

## BINGHAM CENTRE FOR THE RULE OF LAW

### RESPONSE TO THE *JUSTICE AND SECURITY* GREEN PAPER

1. This is a submission in respect of HM Government's Green Paper, *Justice and Security* (Cm 8194). The submission is made by the Bingham Centre for the Rule of Law.<sup>1</sup>
2. An earlier draft of this submission was discussed at a meeting on 18 November 2011 of 45 practising and academic lawyers with extensive experience of and expertise in the matters raised by the Green Paper.<sup>2</sup> We have also benefited from discussions with Government officials and others. We record our thanks to all those who have given their time to discuss these matters with us.
3. A summary of our conclusions is set out at end of this submission.
4. Before addressing the Green Paper's questions in detail, we consider two overarching questions: (1) is there a problem that requires to be addressed? and (2) what are the governing principles in this area of law?

#### **Is there a problem that requires to be addressed?**

5. In our view, *the Government has not demonstrated, either in the Green Paper or elsewhere, that current legal rules pose a danger to national security*. We note that in the leading case of *Al Rawi*, Lord Dyson stated in the Supreme Court that "there is no compelling reason for taking the course" that was urged by the Government in that case, and which is now proposed in the Green Paper.<sup>3</sup> Indeed, it is a notable feature of the Green Paper that despite the fact that its subject matter has been the subject of much recent appeal-court litigation and has been considered carefully and in great detail by a

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<sup>1</sup> See <http://www.biicl.org/binghamcentre/>. Any correspondence with regard to this submission should be sent to its authors Professor Adam Tomkins, Professor of Law at the University of Glasgow, and Dr Tom Hickman, Blackstone Chambers, both of whom are Fellows of the Bingham Centre with responsibility for co-ordinating its ongoing project on national security and the rule of law: [adam.tomkins@glasgow.ac.uk](mailto:adam.tomkins@glasgow.ac.uk) and [tomhickman@blackstonechambers.com](mailto:tomhickman@blackstonechambers.com).

<sup>2</sup> This response addresses only those consultation questions in respect of which we have expertise: it does not address the full range of consultation questions as set out in the Green Paper. We focus on those issues that have particular relevance for the rule of law.

<sup>3</sup> *Al Rawi v Security Service* [2011] UKSC 34, para 49.

number of our leading judges,<sup>4</sup> much of the learning contained in these cases is brushed aside and ignored.

6. It is said to be the relentless growth of judicial review that has created the problem (paras 1.15 and 1.17). We question this. The extensive judicial engagement with national security matters principally reflects the array of executive powers introduced since 2001 and the fact that in exercising those powers the Government chooses to rely on intelligence material generated by the Security and Secret Intelligence Services.<sup>5</sup> Moreover, the degree to which the Security and Secret Intelligence Services have been “mixed-up” in the unlawful detention and torture of individuals held by foreign intelligence services reflects policy and operational decisions made by those agencies and the Government. The courts’ concerns about such conduct reflected in the *Binyam Mohamed* case and the *Al Rawi* litigation reflects no changed approach on the part of the courts, but apparently changed operational practices on the part of the Intelligence Services. An important aspect of these changed practices is the degree to which information is now shared between intelligence services of different states and the closer working relationships between them.<sup>6</sup>
7. Insofar as the courts have been prepared to give greater scrutiny to national security and international relations issues in recent years than previously, they have also continued to show considerable deference to the Government, as reflected and emphasised, for example, by Lord Hoffmann in *Rehman*,<sup>7</sup> by Lord Bingham in *Corner House*<sup>8</sup> and by Lord Neuberger MR in *Binyam Mohamed*.<sup>9</sup> On matters of principle, the European Court of Human Rights and the Court of Justice for the EU have tended to lead and the British courts to follow.<sup>10</sup>

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<sup>4</sup> Among the leading cases are the following: *R (BM) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, *Al Rawi v Security Service* [2010] EWCA Civ 482, *Al Rawi v Security Service* [2011] UKSC 34 and *Home Office v Tariq* [2011] UKSC 35.

<sup>5</sup> See the Anti-terrorism, Crime and Security Act 2001, Part 4, repealed after the decision of the House of Lords in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (the “*Belmarsh*” case). This was followed by control orders: Prevention of Terrorism Act 2005, and asset-freezing measures: see *Ahmed v HM Treasury* [2010] UKSC 2.

<sup>6</sup> We note, for example, that UN Security Council Resolution 1373 (2001) “Calls upon all States to (a) Find ways of intensifying and accelerating the exchange of operational information ... [and] (b) Exchange information *in accordance with international and domestic law ...*” (emphasis added).

<sup>7</sup> *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153.

<sup>8</sup> *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 9, [2009] 1 AC 564.

<sup>9</sup> Above, n 4.

<sup>10</sup> Compare, for example, the verdicts of the House of Lords and of the European Court of Human Rights in each of the *Gillan*, *Al Skeini* and *Al Jedda* cases: see, respectively *R (Gillan) v MPC* [2006] 2 AC 307, *Gillan v UK* (2010) 50 EHRR 45, *R (Al Skeini) v SSD* [2008] 1 AC 153, *Al Skeini v UK* (2011) 53 EHRR 18, *R (Al Jedda) v SSD* [2008] 1 AC 332, *Al Jedda v UK* (2011) 53 EHRR 23.

8. ***We are not aware of any case in which operationally sensitive security information has been disclosed by a UK court against the opinion of a Government Minister.*** That is to say, from the point of view of protecting sensitive material, our long-established rules and practices of public interest immunity (“PII”) work well.
9. Against this background, the Government’s concern about the judicialisation of intelligence appears to boil down to a fear that, with material emanating from foreign intelligence services being relevant in a number of legal cases, there is a risk that wrongdoing on the part of foreign agencies may have to be disclosed and, although such material would have no operational sensitivity, this may nonetheless damage international relations, with the result that channels of communication with foreign intelligence services may constrict.<sup>11</sup> We are concerned about whether this really justifies a change in the law, given that it would lead to evidence of serious wrongdoing in the hands of the British Government, in which they may well be mixed-up, being covered-up in order to maintain intelligence-sharing. The UN Security Council Resolutions requiring intelligence-sharing should not be understood as trumping the accountability of intelligence agencies.<sup>12</sup>
10. Furthermore, the Government clearly states in the Green Paper that any damage to international relations that may result from risks of disclosure through civil proceedings, such as in the *Binyam Mohamed* case, would *not* jeopardise the provision of direct life-saving information by foreign intelligence partners.<sup>13</sup> The Government states that it wishes to *maximise* the amount of information it obtains from foreign partners (“[t]he fullest possible exchange”) because if it does not have every available item of information that intelligence partners would be willing to provide, there would be a “risk” (and it is put no higher than that) that it might miss some piece of information which in itself seems innocuous but which forms a crucial part of a jigsaw with other material which when added together “allow a threat to be contained, or a terrorist brought to justice”. We are not satisfied that the undoubted and understandable desire of the intelligence community to have access to every item of information that foreign partners are willing to provide justifies blanket secrecy, such as would be introduced by introduction of CMP (especially without the *Wiley* balance<sup>14</sup>) and the abolition of *Norwich Pharmacal* relief, particularly

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<sup>11</sup> The Green Paper states that “The Government has received clear signals that if we are unable to safeguard material shared by foreign partners, then we can expect the depth and breadth of sensitive material shared with us to reduce significantly. There is no suggestion that key ‘threat to life’ information would not be shared, but there is already evidence that the flow of sensitive material has been affected” (para 1.22).

<sup>12</sup> See above, n 6. See further, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action* (Geneva, 2009), Ch 4.

<sup>13</sup> “There is no suggestion that key ‘threat to life’ information would not be shared” (para 1.22).

<sup>14</sup> A reference to *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274. See further below.

where there appears to be only a very remote possibility of it having any effect on saving lives or property.

### **What principles should govern this area of the law?**

11. We welcome the Government's insistence that questions of justice and security must be posed in the light of various governing principles (such that "rights to justice and fairness must be protected", *Executive Summary*, para 10; and that "even in sensitive matters of national security, the Government is committed to transparency", *ibid*). Indeed, we agree with all of the "key principles" listed at para 10 of the *Executive Summary*, and also with the comments at para 1.6 of the Green Paper.
12. However, we are disappointed that the Green Paper's starting point is the opposite of what the Government wrote about itself in *The Coalition: Our Programme for Government* (2010). In the Foreword to *Our Programme for Government*, the Prime Minister and the Deputy Prime Minister wrote that "centralisation and top-down control have proved a failure" and that "it is our ambition to distribute power and opportunity to people rather than hoarding authority within government". The Green Paper's *Executive Summary* opens instead with the notion that the "first duty of government is to safeguard our national security" and that, in delivering this duty, sensitive information must be protected. ***We agree that national security must be protected (by all branches of the State, and not only by the Government) but its protection must be secured in the light of the fundamental principles of freedom and fairness, and not at their expense.*** As we shall demonstrate throughout this submission, it is a highly undesirable feature of numerous of the proposals contained in the Green Paper that authority will be hoarded within government.
13. Further, the distinction between security and secrecy needs always to be borne in mind. Security is the goal: secrecy is a means which will sometimes – but only sometimes – be required in order to achieve that goal. The Government is right in its "key principles" to put transparency first. Transparency is the norm and secrecy the exception. The norm should be broadly construed and generously applied; the exception narrowly. Of course, secrecy will sometimes be required in order to serve the interests of national security. But it should be tolerated only when it is shown to be required. The test should be one of necessity, not expedience.<sup>15</sup>

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<sup>15</sup> The over-inclusive meaning accorded to "sensitive material" in the glossary to the Green Paper should be amended accordingly.

14. As we explain in detail below, the proposals contained in the Green Paper will have the effect of significantly increasing secrecy and decreasing openness in our civil justice system. Applying the test set out in the previous paragraph, the proposals should therefore be put into practice only if it has been demonstrated that they are necessary.
15. The Green Paper also gives insufficient attention to two crucial matters that ought to govern law and policy-making in this area:<sup>16</sup>
  - 15.1. First, the fact that national security is not the only context in which secrecy may be legally required: (i) Commercial secrets may be protected at law; (ii) sensitive information also has to be addressed by the civil justice system in family law, in which there are often immediate life-threatening concerns; (iii) sensitive material not giving rise to national security considerations arises in police cases. A basic question, not addressed in the Green Paper, is why procedures already available in these contexts are insufficient in the context of national security. *Cf* para 1.55, which summarily dismisses without careful reasoning alternatives such as confidentiality rings. Even within the context of national security the Green Paper’s analysis is weak – a striking omission is any consideration of the various creative ways in which issues of national security are dealt with in criminal trials (whether of terrorist or espionage offences) without the need to resort to anything resembling a closed material procedure.
  - 15.2. Second, the need to comply with EU and international law obligations.<sup>17</sup> Questions about the fairness of civil procedures are now governed by Article 6 ECHR and EU law, in particular Article 47 of the EU Charter of Rights, where EU law is engaged. EU law frequently will be engaged, and increasingly so, given the number of executive measures that are either taken under the auspices of EU law or which interfere with EU rights. For example in *Kadi No 2*, the CJEU has held that the provision of “unsubstantiated, vague and unparticularised allegations” to a person without supporting evidence, does not comply with basic fairness under EU law.<sup>18</sup> Furthermore there is no consideration given in the Green Paper to the fact that in the cases which have been brought against the Security and Secret Intelligence Services, very serious allegations of complicity in torture and enforced disappearances have been raised, constituting grave violations of international law.

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<sup>16</sup> An additional criticism is that reference to comparative material in the Green Paper is scant.

<sup>17</sup> The absence of EU law from the Green Paper is a striking omission. The Court of Justice of the EU has shown in a series of cases that it takes questions extremely seriously questions of justice and security. See, *e.g.*, Joined Cases C-402 and C-415/05 P *Kadi and Al Barakaat v Council* [2008] ECR I-6351; Case T-85/09 *Kadi v Commission* [2010] ECR II-0000 (*Kadi No 2*); and Case C-550/09 *E and F* [2010] ECR I-0000. See also Case T-228/02 *OMPI v Council* [2006] ECR II-4665; Case T-256/07 *PMOI No 1* [2008] ECR II-3019 and Case T-284/08 *PMOI No 2* [2008] ECR II-3487.

<sup>18</sup> At para 157.

## Closed material procedure (CMP) in civil proceedings

16. The use of CMP in civil proceedings is the centrepiece of the Green Paper and would constitute a fundamental and potentially wide-ranging change to the civil justice system.<sup>19</sup> As Lord Dyson noted in *Al Rawi*, ***the two key principles of law here are those of open justice and natural justice. CMP departs from both principles*** (whereas, as his Lordship noted, the long-established rules of public interest immunity (“PII”) depart from neither principle).<sup>20</sup> The proposals as to CMP have the potential more or less entirely to replace our law of PII, at least in national security cases and, in all probability, much more broadly. Yet nowhere in the Green Paper is the Government explicit about the sweeping scale and scope of this change. The extent to which it is contemplated that fundamental principle be departed from is nowhere made clear.
17. The main argument for using CMP provided in the Green Paper is that “a judgment based on the full facts is more likely to secure justice than a judgment based only on a proportion of relevant material” (para 2.3). There is some judicial support for this: in *Tariq*<sup>21</sup> Lord Mance stated: “The rule of law must, so far as possible, stand for the objective resolution of civil disputes on their merits by a tribunal or court which has before it material enabling it to do this” (para 40). But with this must be contrasted the following – powerful – observations of Lord Kerr in *Al Rawi*: “The central fallacy of the 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” (para 93). It is important to appreciate that this is neither a fanciful nor a hypothetical fear: it happened, for example, in the case of Harry Roberts.<sup>22</sup> Even after intelligence has been assessed within, for example, the Security Service, there may well be cases where a private party is far better placed to assess an aspect of its credibility, and there will clearly be cases where a trial judge will need to have an issue of credibility explored by counsel capable of taking instructions on the matter.

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<sup>19</sup> The Green Paper does identify various other changes that could be made: (1) Greater ‘active case management’ powers; (2) Creation of a new specialist court for national security cases; (3) Wider remit for the Investigatory Powers Tribunal; (4) Putting PII on a statutory footing. Of these, only (2) and (3) could be regarded as possible alternatives for CMP. See further below.

<sup>20</sup> *Al Rawi v Security Service* [2011] UKSC 34, para 14.

<sup>21</sup> *Home Office v Tariq* [2011] UKSC 35.

<sup>22</sup> Following the decision of the House of Lords in *R (Roberts) v Parole Board* [2005] 2 AC 738 a CMP was used in determining that Mr Roberts should not be released on parole, as he was assessed to be a risk to the safety of the public. The evidence that had been considered in the CMP subsequently came to light (it was evidence supplied by an ‘informer’ of Mr Roberts’ alleged conduct on a work placement). This evidence, when tested in open legal proceedings, was shown to be unreliable.

18. It is important to emphasise that it is apparently not contended (or at least not explicitly contended) by the Government that CMP should be adopted in civil proceedings because of any risk of unjustified disclosure of sensitive material. It is, on the contrary, precisely because such material would *not* be disclosed that the Government seeks to introduce CMP to allow the material to be put before the court, in particular to enable the Government to put its full case to the court. We return to this point below.
19. There are objections to use of a CMP which must be taken very seriously indeed, none of which is squarely faced in the Green Paper:
- CMP represents a major departure from fundamental common law rights of equality of arms and appearance of fairness, since one party is able to advance their case in secret.
  - CMP represents a very significant inroad into principles of open justice (although *in camera* hearings in national security cases—common in criminal cases—also represent a departure from this principle).<sup>23</sup>
  - CMP gives rise to a danger that the Government’s case is not adequately challenged thus producing wrong outcomes (see the remarks, cited above, of Lord Kerr in *Al Rawi*).
  - If CMP is used and the *Wiley* balance for testing whether documents should be subject to closed proceedings is not to be undertaken as part of that process, the blanket of secrecy would be drawn far more widely than it currently is, with much less material being disclosed to the non-government party than is now the case. If, on the other hand, CMP is adopted and the *Wiley* balance for testing disclosure is retained (a matter considered below), there would still be a considerable watering-down of the *Wiley* balance because there would no longer be a powerful incentive for the Government and the court to find that the material should be disclosed (as it would no longer be the consequence of such a finding that the material in question would be excluded from the trial). Thus

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<sup>23</sup> The Court of Appeal stated in *Al Rawi*, for example, that “... it 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” (para 56).

even if the PII *Wiley* balance is retained the reforms would inexorably lead to less disclosure and more secrecy than is currently the case.<sup>24</sup>

- There is a real danger of the spread of CMP, with closed material being used widely in civil claims involving sensitive information, including against the police and in actions between private parties.

20. The Green Paper asserts (at para 2.3) that “CMPs have been a part of the framework of the courts of the UK since 1997” and that as an existing mechanism it “has been proven to work effectively” and is familiar to practitioners. Later in the same paragraph it is claimed that CMPs “have proved that they are capable of delivering procedural justice”. We do not accept the accuracy of these assertions. CMP, as is well known, was introduced into our law in 1997 in the specific context of SIAC, a statutory tribunal designed to solve a particular problem that had been exposed by the ECtHR in *Chahal v UK*.<sup>25</sup> Subsequently, CMP has been adopted in a range of other legal proceedings, including control orders and asset-freezing cases. The suggestion that it has been “proven to work effectively” is surprising given how much appeal court litigation there has been.<sup>26</sup> Furthermore, the Joint Committee on Human Rights found in 2010 that the use of CMP, notwithstanding the contributions that special advocates may make (on which see below), “is not capable of ensuring the substantial measure of procedural justice that is required”,<sup>27</sup> comments which were judicially endorsed both in *Al Rawi* and in *Tariq*.<sup>28</sup>
21. All of this said, however, we now consider the possibility that future, exceptional and wholly unusual cases may emerge in which there may be a justification for a limited use of CMP in civil actions. *Everything that follows in this section must be read and understood as being subject to what we have written thus far.*

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<sup>24</sup> See *Al Rawi v Security Service* [2011] UKSC 34, at para 96 (Lord Kerr): “At the moment with PII, the state faces what might be described as a healthy dilemma. It will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII. Under the closed material procedure, all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make.”

<sup>25</sup> (1996) 23 EHRR 413.

<sup>26</sup> E.g. *MB v SSHD* [2008] 1 AC 440 (fairness, control orders); *RB (Algeria) v SSHD* [2010] 2 AC 110 (fairness, immigration); *A v SSHD* [2004] QB 335 (fairness, detention); *A v UK* (fairness, detention); *AF (No 3)* (fairness, control orders); *Bank Mellat v HM Treasury* [2010] EWCA Civ 483, [2010] 3 WLR 1090 (fairness, asset freezing); *HM Treasury v Ahmed* [2010] 2 AC 534 (fairness, asset freezing); *ZZ v SSHD* [2011] EWCA Civ 440 (fairness, exclusion from UK).

<sup>27</sup> JCHR, *9th report of 2009-10*, HL 64, HC 395, para 90.

<sup>28</sup> *Tariq v Home Office* [2010] EWCA Civ 462, para 32 system is “inherently imperfect”; *Al Rawi v Security Service* [2010] EWCA Civ 482, para 57 “cannot be guaranteed to secure procedural justice”. In the Supreme Court in *Al Rawi* Lord Dyson noted the “limitations” on SAs (para 37) and suggested that the best that they could do was to “mitigate the weaknesses [of a CMP] to some extent” (para 36). Lord Kerr described the “necessary, inevitable but ultimately inherent frailties of the special advocate system” (para 94). Lord Kerr went to say that “the challenge that the 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. It should always be a measure of last resort; one to which recourse is had when no possible alternative is available. It should never be regarded as an acceptable substitute for the compromise of a fundamental human right such as is at stake in this case” (para 94).



22. The Green Paper refers to the prospect of claims being struck out if the operation of PII would remove so much material from a case that a defendant—the Green Paper anticipates that this will be an agency of the Government—could not have a fair trial.<sup>29</sup> Reference is made in this regard to the case of *Carnduff v Rock*.<sup>30</sup> In that case an action by a police informer was struck out partly on the ground that core evidence would be incapable of being disclosed. However *this case is not a safe precedent* for a number of reasons, not least that the court made clear it was not deciding any point of general application and relevant cases on PII do not appear to have been cited to the court. It has been doubted in subsequent cases.<sup>31</sup> And even if the case was correctly decided as a matter of contract law, there is no automatic read-across to other areas of the law.
23. In our view, the prospect of claims being struck out as unfair to one of the parties on the ground that core material cannot be disclosed could properly arise only *after* a PII exercise has been completed, with the court having weighed the harm to the public interest in disclosing material against the harm to the public interest in it being withheld (i.e., the approach set out in *Wiley* and *Conway v Rimmer*: see para 36 below). Importantly, the *Wiley* case makes clear that at this stage the Government has a duty to consider and propose other ways of adducing sufficient information so to enable the trial to go ahead:

*“If the legal advisers of a party, who is in possession of material which is the subject of immunity from disclosure, is aware of the contents of that material, they will be in a better position to perform what they should consider to be their duty, that is to assist the court and the other party to mitigate any disadvantage which results from the material being not disclosed. It may be possible to provide any necessary information without producing the actual document. It may be possible to disclose a part of the document or a document on a restricted basis. An assurance may be accepted by counsel. In many cases co-operation between the legal advisers of the parties should avoid the risk of injustice. There is usually a spectrum of action which can be taken if the parties are sensible which will mean that any prejudice due to non-disclosure of the documents is reduced to a minimum.”*<sup>32</sup>

24. The possibilities go beyond those mentioned in this extract and extend to holding hearings *in camera* and providing material to legal representatives in a “confidentiality ring” (excluding the material from being disclosed to lay clients). These methods are used in cases involving highly sensitive trade secrets and in family law cases where immediate and severe threats to individual safety may arise if material is disclosed. We note that a

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<sup>29</sup> The law of public interest immunity has always recognised that where documents are covered by PII this may mean that one party is unable to make good a valid claim, or a party is unable to make out a defence. This is not an exceptional situation: it is also the case where material is covered by legal privilege, or statutory prohibitions on disclosure (including RIPA 2000, section 17), or even where documents have been lost or destroyed.

<sup>30</sup> [2001] EWCA Civ 680, [2001] 1 WLR 1786.

<sup>31</sup> See, e.g., *Coles v Barracks* [2007] ICR 60, per Wall LJ at [78].

<sup>32</sup> *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274, pp 306-7.

form of “confidentiality ring” is used in the United States to ensure that the legal representatives of detainees at Guantanamo Bay have access to relevant information.<sup>33</sup>

25. Given these considerations—none of which is recognised in the Green Paper—*it is in our view very unlikely that a case that has progressed through the full PII process (including the final stage as articulated in the preceding paragraphs) cannot be tried on the ground that it would be fundamentally unfair to one party. We are aware of no case that has got to the end of a Wiley process that has proved impossible to litigate in an acceptable manner* (whether *in camera*, or subject to confidentiality rings, or otherwise).
26. Nonetheless, we recognise that it is conceivable that in a very small number of cases such a situation could potentially arise. *Obiter* comments of several of their Lordships in *Al Rawi* contemplate that such a situation might arise, and therefore the prospect must be taken seriously.<sup>34</sup> We emphasise however that such a prospect, arising in extremely limited and currently hypothetical circumstances, cannot justify the broad and sweeping reforms currently proposed in the Green Paper, in which a CMP could potentially be imposed by the Government in place of a PII procedure in any case involving material relating to national security.
27. Furthermore, if an exceptional power to allow a court to consider material which is withheld from disclosure is to be introduced, this must be done in an even-handed fashion. It cannot be done solely to advantage the Government. PII may prejudice *claimants* in civil cases by depriving them of evidence that will assist them in proving their cases. Claims can fail or be subject to summary judgment at an early stage because material necessary to substantiate allegations is the subject of a successful PII certificate.<sup>35</sup> If the Government is serious about addressing exceptional cases of fundamental unfairness in the context of PII by allowing material to be put before the court, then it must be open to the court to consider such material in a case where the prejudice is caused not to the Government but to the other party.
28. Indeed, we consider that the prospect of claims alleging very serious wrongdoing on the part of state agencies (such as complicity in kidnapping, forced disappearances and

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<sup>33</sup> The use of confidentiality rings is likely to raise fewer difficulties in cases where the information that the government wishes to withhold does not relate specifically to the conduct of the individual from whom they seek to withhold it and therefore is not material which that individual is able to rebut or challenge from his or her own personal knowledge. For example, general information about treatment of detainees in third countries which is sensitive and not in the public domain may be relevant to a case against the Security Service but does not constitute imputations of the conduct or character of the claimant.

<sup>34</sup> See, e.g., paras 50 (Lord Dyson), 86 (Lord Brown) 103 (Lord Mance) and 158 (Lord Clarke). Lord Mance stated (at para 108) that “As I understand it, no member of the Supreme Court doubts the approach in *Carnduff v Rock* as a possibility”. See also the significant case of *MPC and SOCA v Times Newspapers* [2011] EWHC 2705 (QB).

<sup>35</sup> Perhaps the best known case in which claimants sought but were refused disclosure of material of importance to their claim was *Duncan v Cammell Laird* [1942] AC 624 in which plaintiffs sought disclosure of documents about the trial of a military submarine in Liverpool dock, which had sunk killing many hands.

torture—as have been made in several recent cases) being dismissed because key evidence inculcating state agencies is held to be immune from disclosure, to be a very concerning one from the perspective of the rule of law.<sup>36</sup> If the Government decides to bring forward reforms that will enable courts to consider sensitive material that is withheld from disclosure, ***those reforms must be even-handed and must ensure that the Security and Secret Intelligence Services and other government agencies are subject to fuller accountability, rather than merely providing a trump card for the Government to play in its defence to a civil claim.***

29. Furthermore, where both parties to a case consent to certain matters being subject to a closed procedure this is unlikely to be an objectionable course, although it should remain subject to the case-management powers of the court. In the case of *Evans v Secretary of State for Defence*,<sup>37</sup> for example, concerning the legality of the United Kingdom policy of transferring detainees captured in Afghanistan to the Afghan security services, the parties agreed to orders that ensured that certain material, which was outside the knowledge of the claimant in that case and of importance but not central relevance to the issues before the court, could be considered by the court although not disclosed to the claimant and her lawyers. Other material was subject to an *in camera* process and to specific confidentiality undertakings given by the claimant's legal representatives. These various forms of order, agreed by the parties, enabled the matters to be dealt with expeditiously and fully by the court in a case in which time was of the essence.
30. ***Therefore, exceptional resort to a CMP in a civil action could potentially be justified, but only in the following cases and, even then, only if subject to strict compliance with the constraining principles set out below:***

30.1. ***A claim which, even after the exercise required by the Wiley case has been completed, resulted in such material being withheld by reason of PII that it would be so fundamentally unfair to the defendant for the case to be determined on the available evidence that the case would have to be struck out. In such a case, a claimant could be given the option by the court of proceeding on the basis of there being a closed element to the proceedings.***

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<sup>36</sup> See Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action* (Geneva, 2009), pp 85-8.

<sup>37</sup> [2010] EWHC 1445 (Admin), see esp paras 8 and 13. To take a contemporary example: there have been several claims alleging that the Security and/or Secret Intelligence Services have been complicit in the torture of individuals by foreign intelligence services. Evidence of such complicity may be held to be covered by public interest immunity. Consider for instance the recent chance discovery of correspondence between the Secret Intelligence Service and Colonel Gaddafi. Absent the possibility of adopting a CMP such claims may encounter real difficulties, notwithstanding that they concern the gravest international wrongdoing.

30.2. *A claim in which, even after the exercise required by Wiley had been completed, material of fundamental importance to a claimant is withheld by reason of PII such that the claim cannot succeed. In such a case the claimant could be given the option by the court of consenting to there being a closed element to the proceedings.*

30.3. *Where both parties consent to a closed element to proceedings and the court approves such a course as being in the interests of justice.*

31. Furthermore, if the use of CMP in civil cases is introduced, as is the Government's current intention, it would be vital *strictly* to adhere to four constraining principles, as follows.

*(1) Strictly defined circumstances*

32. *First*, the circumstances in which CMP could be used would have to be strictly defined and confined. We welcome the Government's intention that CMPs should be used only where "absolutely necessary to enable the case to proceed in the interests of justice" (para 2.5).

33. In relation to the first category of case listed above (para 30.1), *CMP could properly be available only where, without it, a case would be so unfair or incomplete that the court would have no option but to strike it out*. Mere unfairness or prejudice to a party should never be enough to justify a CMP in a civil claim. It has always been recognised that PII may lead to some unfairness and prejudice to one party in being unable to present their case—this is a price to be paid for open justice:<sup>38</sup>

*"Public interest immunity is a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal proceedings. ... If a document is not relevant and material it need not be disclosed and public interest immunity will not arise."*

34. If mere unfairness or prejudice were the test for having a CMP there would be such a procedure in every case in which PII is currently upheld.

*(2) Greatest possible disclosure including Wiley balance*

35. *Secondly*, there would have to be the greatest possible disclosure to the other party to the case. We welcome the Government's recognition that: "every effort is and should

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<sup>38</sup> *Wiley*, at pp 280F, 281D-E (Lord Templeman). See also at pp 288G-H, 299-300 (Lord Woolf); and see further *Conway v Rimmer* [1968] AC 910, at p 937E; *Duncan v Cammell Laird* [1942] AC 624, at pp 629-32; *Ex parte Coventry Newspapers Ltd* [1993] QB 278 at pp 284, 292B, 292E (Lord Taylor CJ).

continue to be made to have as much material considered in open court as possible” (para 2.4). This means that ***the court must continue to be able to weigh the potential harm in disclosing the material against the importance of disclosing that material.*** And this means, in turn, that greater justification for failing to disclose evidence of serious wrongdoing, such as complicity in torture, will be required than for material that is not of that nature.

36. The “*Wiley balance*” is a fundamental principle of UK law.<sup>39</sup> It was established in the celebrated case of *Conway v Rimmer*:<sup>40</sup>

*“I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister’s view: full weight must be given to it in every case, and if the Minister’s reasons are of a character which judicial experience is not competent to weigh, then the Minister’s view must prevail.”*

37. In practice, this balance has always ensured that operationally sensitive material is not disclosed—for example sources and secret methods of surveillance. We are not aware of any case in which any such material has been disclosed or, indeed, of any case in which the *Wiley balance* has been applied where material has been disclosed that caused harm to national security. The Government has not identified any objection to the operation of the *Wiley balance* in ordinary civil claims in the Green Paper and it is not explicitly identified as a matter requiring reform.<sup>41</sup>
38. The principle that there must be maximum possible disclosure also means, of course, that it would be wrong in principle for a CMP to be ordered in relation to the entirety of a claim if it could properly be limited to certain issues in the claim.
39. It also requires that alternatives to CMP are seriously explored in each instance where its use is proposed, including the use of confidentiality rings, gisting and release of documents on a restricted basis.<sup>42</sup> It could not be absolutely necessary for there to be a CMP unless such options had been explored and were demonstrably unsatisfactory.
40. Thus, ***no decision to have a CMP should be taken until after the disclosure process has been gone through and as much disclosure provided as possible.*** To impose a CMP at an

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<sup>39</sup> The “*Wiley balance*” is not applied in control order or SIAC cases; this has the effect that the blanket of secrecy is extremely wide in those jurisdictions.

<sup>40</sup> *Conway v Rimmer* [1968] AC 910, at p 952 *per* Lord Reid.

<sup>41</sup> As noted in para 19 above, however, the balance would be watered down if CMP were to be used.

<sup>42</sup> As in, e.g., *Evans v SSD* [2010] EWHC 1445 (Admin), above n 37.

earlier stage would pre-empt disclosure questions and would undoubtedly lead to much more secrecy.<sup>43</sup>

**(3) Decision should be made by a judge**

41. Thirdly, *it must be for the court to decide whether and the extent to which a CMP should be used*. The Green Paper recommends (at para 2.7) that the Secretary of State would make a decision that certain relevant material would be damaging to disclose, and that this decision would be reviewable on judicial review grounds. Effectively, this would put the matter of whether to utilise a CMP in the hands of the Secretary of State. We are clear that this proposal cannot be justified for the following reasons:

41.1. The Government's justification is that the Secretary of State "is best placed to assess the harm that may be caused by disclosing sensitive information" (para 2.6). However, as we noted above, the justification for having a CMP in civil claims is to allow cases to proceed which would otherwise be struck out on grounds of unfairness to a party. The justification proffered is not to prevent disclosure of material that would otherwise be disclosed to prevent harm to national security. The question that has to be asked – whether a CMP is required in the *interests of fairness and justice to the parties* – is manifestly one for *a judge* to decide. It is not appropriate for one of the parties to a dispute to decide for themselves that unless the proceedings are conducted in secret they will not get a fair trial.

41.2. In *Tariq*, Lord Hope found (at para 7) that the use of a CMP was compatible with Article 6 and EU law<sup>44</sup> *only* because protections were in place, which included that the decision to resort to a CMP rested with the judge:

*"the decision as to whether closed procedure should be resorted to rests with the tribunal or the employment judge. The fact that the decision is taken by a judicial officer is important. It ensures that it is taken by someone who is both impartial and independent of the executive. Second, there is the fact that, as this is a judicial decision, it will not be taken without hearing argument in open court from both sides. It will be an informed decision, not one taken without proper regard to the interests of the individual. ... It is a decision that can and should be kept under review as the case proceeds."*

41.3. The Government's suggestion also plainly does not work and is manifestly unsatisfactory for several other reasons. (1) First, if the alternative to a CMP would

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<sup>43</sup> As the Court of Appeal stated in *Al Rawi*: "If ... the defendants are suggesting that the closed material procedure is to be adopted without first carrying out the PII procedure, it may be potentially less expensive and time consuming in some cases, but it would mean that material which would not be excluded from the trial process on a traditional PII procedure will not be disclosed to the claimants, but will be considered by the court in closed session which would be to the claimant's obvious disadvantage" (para 54).

<sup>44</sup> Joined Cases C-402/05P and C-415/05P *Kadi v Council* [2009] AC 1225; *Brown v Stott* [2003] 1 AC 681; compare *Tinnelly & Sons v UK* (1999) 27 EHRR 249.

be that the claim was struck out because the defendant could not adduce sufficient material adequately to make out its defence, the Secretary of State would in fact have no incentive to impose a CMP in cases brought against the Government: it would be in the Government's interest for the claim to be struck out. Nor would the Secretary of State have any incentive to impose a CMP in cases where evidence of wrongdoing on the part of the Government was covered by PII. In practice, the Government would have an incentive to impose a CMP only in cases that would or might not be struck out where there was material helpful to its case (and not to the claimant's) which it wished to show to a court. On the Government's current proposal there would be no power for a court itself to order a CMP to assist claimants where there is evidence of wrongdoing. Such a scheme is fundamentally unfair, one-sided and, in our view, unworkable; (2) although it is said that the Secretary of State's decision to impose a CMP would be subject to judicial review, since it will be made by reference to a quantity of material which the claimant had not seen, it will be impossible in practice effectively to challenge the decision. Making the decision open to judicial review therefore is not a practical or effective alternative to putting the decision to impose a CMP in the hands of the judge; (3) it is also unclear how a system could work in cases involving private parties or non-central government agencies to which the Secretary of State would not be a party;<sup>45</sup> (4) finally, we note that the Government has not identified any other country where a party to a case can elect to hold part of the case in secret.

#### ***(4) Ongoing review***

42. *Fourthly*, the need for a CMP ***must be kept under review as the proceedings progress***. In *Tariq*, Lord Hope emphasised the importance of this (see above). In *Wiley*, Lord Templeman stated (at p 281) that:

*"In civil proceedings ... pleadings may be amended, and the issues which finally arise at the trial may not be perceived or understood at the pleadings stage."*

43. This provides a further reason why it is appropriate for a judge to make the decision about whether a CMP should be utilised. Furthermore, unless the question of the necessity of a CMP is kept under review it will not conform to the principle that it should be used only when absolutely necessary.

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<sup>45</sup> See, e.g., *MPC and SOCA v Times Newspapers* [2011] EWHC 2705 (QB).

***Remaining concerns: the scope of the reform***

44. Even if the four principles set out above are adhered to, there are remaining concerns, especially in relation to the scope for the use of CMP in different types of civil proceedings. This is another issue that the Green Paper does not address, but which is fundamental. The following types of case are just some of those in which CMP could potentially be used if the Government's suggestions were adopted but where it is either clear that CMP would not be appropriate or it is unclear how the system could work.

44.1. *Civil proceedings between private parties.* For example:

- In *MPC & SOCA v Times Newspapers* [2011] EWHC 2705 (QB) it has recently been recognised judicially that if a newspaper is precluded from relying on leaked documents to defend itself in libel proceedings it could be denied a fair trial as it cannot demonstrate the truth behind statements made in print. Could CMP be available in libel proceedings (with the result that a person might lose a libel claim without knowing why)?
- In *Duncan v Cammell Laird* [1942] AC 624 PII was applied to documents received by the defendant shipbuilders from the Admiralty relating to the construction of a military submarine in a negligence claim brought by the estates and families of men drowned when the submarine sank on a trial dive.

44.2. *Civil actions against the police.* There has been no suggestion that there is any need for reform in the important area of civil actions against the police. The police very often have to litigate claims where they have taken action (such as an arrest) based on sensitive information, which they then have to justify in court. They have managed to do this over many years without recourse to a CMP. Indeed, when an *ad hoc* CMP was proposed in these circumstances, the Court of Appeal rejected the proposal as misconceived and unnecessary: *Lamothe v MPC* (unreported, judgment of 25 October 1999). And see further *Raissi v MPC* [2007] EWHC 3421 (QB), in which the High Court ruled that a claim for wrongful arrest could (and should) be tried notwithstanding that the defendant had sought to argue that the reasons for the arrest had to remain secret (by virtue of RIPA, s. 17, which we address below). In the event, the claim was tried and the claimant was successful.<sup>46</sup>

44.3. *Negligence, breach of statutory duty, Francovich damages and other claims against public bodies* including law enforcement agencies such as SOCA, HM Customs and

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<sup>46</sup> *Raissi v MPC* [2007] EWHC 2842 (QB); affirmed on appeal [2008] EWCA Civ 1237, [2009] QB 564.



Excise, but not limited thereto. The Green Paper is silent about this, and yet national security considerations and PII arise, for example, in the telecommunications sector: does the Government envisage CMP in such contexts?

- 44.4. *Claims against the Armed Forces*, such as the numerous damages claims currently proceeding through the courts concerning alleged torture and unlawful killings by the Army in Iraq, including military intelligence and military interrogators: see *R (Mousa) v SSD* [2010] EWHC 3304 (Admin). Such claims are brought at common law and under the Human Rights Act. If the reforms come into effect could CMP be used in such cases?
- 44.5. *Habeas corpus claims/detention judicial reviews*: there are limited contexts in which British authorities presently have powers to detain. But in principle such authorities should not be able to rely on closed material to justify detention. Even at present this situation could potentially arise in relation to judicial review claims for violation of *Hardial Singh* principles or in relation to detention by British Forces overseas. See, e.g., *Al Jedda v SSD* [2008] 1 AC 332. In our view it is clear that CMP should not be available in such cases.
- 44.6. *Ordinary judicial review claims* (not also actionable in tort). CMP has been used in several judicial review claims. We understand that there are currently judicial review challenges to decisions taken by the Government to nominate individuals for EU asset-freezing measures. In *Evans v SSD* [2010] EWHC 1445 (Admin) a CMP was used by agreement to enable the court to have a full picture of diplomatic exchanges with Afghan authorities and to see information held by the Intelligence Services that potentially could not be disclosed due to section 2 of the Intelligence Services Act 1994. In *R (Gillan) v MPC* [2006] 2 AC 307 the claimants declined a CMP to challenge the underlying intelligence material on which the Home Secretary had approved the use of stop and search powers and failed to establish their case (see paras 17 (Lord Bingham) and 64 (Lord Scott)).
- 44.7. Claims brought by public authorities against individuals. An example of such an action is *Ministry of Defence v Ben Griffen* [2008] EWHC 1542 (QB) in which the MOD sought an injunction for breach of confidence against Mr Griffen who had made public statements about matters learned whilst serving in British special forces. Could it be justified for CMP to be used in such contexts?
45. We do not consider that the Government's proposals have adequately thought through these "boundary issues" relating to the use of CMP. Unless these issues can be satisfactorily resolved we do not think that a general power to use CMP in civil claims

could be justified because there would be too great a risk of its use in inappropriate circumstances. *Certainly, the present proposal to provide the Secretary of State with a power to impose CMP in any civil proceedings, whatever their nature or subject-matter, as long as they involve “sensitive” material, is far too broad and unspecific and has not been, and could not be, justified.*

46. In any event, given the highly complex nature of these issues and the very great difficulty in identifying in advance all the circumstances in which use of CMP would be justified or not justified, and given the potential far-reaching ramifications across different areas of the civil justice system, we consider that *any reform should be subject to an independent review after three or five years.*

### **A specialist court?**

47. We recognise that there is a strong argument in favour of a new tribunal that deals with national security matters in order to limit the degree to which CMP might spread into unjustified types of proceedings. However, it would be very difficult to anticipate all the situations in which it would be appropriate for such a tribunal to have jurisdiction (and those which it would not). Such a system is also a departure from the general principle that government officials are subject to the ordinary courts and the ordinary law. The Investigatory Powers Tribunal, in which there is blanket secrecy, does not provide an encouraging precedent. Since the Government has not proposed the use of a specialist court we will not develop further points on this subject.

### **The role and powers of special advocates**

48. While we welcome the Government’s willingness to reduce a number of the unnecessary restrictions on Special Advocates (SAs), no improvements can alter the basic unfairness of proceedings from which one of the parties is excluded.
49. Three core problems have been identified with regard to the role and powers of SAs in the UK.<sup>47</sup> The first is the difficulties SAs face in seeking to adduce evidence to rebut allegations made in closed material. The second is the difficulties SAs face in mounting effective challenges to Government objections to disclosure of material. The third problem is the way that SAs are hampered by rules that severely restrict the extent to which and the manner in which they may communicate with the party concerned after the closed material has been served on them.

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<sup>47</sup> The key sources include M. Chamberlain (2009) 28 *CJQ* 314 and 448; and JCHR, *9th report of 2009-10*, HL 64, HC 395.

50. The Green Paper says next to nothing about the first and second of these problems, other than to propose that they may be addressed through increased training (para 2.26). This is a significant omission from the Green Paper. The opportunity should have been taken squarely to address all the major concerns as to the operation of the system of SAs, including the first and second problems identified above. In any case, we very much doubt that the problems are either caused by a lack of training or are remediable through an increase in training.
51. The House of Commons Constitutional Affairs Committee recommended in 2005 that the Government should consider making available intelligence experts such as retired members of the Security and Secret Intelligence Services to provide expert evidence in appropriate cases. The Government has rejected this proposal on the basis that this would breach the duty of loyalty which such individuals owe to the service.<sup>48</sup> This objection is misguided. Were it valid, retired members of the services ought not to be sitting in judgment in SIAC. But there is no basis for it: public officials owe allegiance to the Crown and the Crown's courts.
52. The Green Paper contains a modest proposal as to the SA's ability to communicate with the party concerned after the closed material has been served on the SA. On this proposal we make the following observations.
53. We question whether any significant liberalisation is possible, in practice. For instance, suppose that, after the closed material has been served on the SA, he or she wishes to ask the individual concerned what they were doing between dates X and Y. If it is possible for a SA to ask this question without compromising national security, does it not follow that it would be possible to disclose in open the fact that the individual's actions between those dates is relevant to the case against them?
54. One matter that could be improved relates to the present need for the SAs to inform the Government of any communication that they wish to make with the individual concerned after the closed material has been served on the SA, in order to allow the Government to object. This has a significant chilling effect on communications, as it reveals confidential information to the Government. Certain communications, such as relating to case management issues, may be of real strategic importance but raise no national security concerns. Equally, and for similar reasons, SAs may have good reasons for not wanting the judge to know the content of some communications.

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<sup>48</sup> *Government Response to the Constitutional Affairs Select Committee Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, Cm 6596, June 2005, p 10.

55. We therefore suggest that SAs be permitted to choose whether to request permission to make a communication from either the judge or the Government. If the Government permits the communication then it need not be communicated to the judge.<sup>49</sup> If the representation is made to the judge he or she should be able to determine whether the communication raises significant national security considerations and thus communicated to the Government. The SA should be given the option of withdrawing the application to make the communication in such a situation.
56. The Green Paper indicates that the Government will require all communications, however mundane, to be notified to the Intelligence Services. In para 2.30 it is claimed that “without detailed knowledge of the investigation, or other linked investigations, the SA could inadvertently disclose sensitive information, for example the identity of an agent or details of related ongoing investigations”. The Government should explain whether this is a purely hypothetical concern or whether it has actually arisen in practice. In our view there are clearly some communications in which such possibilities would be purely fanciful.<sup>50</sup>

### **The scope of the *AF (No 3)* disclosure requirement**

57. The *AF (No 3)* disclosure requirement is based on the requirements of Article 6 of the ECHR as interpreted by the Strasbourg Court in *A v UK*.<sup>51</sup> Equivalent principles apply under EU law, especially under Article 47 of the Charter. The situations in which the *AF (No 3)* / *A v UK* disclosure requirements apply is a matter that is being tested on a case-by-case basis in the courts in the UK, Strasbourg and Luxembourg.<sup>52</sup>
58. Establishing a statutory presumption as to the circumstances in which the *AF (No 3)* disclosure requirement applies would not avoid the need for the precise parameters of the principle being worked out in the courts. This issue cannot be resolved by domestic legislation alone but requires careful and detailed reference to ECHR and EU law. The content of UK legislation could not have any appreciable influence on the CJEU or

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<sup>49</sup> In practice it often happens informally that a Special Advocate asks the Government’s Counsel whether a message can be passed and sometimes this will occur in the presence of the Government’s Counsel. This aspect of the proposal is thus not novel.

<sup>50</sup> The Government should further explain why the additional training to be given to SAs (see para 2.26) would, in their view, be inadequate to remove any real risk.

<sup>51</sup> (2009) 49 EHRR 29.

<sup>52</sup> For example: *ZZ v SSHD* [2011] EWCA Civ 440 (reference to ECJ – citizenship); Case C-402/05P *Kadi No 1* [2009] AC 1225; *Kadi No 2* [2011] 1 CMLR 697 (asset-freezing); Case C-27/09P *PMOI* (14 July 2011) at AG Sharpston [244]-[245] and fn89 (asset-freezing); *Home Office v Tariq* [2011] UKSC 35 (discrimination claims); *IR (Sri Lanka) v SSHD* [2011] EWCA Civ 704 (removal); *Liu v Russia No 2* App. No. 29157/09, 26 July 2011 (removal); *BB and BC v SSHD* [2009] EWHC 2927 (Admin) (control orders light); *Cart* [2009] EWHC 3052, [2011] QB 120 (SIAC bail).

ECtHR. Therefore we see no value in this suggestion. If anything, a legislative presumption would only complicate the law and lead to more rather than less litigation.

### **The powers and jurisdiction of the Investigatory Powers Tribunal**

59. The IPT was established principally to deal with complaints against the Security and Secret Intelligence Services and law enforcement agencies concerned with the investigatory powers under the Regulation of Investigatory Powers Act 2000 (“RIPA”) (and not, as stated in the Green Paper at para 2.63, to provide a judicial body to hear and determine claims and complaints against the agencies based on the Human Rights Act 1998).
60. The IPT’s procedures are more secretive and one-sided than the SIAC model. For example, there is rarely an adversarial component to hearings (almost invariably this occurs only in cases involving general points of law); there is a total and blanket prohibition on disclosure of any information whether it endangers national security or not; and if a claim is rejected no reasons are supplied.<sup>53</sup> From its inception in October 2000 until the end of 2008 the IPT considered 799 complaints, upheld three, dismissed 796 without reasons and gave only five preliminary determinations on questions of law.
61. In *A v B (IPT: Jurisdiction)*<sup>54</sup> the Supreme Court interpreted its jurisdiction in a way that meant the IPT had compulsory jurisdiction for all claims against the Security and Secret Intelligence Services based on the Human Rights Act 1998 (“HRA”). This produces anomalies. For example, a claim against the Security Service alleging complicity in torture will be heard in the High Court insofar as it is based on common law causes of action, but any claims under the HRA must be determined by the IPT.
62. It also means that the UK courts have no jurisdiction to consider HRA claims against the Intelligence Services relating to use of humiliating and degrading treatment (*e.g. Ireland v UK* (1979-80) 2 EHRR 25) involvement in killing (*e.g. McCann v UK* (1996) 21 EHRR 97) or relating to wrongful disclosure of personal information in violation of Article 8 (*R (Hafner) v City of Westminster Magistrates* [2009] 1 WLR 1005).
63. ***We consider that legislation should establish that the IPT’s jurisdiction under the HRA is not exclusive and that it is an appropriate tribunal only for complaints concerning***

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<sup>53</sup> See *IPT Ruling on Article 6* IPT/01/62 and IPT/01/77, 23 Jan. 2003.

<sup>54</sup> [2009] UKSC 12, [2010] 2 AC 1.

**RIPA powers.** It would then fall to the courts to determine whether it is appropriate for claims to proceed in the courts rather than the IPT in other contexts.

64. We also consider that changes need to be made to the IPT's rules, which cannot be justified outside the context of surveillance under Article 6, and question whether it is justifiable for such rules to be made by the Secretary of State who will often be the defendant to complaints.<sup>55</sup>

### **Reform of the *Norwich Pharmacal* jurisdiction**

65. The Government proposes to introduce legislation to remove the *Norwich Pharmacal* jurisdiction where disclosure of the material in question would cause damage to the public interest (para 2.91). Specifically, where material is "held by or originated from one of the [Security or Secret Intelligence] Agencies there would be an absolute exemption from disclosure" (*ibid*). With regard to other Government material the disclosure of which would (in the Government's view) cause damage to the public interest, a Minister will sign a certificate to this effect. It appears that the court would be bound to give effect to such a ministerial certificate unless it was challenged on judicial review grounds (para 2.92). Any such judicial review would need to be held in closed session subject to CMP (*ibid*).
66. ***These proposals are based on several misconceptions.*** The Green Paper states that the Government is "committed to openness and transparency" (para 2.88) and cites the Freedom of Information Act 2000 (FOIA). It then states that FOIA incorporates exemptions for national security material (citing sections 23-24) and asserts that these "are not present in the *Norwich Pharmacal* jurisdiction". This is seriously misleading. In the *Binyam Mohamed* case, for example, both the Divisional Court and the Court of Appeal took extreme care to consider in detail the implications both for national security and for international relations of any judicial decision that material should be disclosed. To suggest that the courts somehow failed to take either national security or international relations into account when ruling on the application of the *Norwich Pharmacal* jurisdiction is not correct. To give the impression that the *Norwich Pharmacal* jurisdiction has been made to apply notwithstanding considerations of national security (or international relations) is likewise unjustifiable. No-one reading the numerous judgments in *Binyam Mohamed* could fail to see that the courts were *consumed* in that case with the

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<sup>55</sup> Whilst the IPT is able to review its own rules for compatibility with Article 6, and held in its ruling on Article 6 that they were compatible, the IPT afforded considerable deference to the Secretary of State in reaching this determination. In *Kennedy v UK* (2011) 52 EHRR 4 the ECtHR held that IPT procedure does not breach Article 6 in the context of surveillance. The Court mistakenly put weight on the fact that: "the IPT is an independent and impartial body, which has adopted its own rules of procedure" (para 167).

task of seeking to weigh the arguments in favour of disclosure as against those in favour of non-disclosure.

67. Furthermore, a number of facts about *Binyam Mohamed* should be borne in mind: (1) the English courts never finally ruled on the *Norwich Pharmacal* claim in respect of the US-originated documents held by the UK – they did not need to, given that the documents were confidentially handed to Mr Mohamed’s security-cleared counsel in the US; (2) after this point the (English) case was concerned only with release of a small number of paragraphs of the Divisional Court’s various judgments that had, on the Government’s insistence, been redacted; (3) the Divisional Court ruled that those paragraphs should be released only after the most careful and detailed consideration of all the various public interests pointing both for and against publication; (4) central to the Divisional Court’s eventual ruling on this point was the despicable mistreatment to which Mr Mohamed had been subjected – it is far from clear that the Divisional Court’s judgment on the application of the *Norwich Pharmacal* jurisdiction would have any real precedential force in a case that was not concerned with credible allegations of torture; (5) but for a certain intervening event in the US, the Court of Appeal would have ruled in the Government’s favour that those paragraphs should not be published (i.e., but for developments in the US the Secretary of State would have won the appeal); (6) no intelligence material was contained in or revealed by those paragraphs of the Divisional Court’s judgments; no source was revealed; no secret techniques of surveillance or intelligence or assessment were revealed: what was disclosed was a very high level gist.
68. Finally, and perhaps most importantly, (7) even if the Court had ruled in Mr Mohamed’s favour on the *Norwich Pharmacal* application, that would not have resulted in the public disclosure of any material, it would simply have provided security-cleared US Counsel on Mr Mohamed’s criminal defence team with material highly relevant to his defence, and (8) the information Mr Mohamed sought was not, for him, a secret: it was evidence recording the mistreatment meted out to him whilst being detained by and the behest of the CIA, which corroborated his own testimony.
69. We do not therefore think there is any justification for the Government’s statement in para 1.44 that because of the *Binyam Mohamed* case:
- “The Government is concerned that the UK’s critically important and hard-earned secrets and those of our intelligence partners may be obtained by individuals through a recent development in our justice system.”*
70. In our view, therefore, ***the proposals are unjustified and go further than is necessary to ensure that genuinely sensitive intelligence material is not disclosed causing harm to the UK or another State.*** To our knowledge there is no evidence that the *Norwich*

*Pharmaceutical* jurisdiction leads to the disclosure of material endangering national security. It must be borne in mind that the *Norwich Pharmaceutical* jurisdiction does not *entitle* a claimant to disclosure: relief is always discretionary. In the exercise of its discretion the court takes fully into account whether considerations of national security (or international relations) ought to prevent disclosure, even before any issues of PII are raised. The current proposal seeks to prevent courts even considering the question of whether disclosure should be ordered. This gives rise to serious rule of law concerns.

### **The role and powers of the Intelligence and Security Committee (ISC)**

71. The proposals as to the ISC (paras 3.1-3.38) are minimal and *will make very little difference in practice*. In brief, the proposals are as follows: that the ISC should report to Parliament as well as to the Prime Minister; that the ISC's remit should be formally acknowledged to extend to the whole intelligence community and not only to the three Agencies (this is already the case in practice), and that operational matters as well as matters of expenditure, administration and policy be formally included in the ISC's remit (again, this is already the case in practice); that consideration be given to giving Parliament a greater say in appointments to the ISC (but no clear proposals are actually made); that the ISC should be accommodated on the parliamentary estate and not in the Cabinet Office; that some evidence sessions could be held in public; and that the ISC should have the power to require (rather than merely to request, as at present) information from the Agencies, but that this should be subject to the Secretary of State's veto. No change is proposed in the requirement that the ISC's reports are liable to be (and in practice are) redacted.
  
72. The ISC is widely regarded by academic commentators to have failed to offer meaningful, robust or effective scrutiny.<sup>56</sup> In recent years a number of its failings have become plainly apparent, e.g.: over UK intelligence as to Iraqi weapons of mass destruction (where the ISC's report may be compared with that of the Butler Review); over rendition and the handling of detainees (where the ISC's report may be compared with the work of the JCHR and of Human Rights Watch);<sup>57</sup> over 7/7, where the Coroner, Hallett LJ, found that the Security Service had misled the ISC and that the ISC had not been given all the information it requested. (Remarkably, the ISC's response to this was no more than to say that it was "extremely frustrating".<sup>58</sup>)

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<sup>56</sup> See, e.g., P. Gill (2007) 22 *Intell and Nat Sec* 14 and M. Phythian (2007) 22 *Intell and Nat Sec* 75.

<sup>57</sup> To be noted, in particular, are the severe criticisms of the ISC in the JCHR's report on *Allegations of Complicity in Torture*, 23rd report of 2008-09.

<sup>58</sup> ISC, *Annual Report 2010-11*, Cm 8114, recommendation CC, p 72.



73. We know that there are two unpublished ISC reports on detainees (including one on Binyam Mohamed).<sup>59</sup> No satisfactory reasons have been produced as to why these reports remain unpublished; yet the ISC has not criticised the decisions to suppress them.
74. Other aspects of the ISC's work do not inspire confidence: e.g. its statement in its current *Annual Report*,<sup>60</sup> that the Court of Appeal's decision in *Binyam Mohamed* "resulted in the release of US intelligence material" (it did not: it resulted in the release of seven previously redacted paragraphs of the Divisional Court's judgment comprising a high level gist which, while derived from information supplied by the US, contained no intelligence dimension at all). The ISC took evidence from the US allegedly confirming fears that this decision "has put a strain on the UK's security partnership with the US" yet the evidence is entirely redacted from the ISC's report.<sup>61</sup>
75. A root and branch reform of the ISC would start with these problems and would develop proposals designed to address them. In the Green Paper there is not even a mention of these problems – they have been airbrushed entirely out of the account – and there is therefore no attempt to propose any solutions.
76. We suggest the following as real and substantial reforms drawing on best practice identified in the literature:<sup>62</sup> ***parliamentary oversight must be clearly owned by Parliament; Parliament should be responsible for the ISC's membership; the ISC should elect its own chair; the ISC should have unrestricted access to all information necessary to it; it should be able to compel evidence and witnesses; and decisions on reporting and publishing should be for the ISC to make.***
77. Thus, ***there should be a select committee of Parliament, preferably a Joint Committee, to oversee the Intelligence Services.*** The Green Paper's reasons for rejecting this option (para 3.19) are unpersuasive. Two reasons are given: the Government would have no veto on publication of sensitive material and the Agency heads would find it difficult to co-operate given their statutory duties to protect information. The first reason is without substance: Parliament's judgment about what it is necessary in the public interest to publish must be trusted. After all, it is already trusted in respect of other select committees that deal with sensitive matters (Defence, Foreign Affairs, Home Affairs, etc). The second reason is also without merit. Sections 2 of the ISA 1994 and SSA 1989 provide that the Chief / Director General shall be under a duty to ensure that material is not disclosed save

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<sup>59</sup> Ibid, p 60.

<sup>60</sup> Ibid, para 16.

<sup>61</sup> Ibid, paras 228-31.

<sup>62</sup> H. Born and I. Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies* (2005).

for the “proper discharge” of the services’ functions. Disclosure to an oversight committee of Parliament is squarely within that provision. If not, any difficulty would be easily surmounted by amending the legislation.

### **Reform of section 2 of the Intelligence Services Act 1994 and the Security Service Act 1989?**

78. Sections 2 of the ISA 1994 and the SSA 1989 have been raised by the Security and Secret Intelligence Services in a number of civil claims as justifying their refusal to provide disclosure of information relevant to the claim. Exceptions are provided for where such disclosure is necessary for the proper discharge of the functions of the services, where it is in the interests of national security or preventing serious crime or “for criminal proceedings”. The agencies appear to accept that disclosure in cases in which they are themselves subject to serious allegations of wrongdoing falls within the exception for the proper discharge of their functions (including in *Binyam Mohamed*, discussed above). However that does not extend to situations where they hold information relevant to other civil claims and it is far from clear where the agencies regard the boundaries of their disclosure obligation to lie.
79. The sections do not themselves render material held by the Intelligence Services inadmissible in civil proceedings: they simply impose an obligation “to ensure” that there are “arrangements for securing” that information is not disclosed.
80. In our view the legal meaning and effect of these provisions is not sufficiently clear. Their effect could also be manifestly unjustifiable. For example, since the exception relating to disclosure necessary for legal proceedings is limited to criminal proceedings, the Intelligence Services would refuse to acknowledge the existence of, or disclose, information relevant to a habeas corpus claim by a detained individual, or a judicial review claim in which fundamental human rights were at stake. We do not consider this to be compatible with the rule of law or with Article 6 of the ECHR. *These provisions should be embraced within the reforms contemplated by the Green Paper, for example by making clear that there is no duty not to disclose information where required to do so by a court or where necessary for the administration of justice.*

### **Is it justifiable to exclude section 17 of RIPA from the reforms?**

81. Another important provision excluded from the scope of the reforms proposed in the Green Paper is section 17 of the Regulation of Investigatory Powers Act 2000 (“RIPA”).

This section provides that the product of any interception of communications is generally inadmissible as evidence (limited exceptions are provided for in section 18). Yet, if the Government truly considers that CMP is necessary to ensure that courts are able to determine civil claims by reference to all the relevant material, it is difficult to understand why this section should not be also reformed.

82. A further aspect of section 17 is that it also prohibits anything from being done in relation to any civil proceedings which may “in any manner” disclose any circumstances from which it “may be inferred” that any intercepted communications are even relevant to legal proceedings. This provision means that currently in any civil proceedings the Government or the police will not even inform the judge on an *ex parte* basis that intercepted communications are relevant to the proceedings. In the *Al Rawi* claim it was discovered that the Government were withholding from the claimants, the court and the Special Advocate appointed to address PII issues, relevant evidence on the basis of a statutory prohibition. The Government refused to indicate, even to the judge or the Special Advocate, which statute they considered to prohibit the disclosure of information.
83. In our view, any reform of civil procedure in the national security context must grapple with such issues, which go to the heart of the rule of law in this context.

## Summary of conclusions

1. **The Government has not demonstrated, either in the Green Paper or elsewhere, that current legal rules pose a danger to national security (para 5)**
2. **We are not aware of any case in which operationally sensitive security information has been disclosed by a UK court against the opinion of a Government Minister (para 8)**
3. **National security must be protected (by all branches of the State, and not only by the Government) but its protection must be secured in the light of the fundamental principles of freedom and fairness, and not at their expense (para 12)**
4. **The two key principles of law in this area are those of open justice and natural justice. Closed material procedures depart from both principles (para 16)**
5. ***Carnduff v Rock* is not a safe precedent (para 22)**
6. **It is in our view very unlikely that a case that has progressed through the full PII process cannot be tried on the ground that it would be fundamentally unfair to one party. We are aware of no case that has got to the end of a *Wiley* process that has proved impossible to litigate in an acceptable manner (para 25)**
7. **Exceptional resort to a CMP in a civil action could potentially be justified, but *only* in the following cases and, *even then*, only if subject to strict compliance with the constraining principles set out below:**
  - **A claim which, even after the exercise required by the *Wiley* case has been completed, resulted in such material being withheld by reason of PII that it would be so fundamentally unfair to the defendant for the case to be determined on the available evidence that the case would have to be struck out. In such a case, a claimant could be given the option by the court of proceeding on the basis of there being a closed element to the proceedings.**
  - **A claim in which, even after the exercise required by *Wiley* had been completed, material of fundamental importance to a claimant is withheld by reason of PII such that the claim cannot succeed. In such a case the claimant**

could be given the option by the court of consenting to there being a closed element to the proceedings.

- Where both parties consent to a closed element to proceedings and the court approves such a course as being in the interests of justice (para 30)
8. If a CMP is to be made available in civil actions, it must be subject to the following constraining principles:
- in relation to the first category of case, a CMP could be properly available in a civil claim only where, without it, a case would be so unfair or incomplete that the court would have no option but to strike it out (para 33)
  - the court must continue to be able to weigh the potential harm in disclosing the material against the importance of disclosing that material (para 35)
  - no decision to have a CMP should be taken until after the disclosure process has been gone through and as much disclosure provided as possible (para 40)
  - it must be for the court to decide whether and the extent to which a CMP should be used (para 41)
  - the need for a CMP must be kept under review as the proceedings progress (para 42)
9. The present proposal to provide the Secretary of State with a power to impose CMP in any civil proceedings, whatever their nature or subject-matter, as long as they involve “sensitive” material, is far too broad and unspecific and has not been, and could not be, justified (para 45)
10. Any reform as to the use of CMP in civil actions should be subject to an independent review after three or five years (para 46)
11. We consider that legislation should establish that the jurisdiction of the Investigatory Powers Tribunal under the Human Rights Act is not exclusive and that it is an appropriate tribunal only for complaints concerning RIPA powers (para 63)
12. The Green Paper’s proposals as to reform of the *Norwich Pharmacal* jurisdiction are based on several misconceptions (para 66)

13. **The proposals as to *Norwich Pharmacal* are unjustified and go further than is necessary to ensure that genuinely sensitive intelligence material is not disclosed causing harm to the United Kingdom or another State (para 70)**
14. **The proposals as to the Intelligence and Security Committee are minimal and will make very little difference in practice (para 71)**
15. **Parliamentary oversight must be clearly owned by Parliament; Parliament should be responsible for the ISC's membership; the ISC should elect its own chair; the ISC should have unrestricted access to all information necessary to it; it should be able to compel evidence and witnesses; and decisions on reporting and publishing should be for the ISC to make. Thus, there should be a select committee of Parliament, preferably a Joint Committee, to oversee the Intelligence Services (paras 76-77)**
16. **Section 2 of the Security Service Act 1989 and section 2 of the Intelligence Services Act 1994 should be embraced within the reforms contemplated by the Green Paper, for example by making clear that there is no duty not to disclose information where required to do so by a court or where necessary for the administration of justice (para 80)**

**ADAM TOMKINS  
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6 January 2012**