



SPECIAL ADVOCATES:

**GOVERNMENT'S SUSTAINED NEGLECT BREACHES
ASSURANCES GIVEN TO PARLIAMENT AND
ENDANGERS THE RULE OF LAW**

Lord Sandhurst KC

About the author

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A recent paper, *The Special Advocate – Not Waving but Drowning*¹, by Angus McCullough KC, the most experienced Special Advocate practising in Closed Material Proceedings, has revealed a sorry state of affairs. Ten years ago, on 25 June 2013, the Justice and Security Act 2013 (JSA) came into force. The Act provided the machinery for the conduct of secret closed hearings in general civil litigation. These extraordinary procedures are generally referred to as Closed Material Proceedings (CMPs).

WHAT ARE THESE SECRET PROCEDURES? HOW ARE THEY CONDUCTED?

- They involve a party being deprived of sight of material relied upon against them by the State, but with that material being considered by the judge or tribunal determining the case.
- Sometimes this ‘closed’ material may be all of the relevant evidence being put forward against a party. It means that cases may be – and sometimes are – determined without that party having any idea why they have lost the case, following a hearing in which they have been excluded from the crucial stage.
- The key element of CMPs that is designed to reduce their intrinsic unfairness is the ‘special advocate’. These are security-cleared lawyers appointed to represent the interests of the excluded party in relation to the secret material, including in the closed part of the hearing. The special advocate does see the secret material. But – and this is a big ‘but’ – they cannot communicate with the person whose interests they are to represent, other than through the Government party or the Court.

WHAT ARE THE DIFFICULTIES AND WHY DO THEY MATTER?

Experienced Special Advocate, then Martin Chamberlain KC, now a High Court Judge, described the difficulties of the role:²

“If the state alleges that my client met a terrorist at a particular time, I cannot ask him whether he was there and if so, why. So I will never know if he had an alibi or an innocent explanation for the meeting; and nor will the court. The task of the special advocate was described by the late Lord Bingham, the internationally respected Lord Chief Justice and senior Law Lord, as like ‘taking blind shots at a hidden target’.”

In the same piece, Chamberlain went on to note:

“The predicament of a man in a similar position was explained by another writer in this way: ‘The written records of the court and in particular the document recording the accusation were not available to the accused, so it was not known in general or at least not exactly what the first plea had to be directed against, so really it could only be fortuitous if it contained anything of significance for the case.’ The writer was ... Franz Kafka describing Josef K’s fictional ordeal in The Trial.... He could as well have been describing a closed material procedure in Britain in the 21st century.”

Chamberlain was writing in the *Daily Mail* in March 2012, following the publication of the Green Paper that led to the JSA, the Act by which CMPs were made available in all civil proceedings.

As Angus McCullough explains, the difficulties described by reference to Kafka are hard-wired into CMPs, whether under the JSA or in other statutory regimes. What is not hard-wired is the avoidable additional unfairness that comes from a failure to support CMPs, and the Special Advocates who are the linchpins within this system.

GOVERNMENT’S ASSURANCES TO PARLIAMENT: A REVIEW TO BE HELD AFTER 5 YEARS, I.E., 2018

Responses to the Green Paper that preceded the JSA highlighted the inherent unfairness of the then closed procedures and identified practical issues that heightened the unfairness of the system. Faced with this the government proposed measures to help address the operation of CMPs

1. <https://ukhumanrightsblog.com/2023/10/30/the-special-advocate-not-waving-but-drowning>

2. www.dailymail.co.uk/debate/article-2114162/Closed-material-procedure-Barrister-describes-twisted-justice-worthy-Franz-Kafka.html

in practice. Importantly, the government also promised during the Bill's contested passage there would be a review after five years to consider the operation of CMPs.

This was sufficiently important to have been included as Section 13 of the Act by way of amendment following debate. It is not an exaggeration to say that without this provision the Bill would have faced an even more torrid time than it did. Section 13 required the review to be 'completed as soon as reasonably practicable' after the fifth anniversary of the relevant part of the Act coming into force. That anniversary fell on 24 June 2018, over five years ago.

THREE YEARS UNACCOUNTABLE DELAY

Nearly three years passed before the government, without any adequate public explanation for delay, took the first step to comply with that statutory obligation and its undertakings to Parliament. On 21 February 2021, it finally announced the appointment of Sir Duncan Ouseley a retired High Court judge with long experience of these secret hearings, to conduct the review.

The special advocates (all those who had been appointed in a case under the JSA and who were still practising as special advocates) made a collective submission to the review in June 2021³. This was a detailed critique of the operation of CMP's from the perspective of the only non-government lawyers involved in these closed procedures. It made some fundamental and important criticisms:

"The Government repeatedly asserts its commitment to CMPs, and ensuring that they are properly resourced, and operated as fairly as possible. Such assertions were made at the time of the Green Paper and Bill that led to the JSA, and have been repeated since. It is, however, our routine experience since the JSA 2013 came into force that those assertions are not matched by reality in some serious respects.

– *The Government has failed to honour commitments made at the time the JSA was being*

debated. These failures have all combined to increase the unfairness of CMPs, significantly beyond the unfairness that is inherent to such procedures.

– *The Government has also failed to comply with Parliament's requirements for monitoring and review of the operation of CMPs, which in turn has delayed and deflected legitimate public scrutiny and debate in relation to their operation."*

Sir Duncan completed his report in December 2021. He made 20 recommendations of steps to improve the operation of CMPs. McCullough writes that none of these appears controversial in principle. Importantly, Sir Duncan expressed some of them to be urgent.

TWO MORE YEARS DELAY (FIVE YEARS IN ALL) STILL NOTHING

Inexplicably, the government did not publish Sir Duncan's report for a year after it was submitted, not until November 2022. Now another year has passed. But not one of those recommendations has been implemented; or even promised. All we have had is a statement on 26 September 2023 from the government minister in the House of Lords, Lord Bellamy, that the government aims to publish its response to the report by early 2024!

I remind readers that the JSA came into force in June 2013 and the initial five-year period to be followed by review ended in June 2018. Here we are more than five years after that. Yet we are told that 20 steps which the distinguished reviewer recommended, some of them urgently, have no prospect of being implemented until sometime next year if ever. We do not even know if they are accepted!

FAILURE TO RESOURCE AND SUPPORT SPECIAL ADVOCATES: MCCULLOUGH'S RESIGNATION

McCullough writes in his paper that he has practised as a special advocate for over 20 years and that it has been a privilege to do this including in appearing in some of the most complex and

3. <https://ukhumanrightsblog.com/wp-content/uploads/2021/06/THE-OUSELEY-REVIEW-SAs-Submission-FINAL.pdf>

controversial cases of his career. But as he points out, that role has brought heavy responsibilities and administrative inconvenience in handling sensitive material which can only be worked upon, I understand, in suitably secure surroundings.

McCullough explains that not only is there the unfairness of the system for the claimant who does not know what is being said, but the advocates are not provided with proper resourcing and support. For example, although promised at the time of the Green Paper, there is still no database of closed judgments. This has been a longstanding complaint of those who do this vital work.

He concludes:

“the failures by the Government to act on it oft-repeated assertions of commitment to the proper functioning of CMPs including the ongoing failure to commit to implementation of the Ouseley recommendations – have led me to conclude that I cannot take on any new appointments in these circumstances, where my ability to discharge the role is significantly compromised by the unaddressed defects in the system.”

CONCLUSION

This is a sorry state of affairs. Without special advocates, the Closed Procedures do not function. The litigant has nobody to review and challenge the closed material that they do not see. He or she is deprived of even the impaired justice that is provided for under the procedures sanctioned by Parliament. That is not what this country should be practising.

This may have wider implications. UK legal services and the courts are held in high regard around the world. If that is forfeited the loss will be substantial, not only in renown, but in hard cash. Government must act at once to implement the Ouseley review's recommendations or explain why not, to ensure that special advocates are properly supported. Sometime next year is too late!



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