

**Lord Kerr at the Lord MacDermott Lecture  
Human Rights Law and the 'War on Terror'  
Queen's University, Belfast  
2 May 2013**

On 29 September 1970, for the last time as Lord Chief Justice of Northern Ireland, Lord MacDermott called a group of newly qualified barristers to the Bar. He was, by that time, not merely an iconic figure in the legal landscape of Northern Ireland, he was rightly regarded as a colossus in legal circles throughout the common law world. Even then I felt – though not as keenly as I should have – the enormous privilege that it was to be called to the Bar by this great man.

I had the added, later privilege to have appeared before him a number of times. This was not, I have to say, an entirely unalloyed pleasure. That was not because of any lack of benevolence on his part, for he was unfailingly kind to newly called members of the Bar, but because his legendary status was more than a little awe-inspiring for a fledgling and not very articulate barrister.

I bring a rather better developed sense of privilege to this occasion. Lord MacDermott was a great friend of Queen's and it was entirely fitting that Queen's should have instituted an annual lecture in his honour. Many

distinguished lecturers have preceded me to this lectern and that circumstance – although daunting – increases the feeling of honour that I have in delivering this, the 2013 MacDermott lecture. It is an especial pleasure for me to return to this magnificent hall in my alma mater.

And that pleasure is enhanced because it gives me the chance to pay tribute to my good friend, Sir Peter Gregson, the outgoing Vice-Chancellor. Over the last nine years Peter and his team have led Queen's from great success to yet greater triumph. I am delighted to acknowledge the abundant debt that all the student population, the alumni and friends of Queen's and indeed the entire society of Northern Ireland owe him for what he has achieved at this university.

The title of tonight's lecture, Human Rights Law and the War on Terror, almost chose itself, in light of the nature of many high profile cases decided by the Judicial Committee of the House of Lords and the Supreme Court over this past ten years. But sincere thanks are due to my judicial assistant, Jacob Bindman, for the precise formulation of the title and for his invaluable help in the preparation of the lecture. Because of Queen's generosity, Jacob is here this evening principally, I think, to ensure that I don't stray too severely off message but I am very grateful to him not only

for his help on this project but for all his efforts to keep me right over this past year.

The words, ‘The War on Terror’ which appear in the title of the lecture are enclosed in quotation marks advisedly because there is more than a little controversy as to what is meant by terror and about the aptness of describing society’s attempts to counteract it as a ‘war’. But I do not intend to dwell on those aspects this evening. That our society is afflicted by the threat of terrorism, however defined, and that it must take measures to counteract that threat are beyond question. But that very circumstance raises a particular challenge for the administration of justice and for judges charged with defining the boundaries on the state’s encroachment on fundamental rights in its efforts to protect national security.

As in so many areas of life, approaching this forbidding, redoubtable challenge requires a strong sense of perspective. And that perspective must be informed by, if not indeed positively guided by, a keen understanding of the lessons of history. It is not only Lord Atkin’s celebrated aphorism in *Liversidge v Anderson*, “amidst the clash of arms, the laws are not silent” which acts as an inspiration to today’s judges in the solemn duty that they must perform in, to quote Lord Atkin again, “stand[ing] between the subject

and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law”.

More recently, that widely respected jurist, Aharon Barak, the former President of the Supreme Court of Israel, issued this cautionary and sobering warning:

“... a mistake by the judiciary in times of war and terrorism is worse than a mistake of the legislature and the executive in times of war and terrorism. The reason is that the judiciary's mistakes will remain with the democracy when the threat of terrorism passes, and will be entrenched in the case law of the court as a magnet for the development of new and problematic laws. This is not so with a mistake of the other branches, which can be erased through legislation or executive action and usually forgotten.”<sup>1</sup>

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<sup>1</sup> Barak, A, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’. *Harvard Law Review*, 116(1), pp.19-162, 149

The pressures, overt or subconscious, on judges making decisions about the lawfulness of measures taken by governments at times of national crisis or where a real terrorist threat to the state is evident are considerable. And, in truth, those pressures have on occasions, because of the exigencies that have been perceived to exist, proved impossible to defy. Justice Brennan of the United States Supreme Court, writing in 1988, observed that the US judiciary had a poor record of upholding civil liberties in times of crisis. He said that the courts had consistently produced sophisticated jurisprudence on the rights of citizens in peacetime but had a poor record in defending those principles when crisis occurred. This is what he said:

“After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”<sup>2</sup>

Brennan thought that a key reason for this failure was the episodic nature of national crises. Paradoxically, he felt that there had not been the opportunity to develop more measured and robust judicial responses to

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<sup>2</sup> W. Brennan, “The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises” (1988) *Israeli Yearbook on Human Rights* 11

threats to civil liberties because there had not been a sufficiently sustained period of threat<sup>3</sup>. He thought that a more long-lasting time of crisis would have allowed jurisprudence to evolve which was more resilient to hysteria and unthinking reactions. Like many other commentators, he felt that fundamental principles must be able to stand firm against attacks made upon them in the name of necessity and expediency and that this had not always been achieved.

It is, of course, an unwelcome irony that today we have an enduring threat to democracy and national security in the form of terrorism that seeks to strike at the very fundamentals of our society. So the platform for the development of that robust corpus of jurisprudence that Justice Brennan had in mind is now in place.

So how do we measure up to the challenge? Well, contemporary judgment on that issue is as invidious as it would, inevitably, be fallible and I will not attempt it. History will judge. But I venture that history will have ample material for its judgment. The most that I can do is to choose (and to say a little about) some of the cases on which that judgment will be based.

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<sup>3</sup> See I Cram, “Failing Justice Brennan’s request? Anticipating Terrorism Risks and the US Supreme Court” [2013] P.L. January 30 for further analysis of Brennan’s thesis in the current context.

In the UK over the last ten years or so there has been an almost unprecedented engagement of the courts with issues surrounding national security. Pressure in the post 9/11 atmosphere has been at its most pronounced on the central features of a fair trial. When one speaks of the right to a fair trial, of course, many think of a criminal trial. The reality of the so-called 'War on Terror' in the legal context, however, is that, for the most part the battle over fundamental rights has not been fought in the criminal law arena. Thankfully, the criminal trial has thus far remained largely untouched by the problems of evidence that the state deems too sensitive to disclose. Instead, what has exercised the courts on very many occasions has been the treatment of those whom the state suspects of involvement in terrorism but either is not able to or has elected not to prosecute. The range of measures that the state has used in relation to such people is extremely wide. Those measures have taken the courts into unprecedented territory.

We have had to deal with complex arguments about the legitimacy of procedures which strike at the heart of traditional common law rights. (Contrary to popular belief and what one might expect, the Human Rights Act and the European Convention on Human Rights have not occupied centre field in all of those cases.) Measures ranging from straightforward detention without trial to asset freezing and protracted attempts at

deportation on grounds of national security have been involved. And into this heady mix is thrown the traditional civil claim where evidence that touches on national security issues brings it squarely into the debate on the right to a fair trial.

An obvious starting point in my brief review of the major cases is *A and others v SSHD* [2004]<sup>4</sup>. Although fair trial issues did not lie at the heart of the case, it represented the beginning of what might be described as a long tug of war between the courts and the executive as to the rights of suspected terrorists to disclosure of material on which decisions adverse to them had been taken. A panel of nine judges in the judicial committee of the House of Lords declared that legislation which had allowed the government to preemptively lock up a number of foreign terrorist suspects in Belmarsh Prison, without charge or trial, was incompatible with the Human Rights Act and that their detention was unlawful. In a passage that forcefully summed up the full reality of the scheme Lord Hope said:

“An individual who is detained under section 23 [of the Anti-Terrorism Crime and Security Act 2001] will be a person accused of no crime but a person whom the Secretary of State has certified

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<sup>4</sup> *A and others v SSHD* [2004] UKHL 56



that he “reasonably...suspects...is a terrorist” (section 21(1)). The individual may then be detained in prison indefinitely. True it is that he can leave the United Kingdom if he elects to do so but the reality in many cases will be that the only country to which he is entitled to go will be a country where he is likely to undergo torture if he goes there. He can challenge before the [Special Immigration Appeals Commission] the reasonableness of the Secretary of State’s suspicion that he is a terrorist but has no right to know the grounds on which the Secretary of State has formed that suspicion. The grounds can be made known to a special advocate appointed to represent him but the special advocate may not inform him of the grounds and, therefore, cannot take instructions from him in refutation of the allegations made against him. Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated whether accurately

or inaccurately with France before and during the Revolution, with Soviet Russia in the Stalinist era and now associated, as a result of section 23 of the 2001 Act, with the United Kingdom”<sup>5</sup>

Notwithstanding the long shadow cast by the events of 9 September 2001, the House of Lords was unequivocal in its denunciation of the legislation. The executive had simply gone too far.

The latter part of the passage that I have quoted revealed the besetting problem that has since been the source of controversy when the state has sought to place restrictions on those deemed to present a threat to national security. Material on which the state wishes to rely but does not want to disclose to the affected party or the wider public has come to dominate the legal argument in the government’s attempts to control those that it sees as a threat. Such material can be described as closed, secret or contrary to the public interest. Ultimately, however, it concerns evidence that may be used to restrict an individual’s liberty, or to remove him from the country, or to defeat a civil claim which he may take against the state or to control his financial activity. And all of these measures are taken without giving the individual a chance to see or contest the evidence, other than through

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<sup>5</sup> *A & Others* [2004] UKHL 56, 55 per Lord Hope

lawyers appointed by the court who may not communicate with the party whose interests they are supposed to represent.

Some aspects of the case of *A and others* featured in an application by the appellants in that case to ECtHR in *A and others v UK*<sup>6</sup>. This resulted in a landmark decision about which I shall have something to say presently. In the meantime, however, the men who had been imprisoned in Belmarsh were released. Some were placed under Control Orders - a term that we are now familiar with but which at the time was a novel concept in UK law. These orders sparked a series of decisions in the House of Lords and later the Supreme Court as to what exactly a person subject to a control order may know of the case against him.

Parliament had legislated to specifically restrict the right to disclosure of evidence for those subject to Control Orders. The principal issue in the series of cases which ensued focused on the requirements of Article 6 of the European Convention on Human Rights and the fair hearing guarantees it enshrines. As part of the new dispensation of control orders, the phenomenon of the 'Special Advocate' emerged. These were specially chosen lawyers who were permitted to view closed evidence on behalf of the suspect and to challenge it or to claim that it should be disclosed. But

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<sup>6</sup> *A and others v UK* (2009) 49 EHRR 625

they were not permitted to discuss the material with the suspect.

Notwithstanding this, the Secretary of State argued, the introduction of special advocates into the equation provided sufficient guarantees of procedural fairness for the suspect. No further open disclosure was required.

The picture that emerged from the decisions in cases where the adequacy of disclosure was attacked was not entirely free from ambiguity. In *Secretary of State v MB*<sup>7</sup>, the House of Lords left open the possibility that the subject might be given a sufficient measure of procedural protection even though disclosure of the *whole evidential basis* for the basic allegation against him had not been made<sup>8</sup>. A majority of the Court of Appeal in the subsequent case of *AF (No.2)*<sup>9</sup> stated there “*is no principle that a hearing will be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence*”<sup>10</sup>.

Thus, despite the robust language in the original decision in the Belmarsh case, those who had previously been locked up now found themselves under very restrictive control orders but still without much, if any, knowledge of the case against them.

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<sup>7</sup> [2007] UKHL 46

<sup>8</sup> *Ibid* at 74

<sup>9</sup> [2008] EWCA (Civ) 1148

<sup>10</sup> *Ibid* at 64

There began to emerge, however, the notion of a core irreducible minimum of disclosure or, as it is sometimes inelegantly called, ‘gisting’. When Strasbourg gave judgment in *A and others v UK* it held that where a decision to certify suspects as international terrorists under section 21 of the Anti-Terrorism Crime and Security Act 2001, (with all the consequences that had by way of detention without trial) was based “solely or to a decisive degree on closed materials, the procedural requirements [of the convention] would not be satisfied”<sup>11</sup>. In rejecting the Secretary of State’s contrary argument the Court went on to say;

“[T]he special advocate could perform an important role in counterbalancing the lack of full disclosure and lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate”<sup>12</sup>

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<sup>11</sup> *A v United Kingdom* (2009) 49 EHRR 625, para 220

<sup>12</sup> *Ibid* 220

So although the special advocate system could go some way towards mitigating the effect of non-disclosure, ultimately there came a point where, in order to comply with the minimum guarantees of article 6 of the Convention, sufficient information of the case against him had to be supplied to the suspect in order that he could give informed instruction to the special advocate. That this was the minimum requirement was acknowledged by the House of Lords in the subsequent case of *AF (No 3)*<sup>13</sup>.

This acknowledgment might be seen in retrospect to be no more than one would expect in light of our common law tradition. If someone is to be detained in prison or if he is to be the subject of a control order which so curtails his liberty as to amount to a form of closely confined house arrest, is it not obvious that he should have the chance to know and to challenge the basis on which the decision so to confine him has been taken? The answer that to reveal the basis for detention would imperil national security cannot be, without more, a complete response. A balance between those – at first blush – irreconcilable positions must be struck. True it is that no perfect solution is possible. But that does not relieve the courts or the executive of the obligation to strive for the solution nearest to perfection that can be achieved. One might have expected, therefore, that much of the debate in

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<sup>13</sup> [2010] 2 AC 69

subsequent cases would have been preoccupied with a quest for that near perfect solution. In my view, however, it has failed to occupy centre stage.

In the case of *Al Rawi v The Security Services*<sup>14</sup>, the claimants were all British residents who had been rendered and then imprisoned in Guantanamo Bay as well as other prisons along the way. All alleged that they had been tortured in the process and had a substantial body of evidence they wished to put before the court which suggested there had been complicity by the UK in certain aspects of their treatment. The Security Services, who were the defendants in the action, asked the High Court to order a procedure under its inherent jurisdiction which would allow the Security Services to place before the court sensitive material in closed session. Apart from those acting for the Security Services, this material would be seen only by the judge and special advocates appointed to act for the claimants. There was no statutory underpinning for such a procedure, but the state argued that there was an inherent power for the court to order such a trial. Moreover, it was said, there was an enormous practical benefit in that the judge would be able to see all the relevant material, not just that which the Security Services felt was safe to be disclosed. This, it was suggested, would produce greater fairness.

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<sup>14</sup> [2012] 1 A.C. 531

The argument was resoundingly rejected. Two principles of apparently absolute clarity stood out from the judgments in both the Court of Appeal and the Supreme Court. The first was that a party to proceedings should be informed of the material that would be used to challenge his claim and that he should have a full opportunity to answer that case in open court. The second principle was that the first principle should not be derogated from unless authorised by unambiguous statutory provisions.

In the Court of Appeal the then Master of the Rolls, Lord Neuberger of Abbotsbury, delivering the judgment of the court said this:

“... the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it ... a litigant’s right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial.”



The Supreme Court was no less emphatic in its dismissal of the Security Service's appeal from the Court of Appeal's judgment. Delivering the lead judgment, Lord Dyson said this:

“10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times...

11. The open justice principle is not a mere procedural rule. It is a fundamental common law principle ...

12. Secondly, trials are conducted on the basis of the principle of natural justice ... The Privy Council said in the civil case of *Kanda v Government of Malaya* [1962] AC 322,337:

"If the right to be heard is to be a real right which is worth anything, it must carry with it

a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

13. ... parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594, para 32: "Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.""

Dealing with the claim that it was better that the judge should see all the material, even if this was denied to the claimant, I said this:

"The defendants' second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable

to having to withhold potentially pivotal evidence. This proposition is deceptively attractive—for what, the defendants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to

be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.”

Two strong, interrelated themes can be seen to have emerged from the *Al-Rawi* decision, therefore. The first was that the court could not draw on its inherent jurisdiction to create a closed material hearing which involved the receipt of evidence by the court which was withheld from another party.

Although the court was master of its own procedure, it could not fundamentally alter the system of trial. In particular, it could not exercise its power to regulate its own procedures in such a way as would deny parties their fundamental constitutional right to participate in the proceedings in accordance with the common law principles of natural justice and open justice.

The second theme was that such a radical departure from the traditional rights of parties as was involved in the holding of a closed material procedure should come about only through the act of a democratically elected legislature. The adducing of evidence by one party and withholding it from another might be technically a matter of procedure but that did not affect the need for such a fundamental change to citizens’ rights to receive the endorsement of Parliament. As Professor Martin Dockray said in *The*

*Inherent Jurisdiction to Regulate Civil Proceedings* (1997) 113 LQR 120, 131,

“Where procedure is as important as substance, procedural change requires the same degree of political accountability and economic and social foresight as reform of an equivalent rule of substantive law.”

In contrast to the position in *Al-Rawi*, in the case of *Tariq v Home Office*<sup>15</sup> the Supreme Court by a majority of 8-1, with mine being the lonely voice of dissent, held that it was necessary to withhold from Mr Tariq information which had led to his summary dismissal from his job at the UK Border Agency. That decision was stated to have been taken on operational security grounds. Mr Tariq had brought a claim against his employers in the Employment Tribunal for wrongful dismissal on the grounds of discrimination. The tribunal does have statutory authority to hold closed material procedures and appoint special advocates and it availed of both powers. Mr Tariq was told he had been dismissed because he was closely related to a suspected terrorist and, although they had no suspicions regarding him personally, the UKBA were concerned about the pressure that might be brought to bear on him by relatives and associates who were possibly involved in terrorism.

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<sup>15</sup> [2012] 1 A.C. 452

The Supreme Court held that neither the common law nor article 6 of ECHR required that Mr Tariq should have disclosure of *any* of the case against him, not even a gist. The basis on which this finding was made was that his liberty was not at stake. That did not appear to me to be a significant difference. It seemed to me that there was no principled basis on which to draw a distinction between the essence of the right to a fair trial based on the nature of the claim that was made. A fair trial in any context demands that certain indispensable features are present to enable a true adversarial contest to take place. These included the claimant having at least a gist of the material that was deployed to defeat his case.

As I have said earlier, the second principle to emerge from *Al-Rawi* was that the first principle (that the court could not draw on its inherent jurisdiction to create a closed material hearing which involved the receipt of evidence by the court which was withheld from another party) should not be derogated from unless authorised by unambiguous statutory provisions.

Democratic approval – or at least the endorsement of a democratically elected legislature – was therefore deemed essential as a matter of central principle. Pragmatic considerations are also in play here, however, although they did not perhaps feature as strongly in the *Al-Rawi* case as in the subsequent case of *Bank Mellat* heard by the Supreme Court in March.

Judgment in that case has not yet been given and, on that account, only limited reference to it can be made.

It is in the public domain, however, that in October 2009 the British government, through the Treasury, made an order, the Financial Restrictions (Iran) Order 2009, which required all persons operating in the financial sector not to enter into or to continue to participate in any transaction or business relationship with an Iranian bank known as Bank Mellat or any of its branches. Bank Mellat applied in the High Court under section 63 of the Counter-Terrorism Act 2008 to have the direction set aside. Statements made to Parliament had made it clear that the reason for singling out Bank Mellat from other Iranian banks was that it had been identified as having assisted Iran's weapons programmes by providing banking and financial services to entities involved with them.

The 2008 Act authorises closed material procedures to be held in this type of proceeding before both the High Court and the Court of Appeal. No reference is made in the legislation to the Supreme Court, however. Mitting J (who heard the application in the High Court) conducted a closed material procedure and he found against Bank Mellat, delivering an open and a closed judgment. The Court of Appeal dismissed the bank's appeal. Although the members of that court had read the closed judgment, they

declared themselves not to have been influenced by it. On appeal to the Supreme Court, one of the issues which arose was whether the court had power, in the absence of express Parliamentary authority, to hold a closed material procedure, in particular, whether it had power to admit Mitting J's judgment and to hear submissions on it. Put broadly, the competing arguments on this issue may be stated thus: for the government it was claimed that section 40(5) of the Constitutional Reform Act 2005 (which provides that the Supreme Court has power to determine any question necessary for the purposes of doing justice in an appeal) meant that the court must have power to hold a closed material procedure in an appeal from the decision of a lower court. For the bank it was argued that the absence of express provision about the Supreme Court holding such a closed materials procedure was determinative.

The 'pragmatic considerations' in the *Bank Mellat* case concerned the structure and safeguards which the 2008 Act (and rules of court made under it) put in place in relation to the holding of a closed material procedure hearing. Thus, for instance, section 66(2)(a) enjoined the person making the rules to have regard to the need to secure that the decisions that are the subject of the proceedings are properly reviewed; and section 67(3)(d) stipulated that, if permission was given by the court not to disclose material,



it must consider requiring the Treasury to provide a summary of the material to every party to the proceedings (and every party's legal representative).

I describe these as pragmatic considerations because they represent the ‘nuts and bolts’ of a system which dramatically alters the way in which trials are conducted. The 2008 Act had recognised that one of the central features of a fair trial could not be arbitrarily swept away without putting in place some compensatory, mitigating measures that sought to redress (to some extent, at least) the palpable imbalance created by the denial to one party of access to crucial evidence. One of the principal features introduced by the 2008 Act which was designed to mitigate the disadvantage to the claimant was the appointment of a special advocate whose function it would be to protect the claimant’s interests.

Special advocates are, of course, engaged in a wide variety of proceedings beyond financial restriction proceedings such as were involved in the *Bank Mellat* case. The disadvantages of the special advocate system in general were discussed at length in *Al-Rawi*. As I have said, they are made aware of the closed material which is adduced in evidence and they participate in the closed hearing but they are forbidden to disclose that material – or even a gist of it – to the party whose interests they purport to represent.

In its report on Counter-Terrorism Policy and Human Rights (dated 26 February 2010), the Joint Committee on Human Rights was scathing about closed material procedure hearings. This report was based on the first-hand experience of those who have acted as special advocates. The Committee's view was that, after five years of its operation under various statutory regimes, the closed material procedure (with special advocates) was not capable of ensuring the substantial measure of procedural justice that was required.

At para 210 of its earlier report, HL Paper 157, HC 394, (published on 30 July 2007), the Committee had concluded:

“After listening to the evidence of the Special Advocates, we found it hard not to reach for well-worn descriptions of it as ‘Kafkaesque’ or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, ‘the public should be left in absolutely no doubt that what is happening...has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal

system.’ Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.”

The criticism of the system of special advocates is probably most forcefully put by the special advocates themselves, however. In their response to the Justice and Security Green Paper (a consultative document issued with a view to introducing legislation extending closed material procedures to all proceedings that involve issues of national security) the special advocates were scornful of the system which they themselves operated. In one passage they made the following observations:

“Our experience as SAs involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPs are inherently unfair; they do not “work effectively”, nor do they deliver real procedural fairness. The fact that such procedures may be operated so as to meet the minimum standards required by Article 6 of the

ECHR, with such modification as has been required by the courts so as to reduce that inherent unfairness, does not and cannot make them objectively fair”<sup>16</sup>

The mitigating measures which the 2008 Act proposed for closed material procedure hearings in the High Court and the Court of Appeal were not, of course, provided for in relation to the Supreme Court for the prosaic reason that the Supreme Court does not feature in that legislation. And, as I have said, one of the issues which arose in the debate as to whether the court had power to hold a closed material procedure and, if it did, whether we should exercise that power, was whether section 40(5) of the Constitutional Reform Act could be taken as signifying Parliament’s intention that the Supreme Court should have power to carry out such a procedure while leaving it bereft of the structure and safeguards which were deemed essential for the other courts in which such a hearing is expressly permitted. It is a matter of record that, by a majority, the Supreme Court decided that it did have power to institute a closed material procedure and, again by a majority, that it should admit and hear submissions on the closed judgment of Mitting J. The special advocate who had represented the bank’s interests made submissions to us in the course of the closed hearing. I don’t wish to be

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<sup>16</sup> Special Advocates Response to Justice and Security Green Paper, 16 December 2011, para 15

tantalizing but that is, I think, all that can properly be said about *Bank Mellat* at this stage.

I have scarcely time to mention the case of *Abu-Qatada* but the wide publicity given to this case makes it necessary that I allude to it briefly. The Court of Appeal recently dismissed the appeal against SIAC's judgment that Abu-Qatada should not be returned to Jordan while there was a substantial risk that evidence would be given at his trial which was the product of torture. It would be wrong for me to pass any comment on the correctness of that decision, not least because, we are told by the press, it will be the subject of an application for permission to appeal to the Supreme Court.

While I make no comment on the Court of Appeal judgment, it is right to record that it purported to follow the decision of the Strasbourg court which had made it clear that it and national courts should set their face against the admission of evidence produced by torture, not simply because this is required so that the state can be seen to have stood firm against the conduct that produced the evidence. At least as compelling was the view that evidence produced by torture was intrinsically unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice – the words of the iconic figure of Lord Bingham. That conclusion

must resonate strongly with all who subscribe to the notion that we should not require those who are entitled to look to the state for the protection of their fundamental rights to accept a lesser standard of justice than we consider is the irreducible minimum of a fair trial.

And so, although I have earlier disavowed any opinion on how the courts of the UK would meet the judgment of history on how they have discharged their duty to stand between the subject and any attempted encroachments on his liberty by the executive, if I were pressured to make a prediction in the form of a school report, I think that I might say, “good in parts, continued concentrated application required”.