
GARDEN COURT
CHAMBERS

Complex Asylum: Part 1

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26 September 2024

Complex asylum: Analysing and presenting Convention reasons

David Sellwood, Garden Court Chambers

26 September 2024

Introduction

- **Who is a refugee**?

- Article 1A(2) of the Refugee Convention 1951, someone who…

> *"…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*
>
> *In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."*

‘Convention’ reasons

- UNHCR Handbook [67]: **Convention reasons “*will frequently overlap*”** and “*the combination of such reasons*” may be relevant in “*evaluating [the] well-founded fear*”

- Nationality & Borders Act 2022:

> *“33 Article 1(A)(2): reasons for persecution*
> *(1) For the purposes of Article 1(A)(2) of the Refugee Convention—*
> *(a) the concept of **race** may include consideration of matters such as a person’s colour, descent or membership of a particular ethnic group;*
>
> *(b) the concept of **religion** may include consideration of matters such as—*
> *(i) the holding of theistic, non-theistic or atheistic beliefs,*
> *(ii) the participation in formal worship in private or public, either alone or in community with others, or the abstention from such worship,*
> *(iii) other religious acts or expressions of view, or*
> *(iv) forms of personal or communal conduct based on or mandated by any religious belief;*

‘Convention’ reasons

- Section 33, Borders and Nationality Act 2022 continued…

> *“(c) the concept of **nationality** is not confined to citizenship (or lack of citizenship) but may include consideration of matters such as membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins or its relationship with the population of another State;*
>
> *(d) the concept of **political opinion** includes the holding of an opinion, thought or belief on a matter related to a potential actor of persecution and to its policies or methods, whether or not the person holding that opinion, thought or belief has acted upon it.”*

‘Convention’ reasons

- Section 33, Borders and Nationality Act 2022 continued…

> *“(2) A group forms a **particular social group** for the purposes of Article 1(A)(2) of the Refugee Convention only if it meets both of the following conditions.*
>
> *(3) The first condition is that members of the group share—*
> *(a) an innate characteristic,*
> *(b) a common background that cannot be changed, or*
> *(c) a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.*
>
> *(4) The second condition is that the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.*
>
> *(5) A particular social group may include a group based on a common characteristic of sexual orientation, but for these purposes sexual orientation does not include acts that are criminal in any part of the United Kingdom.”*

Political opinion

- Recurring theme when defining Convention reasons: **broad purposive construction** (e.g. see *Shah & Islam v SSHD* [1999] UKHL 20.
- What constitutes 'political' for the purposes of the Convention?
- Not defined in the Convention itself.
- Still important: ***Gomez*** *(Non-state actors: Acero-Garces disapproved) Colombia** [2000] UKIAT 00007.
  - Membership of political party or group not required, no political activity, a genuinely held opinion sufficient (do not even need that if the same is imputed);
  - For state actors, political, "*essentially any action which is perceived to be a challenge to governmental authority*" (Prof Hathaway, The Law of Refugee Status).
  - Different for non-State actors
  - **Concept of political opinion is a 'malleable one', shifts in time and place**

Political opinion

- Principles further developed more recently, in ***EMAP*** *(Gang violence – Convention Reason) El Salvador CG* UKUT 335 (IAC), endorsed and summarised *Gomez* at [§71]:

> *"The paradigm case of persecution for reasons of political opinion involves an oppressive state suppressing dissidents. The need for the Refugee Convention to be interpreted in light of its purpose has given rise to many variants of that classical situation. Individuals who have no opinion at all may be persecuted by the state which wrongly imputes dissenting views to them. Actors of persecution other than the state might persecute others on behalf of the state, or for their own benefit. It is not axiomatic that any persecution by a political entity will constitute persecution for a Convention reason, but the more overtly political in nature its objectives, the more readily it can be inferred that the persecution inflicted would be "for reasons of" political opinion. Where an agenda is not explicitly articulated it may nevertheless be gleaned where the persecutor has "views which have a bearing on the major power transactions relating to government taking place in a particular society"*

Political opinion

- *EMAP*: each case must be **determined on its facts**.
- Helpful to look at the facts in *Gomez* (unsuccessful) and *EMAP* (successful)
- Other scenarios may include, for example, those subject to 'corporate raids', high net worth individuals, and corruption whistleblowers, that latter category in particular having 'engendered significant controversy'.
- Domestic authorities on **whistleblowers** somewhat thin (see ***Storozhenko*** *v SSHD* [2001] EWCA Civ 895)

Political opinion

- International authorities on whistleblowers more helpful (see ***Voitenko*** *v Minister for Immigration and Multicultural Affairs* [1999] FCA 428. *Ranwalage v Minister for Immigration & Multicultural Affairs* [1998] 159 ALR 349; *C & S v Minister for Immigration & Multicultural Affairs* [1999] FCA 1430; and for Canada, see *Klinko v Minister of Citizenship and Immigration* (FCC 22 February 2000); *Vassiliev v Minister of Citizenship and Information* (Federal Court of Canada, 4 July 1997), and *Minister v Immigration and Multicultural Affairs v Y* (FCA, 15 May 1998, No 515 of 98))

- Consider the individual's conduct (a 'proponent of law and order', 'public activities', 'campaigns', 'investigation' and 'exposure'); the nature of & actors involved in the corruption; and the nexus between the individual's activities, & the particular harm feared.

- What about individuals who have no political or imputed political opinion, but face persecution from the State for a political advantage?

Thank you

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‘Persecution’ in complex cases involving criminal allegations

Sadat Sayeed, Garden Court Chambers

26 September 2024

Prosecution or Persecution?

When does prosecution for common law/ordinary criminal offences amount to disguised persecution?

- For many authoritarian, or even partially democratic, regimes, criminal prosecution is often the preferred method of persecution, particularly where the target is a person of prominence (whether in economic and/or political terms): see for example Russia, China and India, amongst others.

- The UNHCR Handbook says at paras 56 - 57:

  "56. Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.

  57. The above distinction may, however, occasionally be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition. Moreover, penal prosecution for a reason mentioned in the definition …. may in itself amount to persecution."

A core principle

- It is a general principle of refugee law that the component matters going to the refugee definition must be looked at holistically.

- In *R v Immigration Appeal Tribunal v ex parte Rachichandran* [1996] Imm AR 76, Simon Brown LJ said:

> "....the issue whether a person or group of people have a "well-founded fear [i.e. a real risk - see *Ex parte Sivakumaran*] of being persecuted for [Convention] reasons"....raises a single composite question. It is, as it seems to me unhelpful to try to reach separate conclusions as to whether certain conduct amounts to persecution and as to what reasons underlie it. Rather the question whether someone is at risk of persecution for a Convention reason should be looked at in the round and all the relevant circumstances taken into account."

What is the scope of the persecution in this context?

The definition of 'persecution' is now, as a matter of domestic law, enshrined in section 31 of the Nationality and Borders Act 2022 (to be applied by the SSHD and courts to claims made on or after 28 June 2022). It largely mirrors that which was found in reg 5 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (which in turn gave domestic effect to the EU 'Qualification Directive' of 2004). The definition is helpfully broad, and can capture the entire criminal justice process:

(2) For the purposes of that Article, the persecution must be—

(a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Human Rights Convention, or

(b) an accumulation of various measures, including a violation of a human right, which is sufficiently severe as to affect an individual in a similar manner as specified in paragraph (a).

(3) The persecution may, for example, take the form of—

(a) an act of physical or mental violence, including an act of sexual violence;

(b) a legal, administrative, police or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;

(c) prosecution or punishment which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; .....

Types of offences – a sliding scale of difficulty

Easy:

Prosecution for an offence which is political in itself (such as sedition) or for contravention of laws which themselves infringe human rights (such as freedom of assembly or expression), will give rise to an inference of persecution. We often see these sorts of prosecutions in ultra-authoritarian states such as China or in Middle Eastern states such as Saudi Arabia or Iran.

More difficult:

Common law offences which appear to be committed for a relevant political purpose. At one end, there is criminal damage or some form of obstruction by a protestor – at the other end, offences which verge on terrorism. Even where there is a risk of this type of prosecution, the decision of the House of Lords in *T v Immigration Officer* [1996] AC 742 means that Convention protection can be lost if the crime is so atrocious or the violence inflicted is considered too remote from an effective political objective to be said to be political. In these circumstances, the broader protection against torture and inhuman and degrading treatment offered by the ECHR and other international instruments will be very relevant.

Most difficult:

Common law offences which are committed for no apparent political purpose. Persecuting states will often seek to disguise persecution by prosecuting offences which are entirely un-connected to any political activity by the putative refugee or the advancement of the political agenda of the persecuting state.

Indicators of persecution disguised as prosecution – 1

In *MI (Fair Trial, Pre Trial Conditions) Pakistan* CG [2002] UKIAT 02239, the Tribunal examined how asylum claims, based on a fear of prosecution amounting to persecution, should be dealt with:

(1) although it is not the purpose of the asylum determination process to judge guilt or innocence, nonetheless a factual evaluation as to whether there is a real risk that the claimant faces injustice rather than justice must be made;

(2) whether prosecution amounts to persecution is a question of fact, and all relevant circumstances must be considered on a case by case basis;

(3) the criminal justice process in the county of origin must be looked at as a whole, with possible harms considered cumulatively and not separately;

(4) whether prosecution amounts to persecution must be analysed by reference to international human rights norms;

(5) prosecution does not amount to persecution unless likely failures in the fair trial process go beyond shortcomings and pose a threat to the very existence of the right to a fair trial;

(6) when considering whether there is a general risk of persecution to any person subjected to the criminal law process in a given country, it is important to establish the scale of relevant human rights violations, particularly in relation to mistreatment in detention and the right to a fair trial.

Indicators of persecution disguised as prosecution - 2

In *MI*, the Tribunal said at para 25:

> "Where evaluation of issues of prosecution versus persecution must be made, it is vital decision-makers avoid a fragmented approach. Particular care must be taken to focus on the criminal justice process involved as a whole. Whichever parts of the criminal law process are being examined - be it the initial laying of information, the bringing of charges, the arrest, the detention, the consideration of bail, the trial itself, the subsequent punishment - the refugee decision-maker must be alert to how these stages interact and what safeguards apply at each stage. Also relevant will be the nature of the law in question and whether its provisions adequately ensure justice. Only a holistic approach to this issue can ensure the decision-maker weighs any harms involved cumulatively, not just separately."

Significance of guilt/innocence

An asylum claim is not a forum in which a full criminal defence can or should be ventilated. However, that that does not relieve the decision maker from having to assess whether there are strong indicators or guilt or innocence, because that goes to heart of the composite question to be answered.

- The stronger the substantive merits of a criminal prosecution the more difficult it is to show that there is an improper motive driving the case.

- The weaker the case, the more likely it is that the prosecution is improperly motivated. Which begs the question what is the real motive behind the case? Or to be more precise, what is the 'real reason' behind the prosecution, if not the legitimate operation of the criminal justice system?

Can a fair trial 'cure' a persecutory prosecution?

There may be asylum claims from countries which do (or at least try to) adhere to democratic principles and the rule of law, but in which there is an uneven application of, and respect for, the rule of law across democratic institutions.

We know from *MI* that we can't just look at the constituent elements of a criminal justice system in isolation when asking the question whether a prosecution is in fact disguised persecution.

India provides a very good example – law enforcement authorities like the Central Bureau of Investigation and the Enforcement Directorate have long been regarded as coercive tools of the Indian government of the day, often targeting political opponents and advancing the political/economic objectives of the government and its allies. But for a long time [*although the recent evidence suggests this is changing*], the Indian judiciary has been regarded as largely independent, operating fairly and without political interference, and ultimately delivering justice.

But the Indian criminal justice system, end to end, is fraught with major problems. Life-threatening conditions of detention, widespread torture and ill-treatment, and huge delays in the system which means many defendants spend years on remand before coming to trial. So even if you have your day in court, one day, and are eventually acquitted after a fair criminal trial, you will have already been persecuted by the state.

That is why the guidance in *MI* has stood the test of time. The criminal justice system as a whole must to be evaluated, and the decision-maker needs "be alert to ….. and what safeguards apply at each stage."

Final thoughts

When looking at a potential asylum claim arising in the context of criminal proceedings, which the applicant is asserting are baseless and improperly motivated, ask yourself the following questions:

(1) Is there any substantive merit to the criminal allegations?

(2) What is really is going on here?

(3) Who is, or are, the controlling minds, ultimately driving the prosecution (and possibly controlling the judicial process)?

(4) Does the prosecution advance an agenda or an objective in favour of the controlling minds?

(5) What are the available safeguards at each stage of the criminal justice process?

(6) In the context of the specific country (in particular, bearing in mind the intersection of business, politics, and crime) can that agenda or objective, be characterised as political (taking a broad and purposive approach to 'political opinion')?

Thank you

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The application and operation of Article 1F(b) in complex asylum cases and certification under s55 IAN 2006 Act

Emma Fitzsimons, Garden Court Chambers

26 September 2024

Article 33 – Prohibition of *refoulement*

"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country"

Article 1F(b) – Exclusion – serious non-political crime

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

Exclusion v exception from protection?

Rationale for exclusion clauses?

"The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that ***certain acts are so grave as to render their perpetrators undeserving of international protection as refugees****. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons* ***do not abuse the institution of asylum in order to avoid being held legally accountable for their acts****.* ***The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum****, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore,* ***always be interpreted in a restrictive manner****."*

UNCHR Guidelines on International Protection: Application of Article 1F at §2

Article 1F(b) criteria

Four parts must be satisfied:

- There must be serious reasons for considering that the individual has committed a criminal offence in another country.
- The offence has to be serious.
- The offence has to be non–political.
- The offence has to have been committed outside the country of refuge prior to admission to that country as a refugee.

"Serious reasons for considering…"

***Al-Sirri v SSHD* [2012] UKSC 54**

- "Serious reasons" is stronger than reasonable grounds.
- Evidence must be "clear and credible."
- "Considering" is stronger than "suspecting," or "believing" – requires the decision maker's considered judgment.
- Decision maker need not be satisfied to the criminal standard beyond reasonable doubt
- Unnecessary to important domestic standards of proof into the question.
- However, reality is that a decision-maker needs to be satisfied to the balance of probabilities.
- Burden is on the SSHD.

"Offence has to be serious"

***AH (Article 1F(b) – 'serious') Algeria* [2013] UKUT 00382 (IAC)**

- The term 'serious' must reflect the level of gravity of crime required to exclude a person from the Convention.

***AH (Algeria) v SSHD* [2015] EWCA Civ 1003**

- In the subsequent appeal, the Court of Appeal concluded that the term was sufficiently clear and did not need to be qualified as 'particularly' serious.

- Length of sentence alone not determinative – context and nature is more important.

- The Court went on to find that Article 1F(b) was not confined to fugitives from justice. Nor did rehabilitation, after having served a sentence for a serious non-political crime render the exclusion clause inapplicable.

"Offence has to be non-political"

***T v Immigration Officer* [1996] AC 742**

- Two limbs:
- (1) it is committed, for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and
- (2) there is a sufficiently close and direct link between the crime and the alleged political purpose.

***KM (Exclusion: Article 1F(a); Article 1F(b), DRC)* [2022] UKUT 125 (IAC)**

- An asylum seeker from DRC was excluded were there was sufficient evidence to consider he had aided and abetted in the torture of suspects during his service in the paramilitary police force.

Section 36(2) Nationality and Borders Act 2022

- "In Article 1(F)(b), the reference to a serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective."
- Explanatory Notes gives the examples of murder, rape, arson and armed robbery.

"Committed outside country of refuge prior to admission as a refugee"

- Article 1F(b) is explicitly limited to crimes committed outside the country of refuge **prior** to admission to that country as a refugee.

- ***Section 36(3) of the Nationality and Borders Act 2022*** confirms "reference to a crime being committed by a person outside the country of refuge prior to their admission to that country as a refugee includes a crime committed by that person at any time up to and including the day on which they are issued with a relevant biometric immigration document by the Secretary of State."

Certification in domestic asylum appeals

Section 55 of the the Immigration, Asylum and Nationality Act 2006

- In asylum appeals the Secretary of State may certify that the appellant is not entitled to the protection of the Convention because Article 1F applies or because Article 33(2) applies on national security grounds.

- If such a certificate is issued, the Tribunal or the SIAC hearing an appeal which raises Refugee Convention grounds is required to decide first whether it agrees with the certificate and if it does, is required to dismiss that part of the appeal which relates to the asylum claim without considering any other aspect of the case.

Consequences of exclusion under Article 1F(b)

- If a person is excluded under Article 1F(b), the State is precluded from granting refugee status.
- Likewise, a decision from UNCHR to exclude someone from refugee status means they can no longer receive protection or assistance from them.
- A person who is excluded *may* however have another basis for pursuing leave to remain e.g. on human rights grounds.
- Bear in mind that if a person is excluded under Article 1F(b), the State may also have obligations under international law to criminally prosecute or extradite that individual.

Thank you

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CLOSED MATERIAL UNIVERSE:

ANOTHER DIMESION OF COMPLEXITY

Edward Grieves KC, Garden Court Chambers

24 September 2024

CLOSED Material: Altering the Fundamental Laws of Fairness

Material relied upon by the State in legal proceedings

is provided to the Court

but not the opposing party

which the Court may take into account

CLOSED Material Procedures are not ....

• Confidential or private hearing - the opposing party are present, but others are excluded (e.g. press/members of the public): e.g. family proceedings, SIAC case of *T6 v SSHD* (SC/95/2010) where there was an OPEN judgment, a CONFIDENTIAL judgment and a CLOSED judgment [11] or a confidentiality ring (e.g. the embargoed judgment procedure).

• Public Interest Certificate procedures - the State prevents disclosure to the opposing party if successful (which can mirror the reasons the State relies upon to not disclose CLOSED material) but the State cannot rely upon it either - it is excluded from consideration by the Court.

• Anonymity Orders - designed to prevent press reporting

• W (Algeria) Orders - the State sees sensitive material from the opposing party, but it is restricted to certain individuals

CMP EXPANDING UNIVERSE……

1997-2014

•Special Immigration Appeals Commission Act 1997 + 2003 Procedure Rules + Practice Directions

•Proscribed Organisations Appeals Commission (Terrorism Act 2000) +2007 Procedure Rules

•Prevention of Terrorism Act 2005 (Control Orders) + Civil Procedure Rules

•Terrorism Prevention and Investigation Measures Act 2011 (TPIM's) + CPR

•Justice and Security Act 2013: High Court ad hoc CMP (permission required, applies only to "relevant civil proceedings" and CLOSED material only justified on basis of national security considerations + Exclusion and Naturalisation reviews in SIAC

•Immigration and Asylum Act 2014: certain deportation reviews in SIAC

CMP EXPANDING UNIVERSE……

2015 - 2022

•Counter-Terrorism and Security Act 2015: Temporary Exclusion Order (Part 88 CPR) + s.18 BNA refusal to grant certificate of naturalisation in SIAC

•Nationality and Borders Act 2022: certain immigration decision reviews in SIAC

•Court of Protection: Closed Hearings Guidance 9.2.2023 following Re A (Covert Medication, Closed Proceedings) [2022] EWCOP 44

•Family proceedings currently under scrutiny

SIAC Jurisdiction

- s. 2. Appeals (via certified s 82(1), 83(2) or 83A(2) NIA Act 2002)

- s.2B. Deprivation Appeals

- s.2C. Exclusion Reviews

- s.2E. Certain Deportation Decision Review (where no right of appeal or gives rise to issues which cannot be subject of the appeal)

- s.2F. Certain Immigration Decisions Review (where no right of appeal)

"closing SIAC gap": Explanatory Note Nationality and Borders Act 2022, s.77 - automatically directs decisions to SIAC only reviewable by judicial review where CLOSED material is relied upon (thereby expanding the basis of the use of CLOSED material, as only that CLOSED for reasons of national security may be heard in the High Court under JSA 2013, whereas under SIAC it can also be used in relation to "sensitive international relations, serious organised crime or historic security information"

The Road to SIAC: Certification

"the decision is or was taken wholly or partly in reliance on information which in his opinion should not be made public

- in the interests of national security
- in the interests if the relationship between the UK and another country; or
- otherwise in the public interest"

s97(3) NIA Act 2002; s40A(2)BNA 1981; 2C(1)(c), 2D(1)(b), 2F(1)(c) SIAC Act 1997

"Public interest" is wide. Rule 4 of the SIAC procedure Rules 2003 (requiring non-disclosure in the public interest) mirrors the above formulation but also explicitly includes "the detection and prevention of crime". Explanatory Note of Nationality and Borders Act 2022, s.77 also envisages "historic security information"

Procedural and Substantive Complexity

The addition of Closed Material brings with it:

- the Procedural Protections of the Special Advocates
- Concurrent Procedural Complexity – Rule 38 processes
- Elongated Process
- Complex Disclosure
- Novel Points of Law
- Supervision of a High Court Judge
- A Highly Responsive Interface with the Court

The “Dismal Story” of the Special Advocates’ “Neglect”

28 January 2020	“Secret Justice”: An Oxymoron and the Overdue Review; Angus McCullough KC - ukhumanrightsblog.com [“AMKC”]
14 December 2021	“Secret Justice Review: The Special Advocates respond to the Government’s submission, AMKC
November 2022	Ouseley Report: 3 years late (after date required by s.13 JSA 2013) 20 recommendations.
30 October 2023	The Special Advocate – Not Waving but Drowning, AMKC:

“The structural unfairness of [the] system is one thing, but it is quite another for that unfairness to be heightened by a failure to provide proper resourcing and support for special advocates. That aggravated unfairness of CMPs is a price paid by the excluded parties, even though they may be unaware of it. The system depends on special advocates being able to discharge our role effectively.

8 May 2024	The system for closed proceedings is in melt-down, AMKC
29 May 2024	Closed Material Procedure: Government Response
30 May 2024	Washed-Up: Angus McCullough KC comments on long awaited HMG response to Ouseley on Closed Proceedings, AKMC

"the terms in which some of the key recommendations have been accepted are non-committal in relation to both timing and concrete steps to be taken, including in relation to matters which Sir Duncan described as requiring urgent attention.....Individual special advocates will come to their own decisions as to whether they are now prepared to accept new appointments. My own position has been, and remains, that returning to the role is dependent on implementation of Ouseley. These issues need to be addressed by concrete measures rather than open-ended declarations of intent. There can now be no progress until after the general election. The incoming government, whatever its stripe, must address this as a priority, both as to implementation and revisiting the recommendations that have currently been rejected"

The Reach of *Rehman/Begum*: National Security Assessments

U3 v Secretary of State for the Home Department [2023] EWCA Civ 811, [2024] 2 WLR 319

"SIAC may make findings of fact which may be relevant to the assessment of national security, as long as it does not use those findings of fact as a platform for substituting its view of the risk of national security for that of the Secretary of State" [174].

"The contentious aspects of the assessment will often turn on questions of motivation, which will depend on inferences, or on similar issues.....In an appropriate case, SIAC may judge that the evidence enables it to make findings about a person's motivation. If it can it may do so. SIAC has to bear in mind that if it considers such a finding is possible and appropriate, the use which SIAC can make of such a finding is limited. The finding is part of the factual picture to which it must apply the tests of *Rehman* and *Begum*. Since a finding about motivation necessarily involves an assessment based on inferences from primary facts, SIAC must bear in mind that its finding about motivation cannot displace a contrary assessment by the SSHD, as long as there is material which would rationally support such a contrary assessment [175].

Special Imitation Appeals Commission

So, How do you Win ?

- Accept Reality
- Prosecute and Defend simultaneously
- Cover everything
- Intricate Research and 3rd party evidence
- Provide instructions and Information to the Special Advocate
- The Long Haul and War of Attrition

May the Force be with You

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