

JUSTICE AND SECURITY GREEN PAPER

Response by the Constitutional and Administrative Law Bar Association

Introduction

1. The Constitutional and Administrative Law Bar Association ('ALBA') is the professional association for practitioners of public law. It exists to further knowledge about constitutional and administrative law amongst its members and to promote the observance of its principles. It is predominantly an association of members of the Bar but amongst its members are also judges, solicitors, lawyers in public service, academics and students. Its members include barristers who have acted both for and against the Government in cases involving national security issues as well as Special Advocates. It has over 1000 members. As a consequence it has a direct interest in the Green Paper, which raises fundamental issues of constitutional law.
2. In the time available it has not been possible to consult ALBA's entire membership. However, this paper has been circulated to the executive committee. The executive committee is representative and includes members who act both for and against central Government and other public bodies. It also includes members who have substantial experience of acting in national security cases.
3. ALBA notes in particular the submissions made on behalf of the Special Advocates. ALBA recognises that the Special Advocates are uniquely placed to comment on the Green Paper given their experience and the fact that they are independent observers of the challenges faced by Government and the impact of closed procedures on fair trial rights. In light of the particular experience of the Special Advocates and the fact that their submissions accord with the experiences of the ALBA committee members involved in the drafting of these submissions, ALBA adopts the submissions made by the Special Advocates.

Summary

4. In summary, ALBA's position is that:

- (1) fundamental principles of procedural fairness require that all parties are entitled to see and challenge evidence relied upon by one party in court proceedings and to call their own evidence in response;
- (2) the proposals in the green paper involve a departure from those fundamental principles;
- (3) such a departure should only be countenanced if there were overwhelming reasons for such a departure and any departure should be as limited as possible;
- (4) at present, there is no evidence of any such overwhelming need to depart from the principles of procedural fairness and certainly not on the scale, or in the circumstances, proposed in the green paper;
- (5) consequently, in response to the first question posed in the green paper, the preliminary response is that there is at present no justification for extending the closed material procedure; in so far as it continues to be used (in immigration and control order cases), ALBA supports the views of the Special Advocates on improvements that could be made;
- (6) in relation to question 5, ALBA does not consider that there would be any significant merit in seeking to introduce legislation to clarify the contexts in which the "*AF (No.3)*" gisting requirement would apply. That matter is best left to development by the courts on a case-by-case basis.

Procedural Fairness and The right to open justice

4. The legal system in England and Wales has long been based on two basic principles: open justice and also procedural fairness (also referred to as natural justice). It has long been recognised that the principle of procedural fairness and natural justice involve the right of a party to be heard before an adverse decision is reached in his or her case. The right to be heard incorporates the right to know the case against you. For example, in *Kanda v Government of Malaya* [1962] AC 322 Lord Denning stated that:

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. (p337)

5. That right to be heard, as part of the fundamental principles of procedural fairness, must be zealously guarded despite the competing claims of the state. As Lord Hope stated in *RB (Algeria) v Secretary of State* [2010] 2 AC 110 (in the context of a case regarding persons suspected of terrorism):

... from time to time, much time and effort has to be given to the protection of those who may seem to be the least deserving. Indeed it is just because their cases are so unattractive that the law must be especially vigilant to ensure that the standards to which everyone is entitled are adhered to. The rights that the aliens invoke in this case were designed to enshrine values that are essential components of any modern democratic society: the right not to be tortured or subjected to inhuman or degrading treatment, the right to liberty and the right to a fair trial. There is no room for discrimination here. Their protection must be given to everyone. It would be so easy, if it were otherwise, for minority groups of all kinds to be persecuted by the majority. We must not allow this to happen. Feelings of the kind that the aliens' beliefs and conduct give rise to must be resisted for however long it takes to ensure that they have this protection. [211]

6. State agents may have expertise in the protection of the public but they are not experts in the requirements of a fair trial. These matters explain why the judiciary must be responsible for ensuring that there are not excessive claims (*MB v Secretary of State* [2008] 1 A.C. 440 at [66]).

7. It is also not correct to state, as is done in the Green Paper, that closed material proceedings are “familiar to practitioners”. ALBA is predominantly comprised of practitioners in the field of judicial review and public law. Very few of its members (which number in excess of a 1000) would have any experience of litigation involving closed material. The use made of close material procedures is, to date, extremely limited to a small number of specific areas. That fact further serves to emphasise the unusual and limited nature of closed material procedures. They are not a familiar part of the legal landscape or of litigation. They are an unusual departure from fundamental principles.

Problems with the current proposals

8. The Special Advocates have identified in great detail the problems with the proposals contained in the Justice and Security Green Paper.
- 9 ALBA would highlight the following key problems with the current proposals:

91 The proposals fail to recognise how significant a departure they are from basic and fundamental principles of procedural fairness and natural justice in litigation. They are inherently contrary to any normal concept of a fair trial. The evidence cited demonstrate the problems faced by a litigant who is the subject of a closed procedure;

9.2 There is a need for a clear justification for any further departure from the basic principle of open justice. The principle is of such fundamental importance that powerful justification is required. There is at present no evidence of any sufficiently powerful justification for departing from fundamental principles on the scale, and in the way contemplated by the Green Paper;

9.3 The Supreme Court has recently confirmed that the well established public interest immunity procedure should be applied in civil litigation involving national security issues (*Al Rawi v Security Services* [2011] 3 WLR 388). The implications of that judgment are still being considered by the courts. Until that

judgment has been tested and developed, it is impossible to say that there is a need for an extension of closed procedures. It is striking that the courts have managed without closed procedures for many years despite the obvious national security issues that have arisen in the past; and

- 9.4 The proposals fail to ensure that ultimate control of secrecy is entirely in the hands of an independent judiciary able to test fully whether claims to a secret procedure are well-founded.

Consultation Questions

- 10 In relation to the first specific question (“How Can We Best Ensure that Closed Material Procedures Support and Enhance Fairness for All Parties?”), ALBA would comment as follows.
11. The starting point should, in fact, be whether closed material procedures should be extended and used in the way contemplated in the Green Papers. In summary, for the reasons given above, ALBA would submit that no changes should be made to fundamental principles of procedural fairness and natural justice, designed to ensure a fair trial, without very powerful justification. No such justification has yet been provided. Far greater evidence of the need for such fundamental change would need to be provided than has been provided so far.
- 12 In terms of improvements to the existing system where it is in use, ALBA supports the suggestions of the Special Advocates. No submissions are made in response to questions 2 and 3. In relation to Question 4, ALBA supports the Special Advocates submissions.
- 13 In relation to question 5, ALBA at present sees no particular merit in seeking to clarify by legislation the contexts in which the *AF (No.3)* gisting requirements. It seems better to allow the courts to deal with this matter on a case-by-case basis, reflecting the particular circumstances of each case. Further, if generalised legislation is introduced, which fails adequately to deal with all relevant factual

scenarios, there is a risk that the legislation itself may be found incompatible with the European Convention on Human Rights.

- 14 In relation to question 6, ALBA agrees that there appears to be no benefit in establishing a new system of greater active case management or a specialist court for such issues. Nor does it see any benefit at present in making a change to the remit of the Investigatory Powers Tribunal (question 7).

- 15 In relation to question 8, ALBA considers that on the information at present provided, civil cases should be dealt with in accordance with established principles. These include the principles governing public interest immunity where, in appropriate cases, sensitive material is not disclosed or used in cases.

1 January 2012.