JUDICIARY OF
ENGLAND AND WALES

MR JUSTICE IRWIN
CHAIRMAN, SPECIAL IMMIGRATION APPEALS COMMISSION

PRACTICE NOTE FOR PROCEEDINGS BEFORE SIAC

As from Monday 11 January 2016, the following procedures and practices will be followed in all cases, save where there is a direction otherwise. Variation can be sought, but only for good reason, turning on the facts or circumstances of the specific case.

Setting Directions and Identifying Issues

1 Within 21 days of service of the Notice of Appeal or Notice of Claim for Review, the Secretary of State for the Home Department ["SSHD"] is to serve on the Appellant (in the case of OPEN material and documents), and on the Special Advocates Support Office ["SASO"] (in the case of OPEN and CLOSED material and documents):

(1) an OPEN synopsis of the issues arising, in the form of a Scott schedule;

(2) a CLOSED synopsis of the issues arising, in the form of a Scott schedule;

(3) a gist or summary of the submission(s) to the Secretary of State or other minister who took the relevant decision(s), (a) in OPEN redacted form and (b) in CLOSED un-redacted form;

(4) copies of all relevant decision letters;

(5) draft directions, including a proposed timetable to progress the case in a proper manner. The draft directions must address the matters set out in Rule 9A, and in addition make outline proposals for disclosure and the timing of disclosure focussed on the issues arising in the case for disclosure, and the timing of disclosure focussed on the issues arising in the case. Every timetable is to include proposed dates or windows for necessary discussions between counsel, in particular discussions between counsel for the SSHD and Special Advocates in relation to matters arising under Rules 37/38 of the Rules.

2 In every case any proposed timetable will confine planned hearings before SIAC to dates within legal term.

3 It is anticipated that in each case, at least one Special Advocate will be required to be in CLOSED from the outset of proceedings.

4 Not later than 14 days following receipt of items (1) to (5) set out in paragraph 1 above, the Appellant/Claimant, and where appropriate SASO, are to serve and file [1] agreed draft directions, if agreement has been reached, [2] proposed alternative directions, to the extent that agreement has not been reached and [3] submissions on the Summary/Summaries of Issues, in the Scott schedule. Item [3] is to be served and filed in hard copy.

5 All parties should note that Scott Schedules under paragraph 4 or otherwise must contain sufficient detail and precision to be useful. The Commission will not regard Schedules as compliant otherwise. If issues are not identified in the Schedule, the Commission may decline to permit later introduction.

6 Not later than 7 days following the service and filing of the material set out in paragraph 4, the parties must jointly apply for a directions hearing before SIAC.

7 Not later than 7 days before the first directions hearing, the SSHD and/or SASO are to indicate in writing whether or not there is a need for a CLOSED

session at the directions hearing, and if so, why. This indication is to be given, wherever possible, in OPEN, even if requiring amplification in CLOSED form. A CLOSED hearing without notice to the Appellant/Claimant is highly undesirable.

8 The first objective of the directions hearing is to identify the issues arising in the case, in OPEN and (where necessary) CLOSED hearings, so as to inform the order for directions, the timetable in the case and the discharge by the Respondent of the obligations of disclosure. It is the responsibility of all parties to give active assistance in identifying the issues which arise.

Disclosure: Appeal Proceedings

9 Rule 10(1) distinguishes between a statement of the evidence on which the SSHD relies and "*any exculpatory material of which* [the SSHD] *is aware*" and imposes an obligation to serve **both,** before the Appellant serves a statement under Rule 10A. There are good reasons why that obligation is imposed, both for speed and economy, and for fairness. The obligation arises in respect of any material which adversely affects the case of the SSHD or would lend support to the position of the Appellant/Claimant.

10 Subject to any specific ruling in a given case, the SSHD is taken to "*be aware*" of any material relevant to the decision(s) taken which she has actually considered, and of material which is or has been in the possession or control of:

[1] Home Office;

[2] the SyS, SIS [and/or GCHQ] (including material arising from port stops, police arrests and interviews ensuing from either);

[3] the FCO, in relation at least to the issue of safety on return.

11 Rule 10A(2) imposes an obligation on the SSHD to "make a *reasonable search* for" further exculpatory material if, **but only if**, the Appellant chooses to serve evidence. This trigger emphasises the need for full and fair disclosure of exculpatory material under Rule 10(1), particularly in the context where the Appellant may be in ignorance of most or all of the key allegations against him, because they are made within the CLOSED procedure. The obligation arising under Rule 10A(2) is to respond to any matters raised in the statement(s) served by the Appellant.

Disclosure: Review Proceedings

12 Rule 10B Sets out the obligations of the Secretary of State for disclosure arising in a Review. It should be noted that the Commission's duty under Rule 4(3) arises in Review proceedings just as in an Appeal. In the absence of particular circumstances being placed before the Commission, the "evidence on which [the Secretary of State] relies in opposition to the application for review" must include all the material placed before the Minister or official who took the decision(s) challenged, in addition to any other material relied on, in accordance with *AHK v SSHD* [2015] EWHC 681 (Admin), paragraphs 34 to 36, and 38.

Disclosure: General

13 It must further be noted that the SSHD has an obligation to disclose **exculpatory** material, whether under Rule 10(1), or Rule 10(A), or otherwise, even if it was obtained in circumstances (such as torture or arising from an abuse of process) which would lead the SSHD to decline to rely on it, if it were favourable to her case against the Appellant.

14 The successive disclosure obligations imposed on the SSHD by the Rules must be discharged with paragraphs 9 to 13 above in mind. Specific direction as to disclosure may be sought from the Commission if the circumstances of the case require it.

15 In each case, the solicitor acting for the SSHD with conduct of disclosure, at the time of disclosure, is to confirm in writing that the relevant disclosure obligations have been fulfilled, with the considerations in paragraphs 9 to 13 above in mind.

16 Although proceedings before SIAC remain adversarial, an Appellant has an obligation to the Commission to set out his/her full case in written evidence in a timely fashion, so as to avoid duplication of effort and delay. The duty of disclosure under rule 10A(2) depends on that obligation. The Commission will consider limiting the issues in a case if that duty is not observed. Parties are encouraged to raise this matter as early as possible if an Appellant is said to be in default.

Rule 38 hearings

17 The Commission is greatly helped by the repeated co-operation between the lawyers for the SSHD and the Special Advocates on Rule 37/38 issues. Directions should ensure that there is good opportunity for discussion to narrow issues before the Rule 38 hearing by [1] ensuring proper and timely disclosure [2] ensuring that there is a proper opportunity for discussion in good time before any Rule 38 hearing and [3] declining adjournments or extensions of time limits which would have the effect of preventing or curtailing proper discussion before any Rule 38 hearing, unless there is a compelling reason for such adjournment or extension.

18 Where material is redacted in documents which are disclosed in CLOSED, the Special Advocates instructed should be permitted to inspect (but not hold or copy) the un-redacted text, unless:

(a) the redacted text is subject to legal professional privilege;

(b) the redacted text relates to a separate subject matter with no impact on the issues in the case before SIAC;

(c) there is a specific sensitivity arising from national security, or otherwise within the terms of Rule 4(1).

In such cases, the SSHD should annotate the document, indicating which of the above reasons is relied upon, and where redaction is on grounds (b) or (c), SIAC may be requested to review the redacted material.

19 Directions should in every case provide that, following discussions between counsel for the SSHD and the Special Advocates, a Scott schedule containing the competing submissions in respect of material where agreement has not been reached should be filed with the Commission, in hard copy, not less than 7 days before the Rule 38 hearing.

Approach to Evidence

20 The Commission is fully aware of the duties set out in Rule 4(1) and (2). The Commission is also fully aware that the duty in Rule 4(3) must be fulfilled, and at all stages the Commission must have fairness in mind. It is recognised that this can be a difficult balance to achieve, for the parties as well as the Commission. For all purposes, the presumption must be that evidence, whether written or oral, will be given in OPEN, save where Rule 4(1) considerations require CLOSED material procedures, or similar considerations for the safety of witnesses require steps to be taken to protect their safety. Every witness giving written or oral evidence should be aware of this approach, before providing a witness statement or giving oral evidence to the Commission.

Keeping the Appellant/Claimant informed

21 Throughout the proceedings the SSHD and the Special Advocates have a duty to inform the Appellant's/Claimant's representatives of the nature and purpose of any CLOSED steps in the proceedings (including written submissions, oral hearings, rulings, and decisions) in so far as this is possible consistently with rule 4(1). That duty operates both before a particular step has

been taken, and afterwards. In particular, at the end of any CLOSED hearing and/or following any CLOSED ruling or decision, the SSHD and Special Advocates shall consider, and if possible agree, what may be said to the OPEN representatives by the Commission in relation to that hearing, ruling or decision.

22 Where proceedings require video link hearings, the Commission will operate in conformity with Guidance Note 2013 No2 issued by the Upper Tribunal Immigration and Asylum Chamber. Parties must acquaint themselves with the Guidance and follow the steps set out.

Transcripts

23 Transcripts of CLOSED hearings can only be prepared by security cleared personnel under secure conditions. This is expensive and needs advance planning, particularly if there is a need for overnight transcription. If in any case overnight transcription is sought, then specific application must be made with good reason, at least 21 days before the relevant hearing.

Communications between Special Advocates who are "in CLOSED" and the Appellant's/Claimant's lawyers, on administrative matters

24 The Commission notes the letter of the Minister of 31.x.2012, to the effect that

> "*HMG will use its 'best endeavours' to respond to purely procedural type requests from the Special Advocate to communicate with the OPEN representatives within 24 hours*".

The Commission is grateful for the indication. If in a given case a response is not forthcoming within one working day, then the Commission will consider a written application for specific directions on the matter.

Communications between Special Advocates who are "in CLOSED" and the Appellant's/Claimant's lawyers: general

25 Where the SSHD has no objection to a proposed communication (whether on an administrative matter or otherwise) from a Special Advocate to the Appellant's/Claimant's lawyer the SSHD shall promptly make the communication to the Appellant's/Claimant's lawyer, copied to SASO, indicating that the communication is being made at the request of the Special Advocate. For the avoidance of doubt, rule 36 does not require the authorisation or direction of the Commission in these circumstances.

26 SIAC Rule 48 requires that draft OPEN judgments should be sent to the Special Advocates at the same time as sent for security checking, and that any suggested amendments are copied to the Special Advocates for comment.

Irwin J
Chairman
17 December 2015

Flaux J
Chairman elect