nominated solely for the bail application. Where bail is granted, it is usually on conditions similar to typical Control Order obligations (see Section 3 below).

Anti-terrorism, Crime and Security Act (ACTSA) 2001 cases in SIAC

18. The use of Special Advocates increased considerably after the introduction of the Anti-terrorism, Crime and Security Act 2001. Part IV made provision for amended Immigration measures to deal with the perceived threat of international terrorism. Section 21 of the Act provided that the Secretary of State might detain any non-British national if he reasonably believed that that individual's presence in the United Kingdom was a threat to national security and he suspected that that individual was a terrorist. Once certified under s.21 an individual could be detained under the Immigration Act 1971 (as amended) even though there was no imminent prospect of removal or deportation from the United Kingdom. Clearly, such a provision conflicted with the decision of the ECtHR in *Chahal*. As a result, the Government passed the Human Rights Act (Amendment No. 2) Order 2001 (SI 2001 No. 4032) which provided for a derogation from the provisions of the Convention, and in particular Article 5, to the extent that allowed detention of individuals in these circumstances.

The designated derogation contained in its schedule a reproduction of the Government's formal note verbale presented to the Council of Europe explaining the reason and extent of the United Kingdom derogation from the Convention.

19. An appeal to SIAC lay under s.25 of the Act. Section 30 of the Act provided that for the purposes of any challenge to the United Kingdom's derogation from the Convention, the proper forum for such a challenge was SIAC not the High Court. The Act also explicitly excluded any recourse to judicial review of any of the provisions of Part IV. Early appeals to SIAC pursuant to the 2001 Act produced a number of difficulties for the Special Advocate system which had not been foreseen at the time of its inception. These are set out in more detail below but in essence, the nature of the allegations made against a number of individuals detained under the legislation was that they were members of organisations and groups which had links with Al-Qaeda, and the evidence against the individuals therefore tended to overlap to a certain extent. Furthermore, the Government, in countering the derogation challenge, and seeking to establish that a public emergency existed which threatened the life of the nation so as to justify a derogation from Art 5 ECHR, produced a 'generic' witness statement and exhibits which it submitted in all cases under the 2001 Act. For reasons elaborated below (see Section 9 of this manual), the consequence of the above was that no Special Advocate who had already undertaken any appeals under the 2001 Act and who had seen the withheld material could subsequently act in the interests of another 2001 Act Appellant – since they would not be able to see or speak to that appellant at any time during or before the proceedings and would not have the opportunity to take whatever 'instructions' they could. The only way to deal with this initially was to have the Special Advocates act for groups of Appellants at a time (usually 3 or 4). As will be seen, a way round this difficulty was found.
20. Following a successful challenge to the Government's derogation from Article 5 (see *A and Ors* [2004] EWHL 56), Part IV of the ATCSA 2001 was repealed by section 16(2)(a) of the Prevention of Terrorism Act 2005. More detail regarding the ATCSA cases can be found in Section 6 of this manual.
21. The jurisdiction of SIAC was further widened in 2002 by the Nationality, Immigration and Asylum Act 2002 so as to enable it to also hear appeals against a removal of citizenship by the Secretary of State.
22. The role of the Special Advocate for an Appellant was not defined in either the 1997 or 2001 Acts in any greater detail than that the Special Advocate must act in the best interests of the Appellant. The extent of the role of the Special Advocate is defined in the SIAC Rules (*Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034)*). A similar approach applies in the Prevention of Terrorism Act 2005.

3. High Court Control Orders

23. The Prevention of Terrorism Act 2005 (in this section simply referred to as 'the Act') provides under s.1(2) for two different types of Order:
 - a) A derogating Control Order (one which infringes Article 5 rights)
 - b) A non-derogating Control Order (one which does not infringe Article 5 rights).

The Home Secretary may make non-derogating Orders of his own motion (subject to the supervision of the High Court, see s.3 PTA 2005). Derogating Orders can only be made by the Court on application, following the passing of a 'designation Order' through Parliament, providing for a derogation from Article 5. At the time of writing there has been no designation Order and therefore no derogating Control Orders are permitted.

24. Section 1(4) sets out the kinds of conditions that may be imposed under Control Orders. These include controls which, for example, prevent the controlled person from engaging in particular activities, possessing certain materials, going to particular places or associating with certain people.
25. Before applying for permission to make, or making, or applying for, any Control Order, the Secretary of State must consult the Chief Officer of the relevant police force about whether there is evidence available which could realistically be used for a prosecution against an individual for terrorism-related offences (s.8(2)). Even if there is no such evidence, that officer must be notified whenever an Order is made against an individual (s.8(3)) and must keep the issue of prosecution under review (s.8(4)).

Non-Derogating Control Orders

26. Apart from in exceptional cases, the Secretary of State cannot make a non-derogating Control Order against an individual without obtaining the permission of the Court to do so (s.3(1)(a)). The exceptions are in relation to 'urgent' cases where the Secretary of State may make an Order but must certify in the Order that the case was urgent and the must immediately refer the Order to the Court (s.3(1)(b)). The only other exception (of no relevance to new Control Orders) was in relation to those persons previously certified under s.21 Anti-terrorism Crime and Security Act 2001 where the control Order was made before 14 March 2005 (s.3(1)(c)).
27. On an application for permission, the Court must consider (under s.3(2)) the grounds which the Secretary of State sets out as the basis of his application, and determine whether those grounds are 'obviously flawed' (s.3(2)(a)). Unless the decision is obviously flawed (in which case permission must be refused), the Court 'may' give permission and must then give directions for a substantive hearing in relation to the Order.

28. In any case where an Order is made without permission, the Secretary of State must immediately refer the case to the Court (s. 3(3)) and again the Court must decide whether the decision of the Secretary of State to make the Order was 'obviously flawed'. If it was, it must quash the Order. It may also decide that although the Order is valid, one or more of the controls is obviously flawed - in which case the Court may quash that or those obligations. The Court may also quash the Secretary of State's certificate that the matter is urgent (s. 3(8)) although it is not apparent what the outcome of that would be, since it would appear that the only effect would be to oblige the Secretary of State to request permission to issue the same Order. The consideration of a reference by the Secretary of State must begin within 7 days of the commencement of the Order (s.3(4)). If the Court decides to uphold the Secretary of State's order (whether modified or not) it must proceed to give directions for a substantive hearing.
29. Any application for permission or a reference to the Court within 7 days may take place without notice to the individual and without his presence (s.3(5)). However, any directions given following the granting of permission, or following the confirmation of an Order made without permission, must give the controlled person an opportunity to make representations on those directions and any others he may want within 7 days (s. 3(7)).
30. The Secretary of State may only make a Control Order, (whether following permission or not) if he has reasonable grounds for suspecting that the individual is or has been involved in a terrorism-related activity and it is necessary for purposes connected with protecting the public from a risk of terrorism to make an Order imposing obligations on that individual (s. 2(1)(a) and (b)). For these purposes, section 1(9)(d) of the PTA 2005 defines a 'terrorism-related activity' as any one or more of the following:
 - a) the commission, preparation or instigation of acts of terrorism;
 - b) conduct which is or is intended to facilitate the same;
 - c) conduct which gives or is intended to give encouragement to the same;
 - d) conduct which gives support and assistance to individuals who are known or believed to be involved in terrorism related activity

Under s.2(9), there is no obligation on the Secretary of State to rely only on the grounds of suspicion upon which the Order is made in relation to setting conditions for the prevention of terrorism-related activity.

31. On a substantive hearing in relation to a Control Order, the Court must decide whether the Secretary of State's decision that the requirements of section (2)(1) (set out in paragraph 29 above) were fulfilled was 'flawed', and whether his decision in relation to each obligation was 'flawed' and must apply the principles of judicial review in doing so (s. 3(9)). If the Court determines that an Order was flawed or any obligation in it was flawed, it may quash the Order or the obligation or may give directions to the Secretary of State for the revocation or modification of the Order. In all other cases, it must confirm the Order.
32. A non-derogating Control Order lasts for 12 months from the date of its making (s.2(4)) and may be renewed for one or more further periods of 12 months. All non-derogating Control Orders whether original orders or renewals must set out the date on which they presently are due to expire. The Secretary of State may renew a non-derogating Control Order if he considers it necessary for purposes connected with protecting members of the public from a risk of terrorism for an Order to continue in force, and considers that the obligations imposed under the new Order are necessary for purposes connected with preventing or restricting involvement by that person in terrorism-related activity (s. 2(6)(b)).

Derogating Control Orders

33. A derogating Control Order (DCO) can never be made by the Secretary of State – only the Court can make these Orders on the application of the Secretary of State (s 1(2)(b)). A derogating Control Order can only be made if a valid 'designation order' is in place, which derogates from the United Kingdom's obligations under the ECHR. Such a derogation order can only be made for 12 months at a time and is subject to renewal by positive resolution procedures (s. 6)
34. Where the Secretary of State makes an application for such an Order, the Court must hold an immediate preliminary hearing to determine whether to make a DCO. If such an Order is made, the Court must give immediate directions for a full hearing to determine whether to confirm the Order.
35. In deciding whether to make a Control Order on the application of the Secretary of State, the Court may make an order if it appears to it that:
 - a) there is material which (if not disproved) could be relied on by the Court as establishing that the individual is or has been involved in terrorism - related activity; and
 - b) there are reasonable grounds for believing that the imposition of obligations on that individual is necessary for purposes connected with protecting the public from a risk of terrorism; and
 - c) the risk arises out of or is associated with a public emergency for which there is a designated derogation in force; and
 - d) the obligations which there are reasonable grounds for imposing include ones which fall within the derogation (s.4(3)(a)-(d)).
36. The Court may impose any obligations it considers necessary to apply in the period between making the Order and deciding whether to confirm it. The initial hearing may, as with a non-DCO, be held in the absence of the individual concerned and without notice to him (s.4(2)). If the Court makes an Order against the individual, it must immediately give directions for the holding of a full hearing to confirm the Order (s.4(1)(b)). There appears to be no provision for DCOs equivalent to that in s. 3(7) which makes it a requirement to allow the controlled person to make representations about the directions given by the Court.
37. At the full hearing, the Court may confirm or quash the DCO. When confirming, the Court may modify the obligations imposed. It may only confirm the DCO if:
 - a) it is satisfied **on the balance of probabilities** that the individual is one who is or has been involved with terrorism-related activity;
 - b) it is necessary to impose conditions on him for purposes connected with protecting the public from a risk of terrorism;
 - c) the risk is one arising out of or associated with a public emergency in respect of which there is a designated derogation from Art 5; and
 - d) the obligations imposed by the Order include ones which are derogating and of a description set out in the designated derogation order (s.4(7)(a)-(d)).

38. A DCO lasts six months from the day on which it is made, unless previously revoked, renewed or quashed (s.4(8)). The Court may renew the DCO on the application of the Secretary of State for a further six months, and may continue to renew the DCO every six months for as long as it sees fit. The Court may renew the DCO only if:
- a) it considers it necessary for purposes connected with protecting the public from a risk of terrorism that the Order continue in force; and
 - b) it appears to the Court that the risk is one arising out of a public emergency in respect of which there is presently a designated derogation; and
 - c) the derogating obligations that the Court thinks should continue are of a description falling within the derogation; and
 - d) the Court considers the obligations imposed to be necessary for purposes connected with the preventing or restricting involvement by that person in terrorism-related activity (s. 4(10(a)-(d))).
39. If on an application for renewal it appears to the Court that the application cannot be dealt with before the expiry of the six months, and this is not due to delay on the Secretary of State's part, the Court may make an Order extending the validity of the Order until the conclusion of proceedings (s.4(11)). This section would presumably require therefore that any excessive delay on the part of the Secretary of State in dealing with the application would lead to the expiry of the DCO before the conclusion of the application and the controlled person's automatic release from the imposed controls – but see s.2(2).
40. Once an application has been made for an Order, an individual can be arrested and detained for 48 hours for the purpose of serving a DCO on him (s.5) if the constable considers it necessary. The Court may sanction detention for a further 48 hours (s.5(4)). Once the individual is subject to a DCO or the application is dismissed he cannot continue to be held. Once held, the individual is deemed to be in lawful custody and the provisions of PACE 1984 apply, as modified under the Terrorism Act 2000 as applying to terrorist-related offences (s.5(6) and (7)) with modifications.

Notification and Modification of Orders

41. No Control Order has effect until personally served (s.7(8)). For the purposes of serving an Order, a constable may enter premises and search those premises for the individual (s.7(9)). He may use force if necessary and anyone who wilfully obstructs him commits a criminal offence (s.9(3)) for which the penalties are set out in s. 9(7).
42. A person subject to a non-DCO may apply to the Secretary of State to modify or revoke an Order if he considers there has been a change of circumstances (s.7(1)). The Secretary of State must consider the application. Any decision by the Secretary of State on that application may be subject to an appeal to the Court (s. 10(3)).
43. A person subject to a DCO may apply to the Court at any time for a revocation or modification of the Order (s. 7(4)). On such an application the Court may modify the obligations only if this consists of removing or relaxing an obligation;

the modification is agreed; or the modification is one which the Court considers necessary for purposes connected with preventing or restricting involvement by the controlled person in terrorism-related activity – i.e. the Court can only relax the conditions, not tighten them, unless (in practice) this is necessary to prevent anticipated terrorism.

44. The Secretary of State may at any time revoke a non-DCO or remove or relax the conditions; he may modify the obligations under a non-DCO only with the consent of the controlled person, unless those modifications are necessary for the purposes connected with preventing or restricting involvement of the controlled person in terrorism-related activity (s.7(2)). The obligations under a non-DCO cannot be amended by the Secretary of State so as to effectively turn it into a DCO (s.7(3)).
45. The Court may impose a derogating obligation only if:–
 - a) it considers the modification is necessary for purposes connected with protecting members of the public from a risk of terrorism; and
 - b) it appears to the Court that the risk is one arising out of, or is associated with, the public emergency in respect of which the designated derogation in question has effect.
46. If the Court considers that a DCO should only impose non-derogating conditions however, it must revoke the Order: (s.7(7)).
47. An application to revoke or amend a DCO may be made at any time to the Court by the controlled person or the Secretary of State, under s.7(4). The Court may amend the obligations imposed by a DCO if the modification is a relaxation/removal of the obligations; it is agreed to by both parties; or the modification is one the Court considers necessary for purposes connected with preventing or restricting involvement by the controlled person in terrorism-related activity (s. 7(5)). In essence, therefore it is the same test as that applied by the Secretary of State in making a decision to modify the obligations under a non-DCO, under s.7(2).

Offences

48. There are a number of criminal offences created by the Act:
 - a) It is an offence under the Act to contravene an obligation imposed by a Control Order without reasonable excuse (s.9(1)).
 - b) It is also an offence for a person who was bound by a Control Order when they left the UK to fail to report to a specified individual on their first return to the UK, even if the Order is no longer in force.
 - c) It is an offence to obstruct a constable searching for a controlled person (see paragraph 40 above).
49. The penalties for such breaches are found in Section 9 of the PTA 2005. They are offences triable either way.

50. Where a person is convicted of an offence under the Act, but the Control Order upon which it is based is quashed (whether by the Court or on appeal, whether after a renewal or not) or is modified by the Court in such a way that the offence could not have been committed had the quashing of the order or condition taken place before the criminal proceedings took place, then the conviction is liable to be set aside and the controlled person may apply to the relevant Courts for this purpose (s.12). This right of appeal exists notwithstanding the fact of any previous appeal, or of any guilty plea but must be brought within specified periods. If convicted on indictment, within 28 days; if summarily convicted, within 21 days.

Appeals

51. An appeal may be brought to the Court by a controlled person where a non-DCO is renewed, or an obligation imposed by a non-DCO has been amended without the consent of the controlled person. (The Secretary of State must apply to the Court for modification of a DCO, so presumably the controlled person could make representations at that stage).
52. An appeal may also be brought against a refusal by the Secretary of State to revoke or amend a non-DCO (s.10(3)). The function of the Court on an appeal against **a renewal of the Order or a refusal to revoke an Order** is to decide whether the Secretary of State's decision on either or both of two questions was flawed; namely whether:
- a) it was necessary for purposes connected with protecting members of the public from a risk of terrorism, for an order imposing obligations on the controlled person to continue; and
 - b) the obligations to be imposed by the renewed order (or the obligations imposed by the order for which revocation is sought) are necessary for the purposes connected with preventing or restricting involvement by that person in terrorism-related activity (s.10(4)).
53. On an appeal against **a modification of an obligation** imposed by a non-DCO, whether on renewal or not, the Court must decide whether the Secretary of State's decision on either or both of two questions is flawed; namely:
- a) in a modification appeal, whether the modification is necessary for purposes connected with preventing or restricting involvement by the controlled person in terrorism-related activity; and
 - b) in an appeal on a decision on an application for modification of an obligation, the decision that the obligation continues to be necessary for that purpose (s.10(5)).
54. The Court must apply the principles of judicial review on appeals mentioned in paragraphs 50 – 52 above. The Court may quash the Order or amend its conditions otherwise must dismiss the appeal. (s.10(6) and (7)).
55. The Secretary of State may appeal against a refusal of permission under s.3(1)(a) or a decision that his decision was 'obviously flawed' under s.3(3)(b).
56. Appeals from the High Court only lie on a point of law (s.11(3)).

Jurisdiction

57. Control Orders can only be impugned in proceedings in the Court or on appeal and derogation matters may only be raised with the Court.

Duration of the Act

58. The Act lasts only one year (s.13(1)) but may be renewed by the Secretary of State for a further year at a time. Renewal must be approved by positive resolution procedure through Parliament, unless there is an emergency in which case it may be renewed but must be approved by a parliamentary vote within 40 days. To date, the Act has been renewed by Statutory Instrument.

Other matters

59. Part 76 of the Civil Procedure Rules (CPR) contains the procedural rules applicable to Control Order proceedings in the High Court. Onward appeals are thereafter governed by Part 52 of the CPR.
60. Paragraph 9 of the Schedule to the PTA 2005 modifies the provisions of the Regulation of Investigatory Powers Act (RIPA) 2000 s.18
61. Paragraph 7 of the Schedule to the PTA 2005 provides for the appointment of Special Advocates to represent the interests of a controlled person in any proceedings from which he and his legal representative are excluded. As in SIAC proceedings, the Special Advocate is not responsible to the person whose interests he is appointed to represent (see paragraph 7(5) of the Schedule). The detailed responsibilities and powers of Special Advocates are set out in Part 76 of the CPR.

Judicial Consideration of Control Orders

62. In August 2006, the Court of Appeal (Lord Chief Justice, Master of the Rolls and President of the Queen's Bench Division) delivered judgment in two separate appeals by the Secretary of State against the decisions of Mr Justice Sullivan in the Administrative Court concerning non-derogating Control Orders.

Secretary of State for the Home Department v. MB

63. The first case (*Secretary of State for the Home Department v. MB [2006] EWHC 1000*) concerned a British national who was subject to a Control Order. Sullivan J considered the compatibility of the procedure, under the Prevention of Terrorism Act 2005 (by which the Administrative Court reviews the decision of the Secretary of State to impose a Control Order), with the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). Sullivan J concluded that the procedure was incompatible with Article 6 ECHR and made a declaration of incompatibility for four main reasons:
 - a) the Court was limited to considering whether the Secretary of State's decision was flawed, at the time the decision was made and on the basis of the material before him;

- b) the Court's function was limited to reviewing the decision of the Secretary of State, as opposed to conducting a full merits review;
 - c) the standard of proof was particularly low i.e. whether there were reasonable grounds for suspecting that a controlled person was involved in terrorist related activity;
 - d) in all the circumstances of the case, the use of closed material contributed significantly to the unfairness of the proceedings as most of the evidence was closed and therefore not disclosed to MB.
64. The Secretary of State appealed to the Court of Appeal (*Secretary of State for the Home Department v. MB* [2006] EWCA Civ 1140), where it was held that:
- a) the Secretary of State is under a duty to keep the decision to impose a Control Order under continual review, so the Administrative Court was required under the Act to consider whether the Secretary of State's decision was flawed at the time of the court's determination;
 - b) the Administrative Court's function was not restricted to a standard of review that fell short of Article 6 requirements when section 3(10) of the Act is read with section 11(2);
 - c) the exercise for considering whether there were reasonable grounds for suspicion did not involve identifying a specified standard of proof, but involved the taking into account of a matrix of alleged facts, some of which would be more clearly established than others;
 - d) Article 6 did not automatically require disclosure of closed evidence and the Act contained appropriate safeguards to permit reliance on closed material.

The Court of Appeal therefore allowed the Secretary of State's appeal, finding that the provisions for the review of the decision to make a Control Order were not incompatible with Article 6 of the ECHR. Permission to appeal to the House of Lords was refused.

Secretary of State for the Home Department v JJ, KK, GG, HH, NN and LL

65. The second appeal (*Secretary of State for the Home Department v. JJ, KK, GG, HH, NN and LL* [2006], unreported) concerned five Iraqis and one British citizen who were subject to Control Orders. In the Administrative Court, Sullivan J held that the very restrictive terms of their Control Orders amounted to a deprivation of liberty; that the orders were therefore in breach of Article 5(1) of the ECHR; and that he was therefore entitled to quash the orders. Sullivan J took as his starting point the fact that each respondent was confined to a small flat for eighteen hours a day. He found that this, taken together with other material restrictions, crossed the boundary between 'restriction' of and 'deprivation' of liberty.
66. The Court of Appeal (*Secretary of State for the Home Department v. JJ, KK, GG, HH, NN, LL* [2006] EWCA Civ 1141) dismissed the Secretary of State's appeal, and upheld Sullivan J's decision that the orders amounted to a deprivation of liberty and that he was entitled to quash the orders. Permission to appeal was refused.
67. It should be noted that, at the time of writing this manual, applications to the House of Lords for permission to appeal were pending in respect of both of the above matters.

4. Other Statutory Proceedings

68. There are a number of further jurisdictions in which statutory provision exists for the appointment of Special Advocates, listed below:

a) Proscribed Organisations Appeal Commission (POAC)

The Secretary of State maintains, in Schedule 2 to the Terrorism Act (TA) 2000, a list of organisations which are banned because the Secretary of State believes that they are 'concerned in terrorism'. Any organisation which is added to Schedule 2, by the Secretary of State, becomes an illegal organisation, and various offences can be committed by any individual who has links with that organisation – for example, through membership of it or displaying its symbols or badges etc. The organisation may appeal to POAC under s. 4 of the Terrorism Act 2000. POAC comprises three members and is chaired by a person who holds or has held senior judicial office. Under paragraph 7 of Schedule 3 TA 2000, the relevant law officer may appoint a Special Advocate to represent the interests of the organisation before the Commission. As in SIAC, the Special Advocate owes no duty of care to the organisation, does not 'act' for it, and cannot consider the organisation to be a client. In all other respects, the process before POAC is as before SIAC. The Rules which govern POAC are Proscribed Organisations Appeal Commission (Procedure) Rules 2001 (SI 2001/443). Appeals from POAC are to the Court of Appeal (see the Court of Appeal (Appeals from Proscribed Organisations Appeal Commission) Rules 2002 (SI 2002/1843)).

b) Pathogens Access Appeals Commission (PAAC)

Under Section 64 of the Anti-Terrorism, Crime and Security Act (ATCSA) 2001, the Secretary of State may issue directions to an occupier to require that any person be denied access to dangerous substances where this is in the interests of national security or public safety. PAAC was created by section 70 and Schedule 6 to the ATCSA 2001 to hear appeals from individuals against the decision to deny them access to such substances (as are listed in Schedule 5 ATCSA 2001). PAAC comprises three members and is chaired by a person who holds or has held senior judicial office. Under paragraph 6 of Schedule 6 ATCSA 2001, the relevant law officer may appoint a person to represent the interests of an organisation or other applicant in proceedings in relation to which they (and their representatives) have been excluded (by virtue of an Order under Rule 18 of the Pathogens Access Appeal Commission (Procedure) Rules 2002 (SI 2002/1845)). Rule 8 sets out in detail the Special Advocate's role in proceedings before PAAC. Appeals from PAAC are to the Court of Appeal (see the Court of Appeal (Appeals from Pathogens Access Appeal Commission) Rules 2002 (SI 2002/1844)).

c) Planning Inquiries

The 1990 Town and Country Planning Act 1990 was amended by the Planning and Compulsory Purchase Act 2004 to provide for planning inquiries involving a national security element. Section 80 of the 2004 Act inserts new provisions into s.321 of the 1990 Act to provide that a person may be appointed to represent the interests of any person prevented from hearing or inspecting any evidence at a local inquiry (in effect a Special Advocate). This would generally be expected to arise in the situation where a Government Department was either seeking planning permission to develop, or objecting to another party doing so. The rules for these cases can be found in *Planning (National Security Directions and Appointed Representatives) (England) Rules 2006 (SI 2006/1284)* and *Planning (National Security Directions and Appointed Representatives) (Wales) Regulations 2006 (SI 2006/1387)*.

d) Proceedings under s.57 of the Race Relations Act 1976

Section 67A(2) of the Race Relations Act 1976 provides for the appointment of a person to represent the interests of the claimant in respect of those parts of proceedings, brought under section 57(1) of the Race Relations Act 1976, from which he and his representative have been excluded under CPR Rule 39.8(1)(a) – see also CPR Practice Direction 39C. The power to exclude the claimant and his representative under CPR 39.8 may be exercised where the Court 'considers it expedient in the interests of national security.'

e) Northern Ireland

Various statutes and statutory instruments provide for the appointment of Special Advocates in proceedings in Northern Ireland in certain circumstances. This manual does not purport to deal with the use of Special Advocates in such proceedings.

5. Non-Statutory Proceedings

69. Thus far, discussion has concentrated on the format of proceedings involving Special Advocates which have a statutory footing. It is as well to be aware however that Special Advocates also now exist in several non-statutory contexts where there are no statutory procedural rules to govern how cases are dealt with. These have so far been dealt with by analogy with the rules pertaining to SIAC and the CPR, with the exception of SVAP which has developed its own procedural rules (see paragraph 73 below).

The Parole Board

70. The use of Special Advocates in the Parole Board jurisdiction derives from the case of Harry Roberts – a prisoner serving three mandatory life sentences for murder (*Roberts -v- Parole Board* [2004] EWHC 3120 (Admin); [2004] EWCA Civ 1031A; [2005] UKHL 45). The House of Lords held by a majority of 3:2 (Lords Bingham and Steyn dissenting) that the Parole Board has the power to withhold material relevant to a parole review from the Appellant and his legal representatives, and is able to appoint a 'Specially Appointed Advocate' (in effect a Special Advocate) to represent the Appellant at a closed hearing. The duty to appoint a Specially Appointed Advocate was implied from the implicit duty of the board, under the Crime (Sentences) Act 1997 s.28, to conduct its decision-making process in a manner which was practical and appropriate in the circumstances to ensure that the prisoner was fairly treated (see Lord Woolf LCJ's speech at para 65). The House held that the question of whether the decision to withhold information and/or appoint a Specially Appointed Advocate in any individual review is compliant with Art 5(4) of the ECHR depends on all the circumstances of the case, and cannot be determined in advance.
71. The lack of any rules providing a procedural framework for the Specially Appointed Advocate in this case presented its own difficulties; however the fundamental features of the statutory system were retained – providing that there should be no contact between the advocate and the prisoner after the advocate has seen the withheld material, allowing the advocate to make submissions on whether what was kept from the prisoner should be disclosed to him in some format and allowing the advocate to make substantive submissions on the closed material.

Judicial Review

72. In the case of *B v. Secretary of State for Transport (unreported)*, the Claimant brought an application for judicial review seeking to quash the refusal to grant her Counter Terrorism Check (CTC) security clearance, and the decision not to give her reasons for the refusal. The Defendant was permitted to withhold closed evidence from the Claimant and a Special Advocate was appointed. The Claimant was successful and, following representations by the Special Advocate, a gist of the reasons for the refusal was given to the Claimant. It should be noted that this type of case will (since this case) now normally be dealt with by SVAP (see paragraph 71 below). However, it demonstrates that Special Advocates can be appointed in Judicial Review proceedings.

Criminal Proceedings

73. The House of Lords in *R -v- H and C [2004] UKHL 3, [2004] 2 AC 134* held that 'special counsel' (in effect a Special Advocate) might exceptionally be appointed in a criminal case. The House held however that such an appointment will always be exceptional, never automatic; a course of last and never first resort; and should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. (See particularly paragraphs 22 and 36-37 of the Judgment for the House's view of the use of special counsel). Special counsel are appointed by the Attorney General on request from the trial Judge. SASO has responsibility for providing formal instructions to special counsel in criminal cases on behalf of the Attorney General. This manual does not deal in detail with the role of special counsel in criminal cases.

Security Vetting Appeals Panel (SVAP)

74. The Security Vetting Appeals Panel is the independent body which hears appeals against decisions to refuse or withdraw security clearance. It is available to hear appeals from individuals in Government departments, the Armed Forces and other organisations, or their contractors, who have exhausted the internal appeals process and remain dissatisfied with the outcome. The reasons for refusing or withdrawing security clearance may include material ('closed material') which, while relevant to the decision, cannot be released to the Appellant or his representatives for reasons of national security. The SVAP is an administrative body and is responsible for its own procedures. The SVAP has put in place procedures for the appointment of a Special Advocate (from the junior counsel on the list of Special Advocates) to represent the interests of the Appellant in respect of the 'closed material' where the SVAP considers this to be appropriate. The Special Advocate's role will usually be limited to written submissions on the 'closed material', although the Special Advocate may request an oral hearing if he considers it to be necessary.

6. The Anti-Terrorism Crime and Security Act cases

75. A Special Advocate will need to be familiar with the litigation in relation to the detention of 'suspected international terrorists' under the 2001 Act. Even though Part IV of that Act, which allowed detention, has now been repealed, cases under it remain of relevance to the work of Special Advocates. What follows is a short resume of the litigation, with reference to reported decisions where possible.

Open Rulings

76. Following the passing of the 2001 Act ten individuals were detained almost immediately and made appeals to SIAC which were first listed for directions in January 2002. An eleventh Appellant was added in early Spring, but soon dropped out of sight again when he was prosecuted for various offences, causing his SIAC appeal to be adjourned. The 10 remaining Appellants became the test cases for the 2001 Act and were collectively known as 'A and Others'. Following various hearings, the Secretary of State decided to proceed on the basis of two types of evidence: 'generic' evidence, common to all appeals by all 10 Appellants and 'specific' evidence which related only to the case of the individual to whom it pertained. The 'generic' evidence was submitted in support of the contention that there existed in the UK a public threat to the life of the nation, justifying the Government's derogation from the provisions of Article 5 ECHR, contained in the 2001 legislation, and provided details of the various terrorist networks and groups which exist and their alleged links with Al-Qaeda. Both forms of evidence existed in open and closed formats.
77. The Appellants had all challenged the right of the UK Government to derogate from Article 5 in their appeals, and had further challenged the derogation itself as unlawful. SIAC decided to hold a preliminary hearing to determine the validity of the derogation from Article 5, prior to hearing the substantive appeals. In this way, the cases split into two – and have proceeded through the appellate system twice.
78. Following a hearing in June 2002, SIAC gave judgment on the derogation issues in July in *A and Others [2002] HRLR 1274* (Collins J, Kennedy LJ and Mr Ockleton). It held, in brief, that although there was a public emergency threatening the life of the nation, the derogation from Article 5 contained in the derogation Order was unlawful as it discriminated against foreign nationals in a way incompatible with Article 14. The Commission quashed the derogation order and declared Part IV of the 2001 Act incompatible with the ECHR. The Home Secretary appealed. The Court of Appeal (Lord Woolf CJ, Brooke and Chadwick LJJ) allowed the appeal *A and Others [2002] EWCA Civ 1502; [2004] QB 335*. The Court held that, Art 15 permitted derogation from Art 14 where 'there was an emergency threatening the life of the nation' and derogation was strictly required, that there were objective, justifiable and relevant grounds for treating non-nationals differently from nationals, and that accordingly the Act

and derogation were proportionate and lawful. The Appellants appealed to the House of Lords who held that, although there was a public emergency threatening the life of the nation (Lord Hoffman dissenting), the derogation failed on proportionality and discrimination grounds (Lord Walker dissenting) *A and Others [2004] EWHL 56*. The choice of an immigration measure to address security issues inevitably lead to suspected terrorists being 'exported' to other countries whenever possible; it was hard to see how this was reconcilable with the aim of preventing terrorism when the individual could resume their activities from abroad. Detaining one group of alleged terrorists (non-nationals) but not others (with UK status) was discriminatory and contrary to Art 14 and Art 26 International Covenant on Civil and Political Rights and was thus inconsistent with the UK's other international obligations.

79. Following the Court of Appeal's judgment in October 2002, the substantive appeals of the Appellants began to progress through SIAC. In January 2003, a specific preliminary issue was dealt with in open: whether s. 18(2) of the Regulation of Investigatory Powers Act 2000 (RIPA) absolutely precluded disclosure to the Appellant(s) in SIAC of material falling within s.17 of that Act (material which discloses the contents of intercepted communications in circumstances from which their origin as intercepted material can be inferred). In *A, X, Y and Others -v- Secretary of State for the Home Department (No 2) (unreported)* SIAC held that whether or not such material was to be disclosed to an Appellant was to be decided by SIAC in accordance with rule 3(1) of its procedure rules – whether such disclosure would be contrary to the interests of national security or other specified public interests.
80. In October 2003, SIAC handed down judgment in the first 10 appeals and also a 'generic' judgment applying to all appeals (unreported). The Appellants appealed to the Court of Appeal. Shortly thereafter one further Appellant, M, who was not one of the first ten, became the first Appellant to have his appeal allowed and his certificate cancelled. The Home Secretary sought leave to appeal. In *Secretary of State for the Home Department -v- M [2004] EWCA Civ 324; [2004] 2 All ER 863* the Court of Appeal dismissed the Home Secretary's application. The Court, in so doing, gave its first views on the use of Special Advocates in these kinds of proceedings (see paragraphs 13, 14, 35(ii)), the issue not having arisen in the derogation context, and its view on the functions of the appellate Court on such appeals. On the latter issue, the Court took a conventional approach, that the appellate Court ought not to interfere with factual findings of the relevant body unless they were legally unsound e.g. perverse etc. As the application for leave was refused, no appeal lay to the House of Lords.
81. In *A, X, Y and Others -v- Home Secretary [2004] EWCA Civ 1123; [2005] 1 WLR 414* the Court of Appeal considered the substantive appeals of the first ten Appellants in relation to the issues of: (1) the level of scrutiny to be applied to the Secretary of State's decision, taking into account the impact of the Rehman case *[2001] UKHL 47*; (2) the scope of the derogation and the level of links with Al Qa'eda which were necessary to bring an Appellant within it and (3) the approach to be taken to evidence where there was reason to suspect that it might have been obtained from an individual by torture, or in another context which would amount to a breach of Article 3 in ECHR terms. On the latter issue,

the Court upheld SIAC's decision (Neuberger LJ dissenting) that the Secretary of State was entitled in principle to rely on evidence which might have been obtained in breach of Article 3, provided that neither he nor any agent of his was implicated in the Article 3 breach, as it was unrealistic to expect the Secretary of State to investigate each statement with a view to deciding whether the circumstances in which it was obtained involved a breach of Article 3. This would be inconsistent with the power to act on suspicion and belief and to impose such a duty on the Commission was equally unrealistic as its task was that of evaluation and judgment. Therefore, if the Secretary of State obtained intelligence material from a foreign state, he was entitled to rely on that material even if he suspected that it had been obtained by that state in a way that would contravene Art 3. The Court found that the possibility that the evidence was obtained by torture was only relevant to the weight it should be given. The Appellants appealed to the House of Lords on the issue of torture evidence, which delivered its judgment on 8 December 2005 (*A, X, Y and Others -v- Home Secretary* [2005] UKHL 71; [2005] 3 WLR 1249). The House of Lords overturned the Court of Appeal's decision and held (by a majority of 4:3) that SIAC should not admit evidence which it concluded, on the balance of probabilities, was obtained by torture. Where evidence was admitted, but a doubt remained as to whether the evidence was obtained by torture, SIAC should bear the doubt in mind when evaluating the evidence.

Closed Rulings

82. In addition to the above, a number of closed rulings were handed down during the course of the proceedings which a Special Advocate may need to see as part of his closed preparation. Of the judgments above, the derogation judgment by SIAC and the generic judgment by SIAC also exist in closed formats. The Court of Appeal in M, and the substantive appeals, were the only other judicial consideration of closed matters. There is a short ruling by the Court of Appeal in the substantive appeals in relation to a closed issue. First instance closed judgments were handed down in a number of cases.
83. The judgments of SIAC on disclosure issues in ATCSA proceedings may also be of use. There have been a number of hearings on disclosure of closed material to an Appellant. Any previous rulings continue to be of relevance to future SIAC appeals, and are also pertinent to Control Order disclosure hearings (under CPR Rule 76.29), as the Administrative Court takes a similar approach to the disclosure issues.

Non-participation by Special Advocates in an appeal

84. An issue which arose in the context of Abu Qatada's appeal before the Commission on a certificate under part IV of the 2001 Act was the extent to which a Special Advocate could determine that the best interests of the appellant were served by non-participation in an appeal. Abu Qatada had no confidence in the SIAC /Special Advocates system and considered that his appeal had been pre-determined. He therefore refused to take any part in his appeal. Shortly thereafter, the Appellant's Special Advocates indicated that having regard to both the statement made on the Appellant's behalf and to all other factors in the case, their judgment was that they should withdraw from the appeal. The Commission indicated that it was unhappy with such an approach since this would leave the Secretary of State to pursue the appeal ex-parte. Following correspondence between the Commission, the Special Advocates and the Solicitor General about the proper role of the Special Advocates, (the correspondence is in the public domain and was referred to by Lord Carlile of Berriew QC in his first annual review of the 2001 Act, when he expressed his opinion that Special Advocates should always take part in an appeal) the Solicitor/Attorney General will not interfere in any way with the professional judgment of Special Advocates and will not require them to perform a function which they consider to be contrary to the interests of the Appellant. Special Advocates may therefore withdraw from an appeal if their judgment is that this is in the best interests of the Appellant. In later deportation proceedings against 'O' (Abu Qatada) the Special Advocates did not engage in cross-examination of the national security witness, and made no submissions on the national security aspect of the case (although they did cross-examine, and make submissions, on the 'safety on return' aspect of the appeal). In the case of S -v- Secretary of State for the Home Department, in which the Special Advocates withdrew from the proceedings, SIAC commented that the Special Advocates had been placed in an "invidious position" by the late indication of the appellant that he did not intend to take part (see paragraph 39 of the judgment). In the case of B v. SSHD (unreported), the Special Advocates took the view that it was not in the best interests of the Appellant for them to cross-examine the national security witness, or to make substantive submissions on the national security case. SIAC accepted that the Special Advocates position was entirely appropriate and served the interests of justice.

7. The Role of the Special Advocates Support Office (SASO)

85. Thus far this manual has concentrated on the substantive legal issues surrounding the role of Special Advocates and relevant case law to date. The remainder of the manual will now concentrate on practical matters which may assist Special Advocates in undertaking their role.
86. It was recognised in *H and C* (op cit.) that the Law Officers in appointing Special Advocates or Specially Appointed Advocates were acting in a public interest capacity and not as partisan members of the Executive. It is usual for the Treasury Solicitor's Department to act for the Attorney General in relation to his public interest functions – for example the appointment of an advocate to the Court (*amicus curiae*) and applications for an order under s.42 Supreme Court Act 1981 to declare an individual a vexatious litigant. The function of the Law Officers in the context of appointing Special Advocates should be seen in the same light.
87. SASO is a small team of lawyers and administrators, located in the Treasury Solicitor's Department (TSol), who provide legal and administrative support to Special Advocates in the exercise of their functions as well as providing formal instructions. SASO was created in response to the recommendations of the Constitutional Affairs Select Committee in its report on the operation of SIAC and the use of Special Advocates (Seventh Report, Session 2004-5, 3 April 2005). SASO is part of the Attorney General's and General Private Law Team in TSol, and operates on a Chinese wall basis with the TSol teams who represent the Government in cases in which Special Advocates appear. SASO comprises SASO (Open) and SASO (Closed). SASO (Open) lawyers and administrators do not have security clearance and accordingly only have access to open material. Only they communicate with the Appellants' representatives. SASO (Closed) lawyers and administrators are security cleared and therefore have access to both open and closed material. As a result, SASO (Closed) are not permitted to communicate with the Appellants' representatives. Special Advocates may contact either SASO (Open) or SASO (Closed), although it must be remembered that matters relating to the closed material may not be discussed with SASO (Open). SASO contact details can be found on the Attorney General's Office (AGO's) website.
88. The role of the Attorney General (or Solicitor General, acting in his place by virtue of s.1 Law Officers Act 1997) in appointing a Special Advocate is purely formal. No 'instructions' (other than in the purely formal sense) will come from the Law Officers to Special Advocates indicating any particular way that the case in which the Special Advocate is instructed is to be argued. That is a matter for Special Advocates and the Appellant, to the extent that the Appellant engages with the Special Advocates. It is worth emphasising that the Attorney General is not privy to communications between Special Advocates and SASO (although the AGO does receive the open minutes of the fortnightly Special Advocates meetings, referred to below).

89. SASO will be instructed by the Law Officers to provide Special Advocates with formal instructions to comply with the requirements of the Bar Codes of Conduct, and to provide Special Advocates with all necessary paperwork and logistical support that an instructing solicitor would provide him with, short of formal instructions. A Special Advocate may of course request whatever assistance he requires from SASO, as he would from any solicitor by whom he was instructed in the normal way.
90. The assistance provided by SASO will include:
 - a) providing initial instructions, open papers and legal materials;
 - b) attending directions hearings and corresponding with the Court in relation to all directions and matters of procedure which may affect the Special Advocates;
 - c) corresponding with the Appellant and/or his solicitor, and the Secretary of State's solicitor about evidence, preparation for hearings, conferences with the Special Advocate(s), directions and other similar matters;
 - d) liaising with the Security Service about practical matters e.g. provision of safes, laptops, etc. prior to going into closed;
 - e) corresponding with the Court in the event of the Special Advocate wanting permission to communicate with the Appellant after he has seen the closed material, in accordance with the operative legislative provisions;
 - f) reading into and being familiar with the closed material;
 - g) maintaining a library of closed materials upon which the Special Advocates may call for reference;
 - h) providing advice and assistance in relation to disclosure and substantive arguments in other cases and the outcomes of the same;
 - i) providing substantive help with research, reading, analysing and preparing the closed material as required;
 - j) providing assistance with the preparation and service of submissions as required;
 - k) corresponding with the Court and with the Secretary of State in relation to closed matters;
 - l) providing the Special Advocate with open transcripts and judgments, and access to closed transcripts and judgments.
91. Special Advocates who wish to use secure internet facilities for research, should contact SASO (Closed). Under no circumstances should Special Advocates attempt to search the internet for material from an unsecured access point once they have received closed material.
92. A few further practical considerations need to be mentioned at this stage connected with the delivery and use of closed material. At the outset of counsel's involvement with a Special Advocate case, they will need to have a safe provided to them by the Security Service for storage of closed materials. This will be provided once a Special Advocate has been instructed in a particular matter, on or before service of closed material. They will need to have arranged with the Security Service, through SASO, where exactly the safe is going to be located.

93. As well as receiving a safe, they will also be given a secure laptop by the Security Service, which must be used for the creation of any closed documents. They will also receive a briefing on maintaining security, and the use and storage of top secret material. Please refer to the closed manual for further details of this. Any questions about security matters should be directed to SASO (Closed).
94. There are two main occasions when the Special Advocate will need to make written submissions to the Court. These are at the disclosure stage, when submitting that documents, or parts of documents, should be made open; and on the substantive case for the appeal itself. They should normally print enough copies of submissions for all parties and the Court / Commission. Any closed documents that need to be served on the Secretary of State or the Court will be collected from Special Advocates by SASO (Closed) and delivered by hand. Special Advocates will either need to be available to hand documents to SASO (Closed), or will need to have provided SASO (Closed) with their safe combination for documents to be collected from their safes.

8. The Special Advocate System in Operation

95. In this section, the procedural steps that a Special Advocate takes when participating in an appeal are discussed. For convenience, where reference is made to issues which are of relevance to both appeals and Control Order cases, the term 'Appellant' is used to describe the non-Government party throughout, and should be taken as referring to both Appellants and controlled persons. Likewise, the term 'Court' is used throughout to refer to Courts, Tribunals and Commissions.
96. The most important procedural distinction to appreciate at the outset, is between material which the Government is content to disclose to the Appellant ('open material') and material which he considers must be withheld from the Appellant on the basis of the public interest ('closed material'). The distinction between 'open' and 'closed' material is crucial to an understanding of the systems within which Special Advocates operate. At the outset of an appeal, or case in which a Special Advocate has been instructed, the decision as to what is properly categorised as 'open' and 'closed' is taken by the Secretary of State, or relevant decision maker.
97. At this stage, or some time prior to this (assuming that the Secretary of State wishes to rely on closed material in the appeal) he will notify the relevant law officer of this fact, and the law officer will consider whether to appoint a Special Advocate (see SIAC Procedure Rule 34(3) and CPR 76.23(3) which are in identical terms). If no Special Advocate is appointed, the Secretary of State may not rely on closed material (see SIAC rule 37(2); CPR 76.28(1)(b)). Assuming that the decision is taken to appoint, SASO (Open) will liaise with the Appellant's representatives over selection of the Special Advocate(s), and provide initial instructions. If the Appellant's representatives choose not to engage in the process of selecting a Special Advocate, SASO (Open) will nominate on their behalf and the process will continue in the normal way.
98. The Attorney General maintains a panel of Special Advocates (security cleared barristers and solicitor-advocates in private practice who have the necessary expertise and who have been appointed to the panel following an open competition). Once the Attorney General has agreed that a Special Advocate should be appointed in a specific case, SASO (Open) send a copy of the panel list to the Appellant's representatives who are invited to select one or two Special Advocates (depending on the nature of the case). The Appellant has a free choice of which Special Advocate he wishes to be instructed, subject only to availability (as in any other case where counsel are instructed) and tainting (where the Special Advocate has already seen closed material in another matter which would be relied on in the present case). Tainting will not prevent the chosen Special Advocate from being appointed, but will mean that they cannot meet the Appellant to discuss the case at any stage of the proceedings to prevent inadvertent disclosure of closed material. Once the Appellant has decided which Special Advocate he wishes to represent his interests, SASO (Open) will then proceed to provide the open material to the Special Advocate(s).

99. Once a Special Advocate has been appointed, they will receive the open material from SASO (Open). After service of open material, the Special Advocate has an opportunity to meet the Appellant before he files his evidence and before service of closed material (provided the Special Advocate is not already tainted (see section 6 below)). Some solicitors and Appellants take the view that they do not wish to see or have discussions with the Special Advocate at all. That is, of course, their right. In those circumstances, however, the Special Advocate will have a more difficult task in assessing where the interests of the Appellant lie as they will have much less understanding of the case to be put forward by that Appellant than they otherwise might.
100. Once an Appellant has submitted his evidence in an appeal, the Secretary of State will usually then produce further material both in an open and closed format. In SIAC this material is intended to be a response to the Appellant's own evidence; in the CPR it is not so described – it is merely referred to as 'any further relevant material' upon which the Secretary of State wishes to rely which he has not already lodged. In SIAC, the Secretary of State's counsel also undertakes a review of material in his possession, following receipt of the Appellant's evidence, with a view to disclosing exculpatory material at the same time as disclosing any further material on which he relies. The Government is under a duty to disclose any material which undermines its case, or which supports the Appellant's case. The further open evidence in response to the Appellant's evidence ('reply evidence'), if any, will be served on both the Appellant and his representatives, and on the Special Advocate (via SASO). The directions given for appeals usually allow a short time after the service of any reply evidence before anything further happens – to allow the Special Advocate to communicate again with the Appellant and his lawyers about the content of the open reply evidence, and to discuss any instructions the Appellant may give to his own lawyers in response.

Service of Closed material

101. Once all of the open steps have been completed between an Appellant and the Secretary of State and evidence has been served by both sides, in whatever format, the point arises at which the Special Advocate must see the closed material. Until this point, there can be free and unrestricted access to the Appellant and a dialogue may occur if the Appellant so wishes without there being any risk of inadvertent disclosure.
102. Once the open stages of the process have been completed, the Secretary of State will serve the closed material upon the Special Advocate (via SASO). Once the Special Advocate is in receipt of any closed material, the fundamental feature of all Special Advocate systems is that all direct communication between the Special Advocate and the Appellant (and his representatives) ceases (with the limited exception set out below). The appellant and his representatives may continue to send information in writing to his Special Advocate if he wishes, but there can be no communication the other way (see SIAC Rules rule 36; CPR rule 76.25 which are virtually, if not completely, identical). In this way, the Special Advocate is protected from any inadvertent disclosure of closed material to an Appellant and is shielded from the potential embarrassment of being in a position where others know that he knows more than is being

revealed. The receipt of closed material has become known colloquially as 'going into closed'. In any event, it marks the end of the period in which the Special Advocate may communicate directly with the Appellant. It should be noted that communication with the Appellant is still possible at this point - but any communication from the Special Advocate to the Appellant after this time requires the permission of the Court and the proposed format of it must be notified to the Secretary of State who can make objections if he so wishes (see SIAC Rule 36(4) and CPR 76.25(4)).

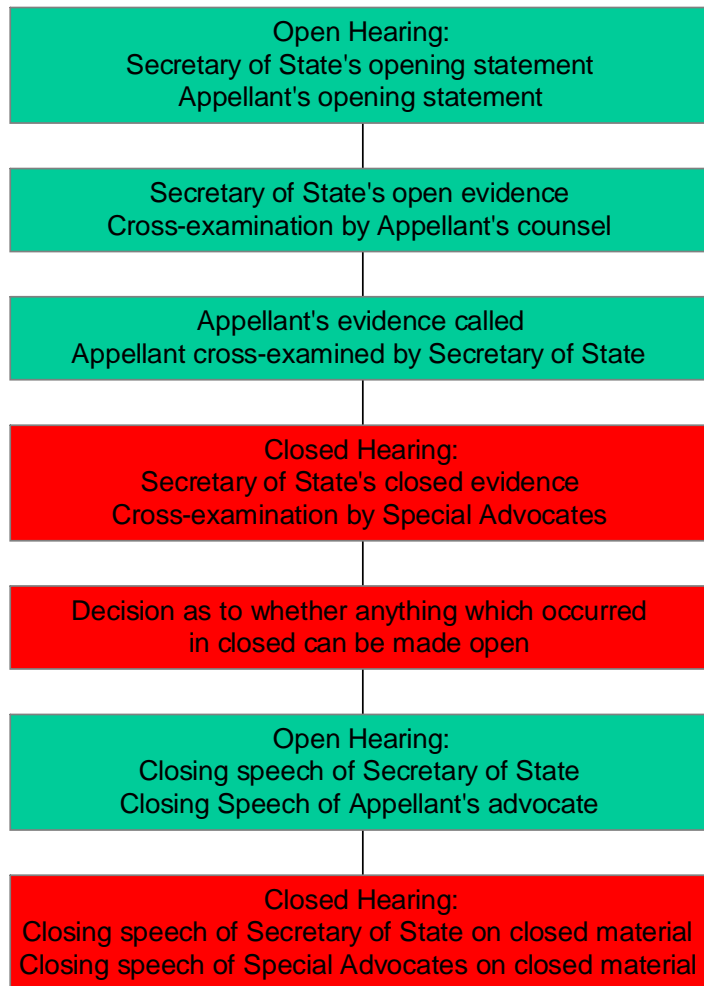
103. Thereafter the processes in relation to the closed material begin. At this stage, the division between 'open' and 'closed' is one set by the Secretary of State. It is now for the Special Advocate to take a view himself on the material and to decide whether any of what is contained within the closed material should in fact be made open (and therefore be disclosed to the Appellant) because its disclosure would not harm the public interest – e.g. the material is already in the public domain or could not be regarded as damaging to national security or other public interests. Sometimes, the Special Advocate will submit that a summary or gist of the material could be safely disclosed to the Appellant. The Special Advocate has a period after service of the closed material in which to consider and prepare written submissions on what, if any, of the 'closed' material should become open. These are known as Rule 38 submissions in SIAC and Rule 29 submissions in Control Order proceedings (although they are in fact governed by CPR 76.29). These submissions may also include requests to the Secretary of State for further information or documents to be provided to the Special Advocate. This period has usually in SIAC been a period of two to three weeks (although no period is specified – see SIAC Rules rule 38(3)). In the CPR, similar provisions specify a period of two weeks for the Special Advocate to indicate whether he challenges the Secretary of State's assessment of what is open and what is closed (see rule 76.29(3)), though the Court may modify it in appropriate circumstances.
104. At this stage, the Special Advocate will be in contact with SASO (Closed) lawyers who can provide substantive assistance in relation to the closed evidence. This is set out more fully in section 7 of this manual.
105. SASO (Closed) then lodge the Special Advocate's Rule 38 submissions with the Court and serves a copy on the Secretary of State (the practicalities of doing so are discussed later- see section 7 below). The Secretary of State will then consider these submissions and enter a written reply, which is lodged with the Court and with the Special Advocate. Thereafter the parties will usually meet to discuss what material can be made open and what should remain closed. If agreement is not reached, a hearing will take place for the Court to adjudicate upon any outstanding issues.

106. If a hearing is necessary, the Court will hear in closed session any submissions the Secretary of State and the Special Advocate wish to make and will give rulings on whether and to what extent closed material should be made open. Note however the provision which also applies in all present jurisdictions in which such material is considered - the absolute bar on disclosure which remains in the hand of the Secretary of State: if the Court orders disclosure of particular information or intelligence, there is no obligation on the Secretary of State to disclose it. He may instead elect not to rely on it in the proceedings, in which case it does not need to be disclosed. The position will be more complex if the material in question is exculpatory or positively assists the Appellant's case.
107. Following completion of the 'disclosure' hearings (or discussions if no hearing proves necessary) the Secretary of State will usually want a couple of weeks in which to make amendments to statements to reflect any material which it has been decided can become open. Thereafter the amended open statements and evidence (if any) will be served on the appellant. At that stage, the appeal hearing is ready to commence.

The Appeal Hearing

108. The appeal itself will also be conducted in two parts to reflect the two types of evidence being presented (see flow chart on page 41). The open hearing will take place first at which the Appellant and his representatives will be present and will take part. This is the only other opportunity a Special Advocate will have to see how the case for the Appellant is put and may receive some guidance on possible cross-examination topics from the lines of questioning pursued by the Appellant's counsel. It is therefore important for the Special Advocate(s) to be present at the open hearing. The closed hearing will then take place and all parties except the Special Advocate and the Secretary of State will withdraw. The Special Advocate will then assume responsibility for representing the interests of the Appellant and will have an opportunity to cross-examine the witnesses called by the Secretary of State. There is also a possibility that the Special Advocate may call his own witnesses. This latter has never, to date, been undertaken, certainly not in a SIAC context. There appears no reason in principle, however, why this should not be possible, and Special Advocates in proceedings in the High Court will have the considerable advantage of being able to call on both the remainder of the CPR (insofar as not disapplied) and on the inherent jurisdiction of the Court to achieve such an end. In its June 2005 'Response the to the Constitutional Affairs Select Committee's Report into the operation of SIAC and the Use of Special Advocates, the Government acknowledged that it is, in principle, open to Special Advocates in SIAC appeals to call expert evidence.

Fig 1: Standard procedure for open and closed hearings in SIAC / Control Order proceedings



109. Once a case is concluded, and closing submissions in both open and closed have been made, the judgment will naturally follow. Judgment will, in all likelihood, be in two formats, open and closed, though SIAC, in a number of cases, has not felt it necessary to produce closed judgments and has merely confined itself to saying that all its conclusions expressed in open form were confirmed by what it had seen in closed evidence.
110. When a judgment is produced, the open form of it will be provided to the Secretary of State about a week before it is made available to the Appellant, so that it can be checked to ensure that no closed matters are referred to. If there is any dispute between the Special Advocate and the Secretary of State about this, it can be resolved by a hearing before the Court – though this has never, to date, proved necessary. Closed judgments will be handed down in the normal way but will only made available to the Special Advocate and the Secretary of State. A Special Advocate can make submissions to the Court or Commission that parts of the Closed judgment should be made open.

9. "Tainting" and "Conflicts of Interest"

"Tainting"

111. A Special Advocate, once he has received the closed material, is precluded from communicating with the Appellant other than with the permission of the Court. This is to avoid the possibility of inadvertent disclosure to the Appellant. Whilst it may be relatively easy for a Special Advocate to check whether a particular fact is in the open material, and not to disclose to the Appellant a fact that is only in closed, it is less easy to avoid asking a question which will indirectly lead the Appellant to guess something that is only in closed. A Special Advocate is therefore said to be 'tainted' once he has seen relevant closed material and is no longer able to communicate with the Appellant (see paragraph 112 below). It should be noted that the appellant and his representatives can continue to communicate with the Special Advocate, through SASO, at all stages of the proceedings.
112. One further situation which causes difficulties is where a Special Advocate is instructed to act in appeal(s) in a national security context where he has acted in similar cases before. The Government has relied on generic material where a number of individuals are associated with a particular group. As a result, once a Special Advocate has acted for an Appellant, or a group of Appellants, in a case where generic material has been relied upon, he is 'tainted' and cannot subsequently act for further individuals, or groups of individuals, in a case where the same generic material is relied upon unless:
 - a) the Appellant is prepared to accept that there will be no open period during which he can meet the Special Advocate and discuss the allegations; or
 - b) in a case where lead and junior Special Advocates have been appointed, the tainted Special Advocate works with an untainted Special Advocate who is able to meet the Appellant.

"Conflicts of Interest"

113. Actual conflicts of interest in the usual sense do not arise, since a Special Advocate owes no duty to the person whose interests he represents. However, a Special Advocate should be careful to ensure that no situation arises in which there could be any perception of anything other than absolute independence on his part. Special Advocates should therefore carefully consider whether any matter in which they have acted previously would lead to a perceived conflict of interest if they were to act for a particular Appellant as a Special Advocate. Likewise, Special Advocates should carefully consider perceived conflicts of interest before accepting instructions in future proceedings. An issue of specific concern is the risk of inadvertent disclosure of closed material, were a Special Advocate to act for another party in future proceedings where there was an overlap of issues.
114. There are no obvious guidelines in this area on when such 'conflicts' may arise. A Special Advocate should therefore ensure that he considers these issues at all stages, and brings any possible problems to the attention of SASO as soon as possible.
115. A Special Advocate who considers that he may be tainted, or have a potential perceived conflict of interest, should raise this with SASO. Reference can be made to the Security Service for guidance on whether there is a cross over of closed material between cases which may affect a Special Advocate's ability to act in both matters.

10. Recruitment of Special Advocates

116. Special Advocates are recruited to the panel maintained by the Attorney General following open competition. Recruitment competitions are held as the need arises and are advertised in the legal press. Please do not hesitate to contact the Attorney General's Office (see section 11 below) for more information.

11. Further Help and Assistance

117. Should Special Advocates require any further assistance or have any feedback on the contents of this manual, please do not hesitate to contact SASO. Current contact details (in the form of the SASO organogram) are available on the Attorney General's Office website (www.lso.gov.uk), under the heading Special Advocates. Alternatively, written correspondence can be sent to the following addresses:–

Special Advocates Support Office (SASO)
Treasury Solicitor's Department
One Kemble Street
London
WC2B 4TS

Attorney General's Office
9 Buckingham Gate
London
SW1E 6JP



One Kemble Street London WC2B 4TS