

# LIBERTY

PROTECTING CIVIL LIBERTIES  
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**Liberty response to the Lord Chancellors  
department consultation on the draft  
Special Immigration Appeals Commission  
(Procedure) Rules 2003**

**March 2003**

*Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.*

1. The author acted as Special Advocate on 2 occasions: for Mukhtiah Singh in 2000 and for the detainees under the Anti-Terrorism Crime and Security Act 2001 in 2002 in relation to the derogation aspect of those appeals. He has been instructed as special advocate in a third case which is yet to be heard (Loutchanksy).
2. The time for consultation on the draft rules is short and it has therefore only been possible to provide some rudimentary comments, but we hope that they are helpful. We understand that the author has also provided assistance to other interested parties and that comments here may be duplicated in other submissions.
3. Rule 4: the general duty of the Commission appears to require that the Commission shall secure that information is never disclosed where disclosure is likely to harm the public interest. This mirrors the present rules. We question whether the public interest in non-disclosure should always be a trump card. We suggest that the Commission should have a balancing function and be able to consider whether in the particular circumstances of the case a marginal effect of disclosure on the one hand and the detriment to the fairness of the appeal on the other justifies disclosure. The Special Immigration Appeals Commission Act 1997 s.5 (6) requires the Lord Chancellor to 'have regard to' the need to secure that information is not disclosed contrary to the public interest. The Act does not require the inflexibility which the present and proposed draft rules appear to envisage.
4. Rule 5 (2): allows administrative decisions to be delegated to the Commission's staff. Liberty has no difficulty with this, but it should be made clear that the Commission retains responsibility for these decisions and ought to entertain a request for a review of a staff decision.
5. Rule 8 (1): Time limit for appealing. Currently the time limit for appealing runs from receipt of the decision being appealed against. The draft rules substitute service of that decision. In many cases there will be no difference between the two, but there may be cases where service is deemed to have taken place but the decision was not actually received. In our view, the type of decisions with which SIAC deals are always very serious. Nothing less than receipt ought to trigger the time limit for an appeal.
6. Rule 9 (1): contents of notice of appeal. Currently, the rules only require that the notice set out the grounds of appeal. The draft rules add that the notice of appeal must also set out 'clear, legible and concise reasons in support of those grounds.' This is unrealistic for two reasons. In the first place the decision against which the person concerned is appealing may say virtually nothing about the SSHD's reasons for taking that decision. The open evidence may

still be bland and less than fully informative, but it will give some idea of the SSHD's case (or at least part of it). Asking for clear, legible and concise reasons in support of the grounds of appeal in advance of service of this evidence is unrealistic. In the second place, the notice of appeal has to be served in a very short time (5 days when the person concerned is in custody). Again it is unrealistic to expect much more than the bare grounds of appeal in that time.

7. Rule 12 (2): SSHD's reply. It is probably implicit in the draft rule (and is certainly the current practice) that the SSHD should serve on the Appellant or his representative copies of the evidence and material which he does not object to disclosing. It would, though, be better if this were provided for expressly in this rule.
8. Rule 13: consideration of SSHD's objection. We have several comments on this proposed rule:
  - a. The draft requires the special advocate to give notice of objection within 7 days of service of the material. The inclusion of a time limit is new to the draft rules. The present rules do not include a time limit although directions from SIAC in the individual case will set one. We suggest that the later is more sensible since it allows for greater flexibility to suit the circumstances of the particular appeal (or, in the future, review of a ATCSA review).
  - b. For both appeals with which we have been involved, 7 days would have been unrealistically short. Without disclosing the content of any of the closed material which Andrew Nicol has seen, we are aware that it required some intensive study. Deciding how to respond to the SSHD's objection may also require comparing the material to which it relates and material which the Special Advocate knows is already available to the Appellant or which is in the public domain. SIAC's jurisdiction at this stage is not limited to a single upholding or rejection of the SSHD's objection. It may uphold or reject in relation to different parts of the evidence or material which the SSHD wishes to withhold. It can also direct the SSHD to serve a more informative open statement. Thus the Special Advocate has to consider the alleged justification for withholding all parts of the closed statements of evidence or reasons. Some (modest) leeway has also to be allowed for the Special Advocate's other professional commitments. In both cases with which the author has been involved it would not have been possible to provide a useful response to the SSHD's objections in less than 14 days.
  - c. Rule 13 (3) requires SIAC to have a hearing where the Special Advocate challenges the SSHD's objections. We welcome this change. Although it represents a change of form rather than substance (In both of the author's

cases SIAC had a hearing and we are not aware of any other where it has not) explaining to Appellants and their representatives that this was a matter of discretion rather than right increased their already high scepticism of the fairness of the procedure.

- d. Rule 13 (4) requires the Special Advocate and SSHD to produce a schedule of outstanding issues in relation to disclosure before SIAC has a hearing to decide the matter. In both the cases with which the author been involved, something of this kind was done. However, it seems out of place to include this requirement in the Rules. In the first case which he did, it was (we understand) arranged informally between counsel. In the second case SIAC made directions. SIAC's power to give directions was ample and, we would suggest, is a more flexible means of dealing with the matter.
  - e. Rule 13 (6) provides that SIAC may direct the SSHD to serve on the appellant material filed under r.12 (2) (b), either in the form in which it was filed or in a different form. As we understand r.12 (2) (b), it is referring to the SSHD's 'open' evidence, reasons and other material. As mentioned previously, the SSHD would normally serve his open evidence on the appellant at the same time as it is filed with SIAC. If the new rules are to be understood as contemplating the same procedure (and we have said above that we think it would be better if they did so expressly) there would be no point in the Commission directing the SSHD to serve that (open) statement in the form in which it was filed since that would already have been done. We suspect that the intention of the draft is to say that SIAC can direct the SSHD to serve on the appellant all or part of the material which had been filed with the Commission but not served on the appellant in the form in which that material was filed with the Commission or in a different form.
9. Rule 22: application for a review: SIAC has not yet conducted a review. The author was instructed to act as a 'friend of the Commission' when it was contemplating whether it was required to begin a review in a case where the certificate had not been served on the person concerned and where there had been no appeal. SIAC decided that it was not in a position where it was required to commence such a review. We understand that the certificate in question was later withdrawn and so the issue of a review became moot. One issue that was discussed (although did not need to be resolved) was precisely when a 'review' commenced. The choice appeared to be between, on the one hand, the actual substantive consideration of the case for (and possibly against) the continuing to uphold the SSHD's certificate and, on the other, the commencement of the SIAC process which would lead up to that substantive consideration. The draft rules perpetuate that ambiguity. Thus r.22 (4) suggests the later meaning. Under r.22 (4)(a) 'If the Commission decides to hold a review – (a) it must send notice that it *is commencing* a review...' On

the other hand r. 24 suggests the former meaning (i.e. the review does not commence until SIAC begins its substantive consideration of the filed evidence and submissions). This ambiguity ought to be avoided. Perhaps r.22 (4) (a) could say instead that ‘...it must send notice it intends to hold a review ...’

10. Rule 23: method of conducting reviews. The review jurisdiction is potentially important. Although the grounds for setting aside the certificate are more limited (compare ATCSA s.25 (2) and s.26 (5)), a review is the only opportunity that the detainee has for challenging the continuation of his detention. Nor does a review simply look again at the same decision as was considered by the Commission on an earlier appeal. On a review the Commission has to consider whether *at the date of the review* there are reasonable grounds to believe that a person’s presence in the UK is a risk to national security and whether at that date there are reasonable grounds to suspect that the person concerned is a terrorist. We would, therefore, suggest that it is wrong for the rules to create a presumption in favour of a paper exercise. We would suggest instead that there is a presumption in favour of an oral hearing but with SIAC having the power to decide to determine the matter on paper.
11. Rule 24(7) gives SIAC discretion as to whether to apply the r.13 procedure (i.e. the procedure for deciding whether to uphold the SSHD’s objection to disclosure) prior to the review. This is objectionable. The starting position ought to be that the person detained ought to be able to see any material which SIAC takes into account whether it is conducting an appeal, review or any other type of proceedings. The legislation under which SIAC has jurisdiction contemplates a departure from that norm where (broadly speaking) national security requires it. Elsewhere the rules properly allow for an adversarial procedure to decide whether that proviso applies (albeit a procedure between the Special Advocate rather than the appellant and the SSHD). It may be that the only closed material which the SSHD wishes SIAC to consider on a review is material which was considered on an appeal. In those circumstances, it is likely that the Special Advocate would not oppose the SSHD’s objection. In case he or she did and did so without cause, SIAC might in this context be allowed to retain its power to decide the matter without a hearing, but that is a different matter than allowing SIAC to dispense with the procedure of entertaining submissions at all from the Special Advocate as to why the SSHD’s objection to disclosure should not be upheld.
12. rule 25: The Special Advocate appointed for a review ought to be able to apply to the Commission for an oral hearing of the SSHD’s objections to disclosure (assuming that the proposal in the previous paragraph was adopted and, in this context, SIAC retained its power to decide the matter after receiving only written submissions). The Special Advocate ought also to be able to apply to SIAC for an oral hearing of the substantive review. It is likely

that this would only be of the closed part of the review, but it would not be necessary to spell this out in the rules.

13. rule 31: bail hearings. It is not clear from the rules what, if any role, is envisaged for a special advocate at a bail hearing. The author has not been involved in bail hearings before SIAC. We know that for some, at least, special advocates have been appointed and there is no obvious reason why that should not continue. The principle that a Special Advocate should be appointed whenever the SSHD intends to deploy closed material before SIAC should be followed.
14. rule 33: directions may be given to vary time limit. The rule should make clear that this includes any time limit prescribed by the rules themselves.
15. rule 36: the UK Representative of the UNHCR is treated as a party for certain purposes. Under r.36 (3) (d) 'Any restriction imposed by or under these rules in relation to the appellant as ... (d) communication with the special advocate shall also apply to the UK Representative when he is a party.' This drafting is inappropriate. Rule 11 (2) imposes a prohibition on the special advocate communicating with the appellant or his representative not on the appellant or his representative communicating with the special advocate. This is not just pedantry. There is no reason why, even after service of the closed material on the special advocate, the appellant or his representative should not send further material to the special advocate. As long as the communication is only in that direction it is unobjectionable and does not undermine the reason behind the prohibition on the special advocate communicating with the appellant or his lawyer (which is the danger of disclosing, even inadvertently, the content of the closed material). Paragraph 36 (3) (d) could say instead 'communication from the special advocate'.
16. rule 42 (4): Where the Commission's determination does not include the full reasons for its decision, the Commission ought to be under an obligation (not merely have a discretion) to serve on the SSHD and the special advocate a separate determination including those reasons. The Commission ought not to be able to keep secret from the SSHD and the special advocate any part of the reasons for its determination.

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