Neutral Citation Number: [2022] EWHC 2986 (Admin)

Case No: CO/710/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Thursday 24th November 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE KING (on the application of O3)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Hugh Southey KC, **Alex Burrett** and **James Robottom** (instructed by JD Spicer Zeb Solicitors) for the **Claimant**
David Blundell KC and **Andrew Byass** (instructed by GLD) for the **Defendant**
Aaron Watkins (instructed by SASO) as **Special Advocate**

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Hearing date: 15/11/22

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. The issue of law raised in these judicial review proceedings is whether the Secretary of State is obliged, by human rights principles of effective judicial protection, to make arrangements for Special Advocates to continue to act in the interests of a proposed deportee after legal proceedings are at an end. The principal argument on behalf of the Claimant is that such arrangements are necessary to ensure that no future change in circumstances can raise an issue of Article 3 ECHR compatibility which is beyond the effective reach of the Courts, because crucial information is known only behind the curtain of national security, and the issue would never be ventilated before a Court.

2. The judicial review claim is the sequel to proceedings before the Special Immigration Appeals Commission ("SIAC") which culminated on 2 December 2020 in an OPEN judgment with a CONFIDENTIAL Annex (containing information accessible to the Claimant but protective of his human rights) and a CLOSED judgment (containing information inaccessible to the Claimant and his lawyers but accessible to Special Advocates and the Courts). Special Advocates acted in the interests of the Claimant pursuant to the SIAC Procedure Rules 2003 (SI 2003/1034). A deportation order had been made on 3 January 2018. SIAC decided that the proposed deportation of the Claimant on national security grounds to "Country X" was legally justified (the national security issue) and Article 3-compatible (the safety on return issue). An appeal on a point of law to the Court of Appeal in the SIAC proceedings failed when the Court of Appeal refused permission to appeal on 6 September 2021. At that point the Claimant became "appeal rights exhausted"; and the Special Advocates who had acted in the SIAC proceedings were also regarded as ceasing to have a role to act on the Claimant's behalf.

3. In these judicial review proceedings a "closed material procedure" (CMP) was invoked and directed by the Court, pursuant to sections 6 and 8 of the Justice and Security Act 2013. That allowed the same Special Advocates, who had acted in the SIAC proceedings and the appeal to the Court of Appeal, to continue to act in the Claimant's interests. This is an OPEN judgment. The hearing before me was a hybrid hearing at the request of the Claimant's representatives. Mr Watkins appeared as Special Advocate. An opportunity for CLOSED submissions and a CLOSED hearing were provided. The CLOSED materials were available. But, in the event, I did not need to consider CLOSED materials, there was no need for a CLOSED hearing and there is no CLOSED judgment.

4. The background and context to the claim for judicial review are as follows. On 20 January 2022 the Secretary of State decided that representations made on behalf of, and in the interests of, the Claimant did not constitute a "fresh claim" for the purposes of rule 353 of the Immigration Rules. The representations made on behalf of the Claimant were dated 19 October 2021 and made by his legal representatives. The representations made in the interests of the Claimant were CLOSED representations dated 31 August 2021 made by the Special Advocates. At the heart of the proceedings – in the past and in the present – is the safety on return question: whether deportation of the Claimant to Country X would be incompatible with his Article 3 ECHR rights. SIAC had concluded

– as at December 2020 – that the answer was "no". The fresh claim representations argued that circumstances had materially changed in such a way that the answer was now "yes".

5. Mr Southey KC (with Mr Burrett and Mr Robottom) for the Claimant emphasises the following legal points. (1) A Court's examination of the Article 3 risk must be a "rigorous one": Vilvarajah v United Kingdom (1991) 14 EHRR art 248 at para 108. (2) Under ECHR Article 13 there is a guarantee of an effective national remedy to deal with the substance of any arguable Article 3 complaint, available in practice and in law: MSS v Belgium and Greece (2011) 53 EHRR §§288-291. (3) It can be wrong in principle for human rights to be denied as a consequence of the victim's ignorance: cf. Klass v Germany (1978) 2 EHRR 214 at §36. (4) A change of circumstances can in principle render an individual's removal incompatible with Article 3, where it was previously compatible with Article 3, and the fresh claim mechanism (rule 353) allows this to be recognised. (5) Judicial review is intended to be a practical and effective remedy, where a putative fresh claim is rejected, which must deliver on the MSS obligation under Article 13 and the Vilvarajah obligation under Article 3. (6) The Claimant has been recognised in the present case as having adduced sufficient evidence to meet the evidential burden on the issue of Article 3 safety of return, it being for the Government to dispel the doubts which arise: see Saadi v Italy (2009) EHRR 30 at §129. To these, Mr Southey KC adds a principal case-specific point. It is that the evidence relied on by SIAC to establish safety on return was entirely discussed CLOSED material, discussed in the CLOSED judgment of SIAC. Here is how it is put in the Claimant's Skeleton Argument:

> ***In this case the key reasoning of SIAC appears to be CLOSED. It is more than a possibility that there was some intelligence evidence that was relied upon to defeat the Claimant's case. The SSHD essentially relied on closed to dispel doubts that may have arisen because of the Claimant's open material (Saadi). That means that the Claimant and his lawyers cannot keep the reasons for the dismissal of appeal under review … Firstly, the Claimant cannot know what reasoning he needs to address to demonstrate significant difference. Secondly, the Claimant will not have access to the sort of intelligence material likely to be needed to address the reasoning. He will have no idea how intelligence has developed.***

For the purposes of this claim for permission for judicial review, I proceed on the basis that all the points made by Mr Southey KC, which I have set out in this paragraph, are correct.

What Happened

6. Several things of particular significance have happened in this case. They can all be described in OPEN. First, at some point after SIAC's judgment (2 December 2020) and before an OPEN Communication from the Special Advocates (24 August 2021), the Secretary of State's representatives had alerted the Special Advocate Support Office (SASO) of certain "matters" – which were CLOSED – which it was relevant for the Special Advocates to consider, acting in the Claimant's interests. Secondly, and as a consequence of that action, the Special Advocates – having obtained clearance to do – were able to issue their OPEN Communication (24 August 2021). In it, the Special Advocates requested that the Claimant's representatives should make a "fresh claim" application. That was so that the Special Advocates could support the contention that there was a "fresh claim", by making CLOSED representations to the Secretary of State. Thirdly, and by way of follow up action, the Special Advocates (31 August 2021)

produced CLOSED submissions – behind the national security curtain – in support of the putative fresh claim. Fourthly, the Secretary of State confirmed (8 October 2021) that the CLOSED submissions would be considered, if adopted by the Claimant, as they then were (22 October 2021). Fifthly, GLD wrote a letter on 9 November 2021 which described the Secretary of State's position on the question of effective judicial protection. Sixthly, the Secretary of State made an adverse decision on the putative fresh claim (20 January 2022), having considered the OPEN submissions made by the Claimant's representatives (19 October 2021) and the CLOSED submissions made by the Special Advocates (31 August 2021). The adverse decision of 20 January 2022 involved OPEN reasons responding to what had been said on behalf of the Claimant and CLOSED reasons responding to what had been said in the Claimant's interests by the Special Advocates.

7. There being an adverse decision rejecting a putative fresh claim, there was no right of appeal on the Claimant's behalf. Instead, there is a right to bring a claim for judicial review. I am now seized of that claim. Pre-action correspondence had followed on 14 February 2022 to which the Secretary of State responded on 21 February 2022. On 16 February 2022 the Home Office had set removal directions for the Claimant's removal on 2 March 2022. After this claim for judicial review was commenced on 28 February 2022, those removal directions were cancelled. In its pre-action response letter of 21 February 2022, GLD explained the Secretary of State's position as to the provision of CLOSED reasons for the decision of 20 January 2022 to the Special Advocates. The position taken by GLD was that those CLOSED reasons were not being sent to the Special Advocates, whose role had ceased since the Court of Appeal's refusal of permission to appeal in September 2021.

8. In GLD's letter of 9 November 2021 GLD explained that the Secretary of State accepted the following. If the decision on the putative fresh claim was negative, and if judicial review proceedings were commenced by the Claimant's lawyers, an application could be made for a CMP, so that the Special Advocates could again be redeployed. The Special Advocates would then be in a position to make any argument, in the Claimant's interests, in support of judicial review, with access to CLOSED materials including the CLOSED reasons for the Secretary of State's decision (20 January 2022). That is what has happened in these proceedings.

Scope of the Judicial Review Claim

9. The issues raised in these judicial review proceedings have narrowed. When the claim was issued (28 February 2022) there were three impugned decisions. The first was the Secretary of State's decision to refuse the putative fresh claim (20 January 2022). The second was the Secretary of State's decision to issue removal directions (16 February 2022). The third was the Secretary of State's failure to "arrange" an ongoing Special Advocate to protect the Claimant's interests, until either he was removed or granted leave to remain. Only the challenge to the third target remains.

10. An essential issue raised in the grounds for judicial review was the claimed denial of an effective remedy pursuant to Article 13 ECHR or the common law, in the context of Article 3 ECHR and proposed removal, in a case where CLOSED material was relevant and CLOSED reasons were being relied on. The grounds for judicial review gave these

as reasons why the adoption of a CMP would not deal with the "legal problem" which had been identified:

> ***The fundamental problem is that, unless the Special Advocates continue to act between the dismissal of the appeal and the point of removal, there will always be a risk that a valid fresh claim will be overlooked. That is because it is only lawyers with access to the CLOSED judgment of SIAC who can know whether there is material that potentially undermines that reasoning and demonstrates that there is a valid fresh claim. Even if this claim is dismissed, it may be possible to identify further material relevant to the CLOSED reasoning of SIAC. However, if there is no special advocate appointed, nobody will be required to identify and submit that material.***

Effective Remedy: the Decision of 20 January 2022

11. It has become clear that no issue arises concerning an effective remedy for the purposes of Article 3 and Article 13 (or the common law), in the context of the decision to reject the putative fresh claim, for OPEN and CLOSED reasons on 20 January 2022. An effective remedy could be, and has been, secured. GLD rightly identified the solution in the letter of 9 November 2021. Once judicial review proceedings were filed, the Secretary of State duly made an application on 7 April 2022 for a CMP certificate pursuant to section 6 of the 2013 Act. It was unopposed. It was granted by Turner J on 18 May 2022. Following on from that certification, provision was made for the Special Advocates to act in these judicial review proceedings. As I have explained, they were the same Special Advocates who acted in the SIAC and Court of Appeal proceedings. They had access to all relevant CLOSED materials including the Secretary of State's CLOSED reasons for the decision of 20 January 2022 rejecting the putative fresh claim. It was these Special Advocates who had provided the CLOSED submissions in support of a putative fresh claim on 31 August 2021. The Special Advocates were afforded the opportunity, by Turner J, to file an OPEN skeleton argument and/or a CLOSED skeleton argument, in the Claimant's interests, to support any argument that the Secretary of State's refusal to recognise a fresh claim was a legally flawed decision. The Special Advocates had the opportunity to ask for a CLOSED hearing. In his directions, Turner J had recorded that a CLOSED hearing at the permission stage might be needed, the Special Advocates having "confirmed" that, although they did not propose to advance any "freestanding" CLOSED grounds for judicial review in respect of the Secretary of State's decision of 20 January 2022, they "may" nevertheless "advance CLOSED submissions in support of the Claimant's OPEN grounds". In the event, that part of the judicial review claim targeting the decision of 20 January 2022 has faded away. Neither the Claimant's legal representatives nor the Special Advocates acting in the interests of the Claimant (by OPEN or CLOSED submissions) have felt able to advance any points in support of any contention that there was any public law flaw in the Secretary of State's decision of 20 January 2022. What that means is that there is recognisably no viable judicial review challenge to that decision; nor any viable legal challenge based on the denial of an "effective remedy" in proceedings to challenge that adverse decision. As for the second target for judicial review, it too has faded away. The removal directions set on 16 February 2022, for removal of the Claimant on 2 March 2022, were parasitic on the adverse decision of 20 January 2022, which is not now impugned. Those removal directions were, in any event, cancelled. They are of historic interest only. That leaves the third target for judicial review.

Effective Remedy: the Prospective Position

12. This is the remaining issue in the case. It was foreshadowed in the Grounds for Judicial Review, in the passage which I have quoted. Mr Southey KC argued in essence as follows. There is an important, live issue about the Secretary of State's refusal to "arrange" continuity of engagement of a Special Advocates, outside extant legal proceedings. The point arises on this case, as a special case, where the Saadi evidential burden has been met, and where the evidence and reasoning satisfying safety on return was all in CLOSED. In the particular circumstances of the present case it is, in principle, incompatible with the right to an "effective remedy" under Article 13 (or common law) for the Secretary of State not to retain Special Advocates acting in the interests of the Claimant, unless and until there are extant legal proceedings. That is because circumstances regarding Article 3 compatibility of removal can change; but a relevant change of circumstances may be visible only through CLOSED materials or with knowledge of CLOSED materials. The change, or its significance, may be unknown to the Claimant and his representatives. Only the Special Advocates would recognise it, only then if they remain engaged in the Claimant's interests, and only if they have access to CLOSED materials relating to the changed circumstances. It is far from clear that the Secretary of State has a continuing duty to alert the Claimant's lawyers of a change of circumstances involving CLOSED material capable of founding a fresh claim. The Secretary of State – as the executive decision-maker who seeks to deport the Appellant – cannot stand, or be expected to stand, as the human rights "gatekeeper". In any event, a duty to alert the Claimant's lawyers of CLOSED material capable of founding a fresh claim would not be sufficient protection for the Claimant. In the first place, the Claimant's lawyers would not be able to draft any representations to support a putative fresh claim, because they would not have access to the CLOSED material. The Special Advocates would not be able to assist in the way they did on 31 August 2021, by drafting CLOSED representations, because the Special Advocates are not engaged in the case.

13. Mr Southey KC also pointed to broader points, arguing as follows. Absent Special Advocates, no person acting in the Claimant's interests will be able to make points relating to a proactive enquiry and review by the Secretary of State to identify new materials which undermine safety on return, a function explicitly recognised in SIAC proceedings by rule 10A of the 2003 Rules. This is not simply a question of Special Advocates engaging with an executive decision-making function. It is about Special Advocates who can act in a way which ensure effective judicial protection. Special Advocates are needed, to put the Claimant's lawyers in a sufficiently informed position to know to commence a judicial review claim of any adverse decision rejecting any new putative fresh claim. Absent this broader protection, the law is encouraging uninformed and speculative judicial review claims, in the nature of blind fishing expeditions, borne out of a need to ensure a CMP and secure engagement by informed special advocates, so that a judicial review Court can see whether there is something untoward behind the curtain.

An academic issue?

14. Mr Blundell KC (with Mr Byass) had argued in writing that all of this raises an "academic" question, not currently arising in the present case, which the Court should not entertain. Mr Blundell KC did not seek to maintain that position in his oral submissions. In my judgment, his change of position was wise. The Secretary of State has made clear that she will not continue an arrangement for the Special Advocates,

once proceedings are at an end. The question whether that creates a lacuna in human rights protection – a protection gap – is a real question. True, it is contingent. But it is contingent on something happening which, if the Claimant is right, would never be known. If this issue of law cannot be raised prospectively, in the present case, when could it be raised? The facts of the present case are, moreover, illustrative of the materiality of the issue. This case has already once illustrated that a change of circumstances can arise in which CLOSED material can be assessed as capable of founding a fresh claim. When this occurred, as reflected in the Communication of 24 August 2021, there were Special Advocates instructed, because there happened to be an extant appeal to the Court of Appeal. The Special Advocates were alerted. They were able to act. What if there had been no extant proceedings and no Special Advocates? Put another way, what if these judicial review proceedings are at an end, and the Claimant has yet to be deported, and there is then a change of circumstances of the kind which led to the Special Advocates' Communication of 24 August 2021? Is there a practical and effective safeguard? Is it demonstrably legally sufficient? Is the contrary arguable with a realistic prospect of success.

The Secretary of State's Continuing Responsibility

15. All of which brings me to Mr Blundell KC's substantive answer. He says there is a clean knock-out blow. It is that the protection gap is decisively addressed by the responsibility on the Secretary of State, recognised by her, as identified in the Court of Appeal's judgment in XX (Ethiopia) v SSHD [2012] EWCA Civ 742 [2013] QB 656 at §§62-63. That was a case involving extant appeal proceedings, where the appeal was from a SIAC determination, on a point of law. There was an argument about whether "fresh evidence" relating to a change of circumstances should be receivable on such an appeal. The problem was that receiving such evidence, as part of the appeal, would transform the nature of the appeal so that it was no longer on a point of law, unless the public law principle by which an 'error of fact' can constitute an error of 'law' was stretched beyond breaking point. The fresh evidence route was rejected: see §§62-63.

16. However, in that context, the Court of Appeal addressed the question of a protection gap. There are these key passages. First, there was the concern raised by the special advocate (at §62):

> ***[The] special advocate, raised a concern about the position if relevant fresh evidence were contained in closed material, since that material could not be deployed in support of fresh claim representations: the special advocates would be unable to alert the appellant to the existence of the material or to make fresh claim representations on his behalf; nor is there any procedure for the deployment of such material in a judicial review challenge to the Secretary of State's refusal to treat representations as a fresh claim. Whilst, as Mr Tam submitted, the Secretary of State would be under a continuing duty to satisfy herself in every case that removal would be compatible with the Convention, and for that purpose would be under a duty to consider inter alia any relevant closed material of which she was aware, that would not be an adequate substitute for judicial evaluation of such material in a forensic process.***

This concern involved three key points: (i) the special advocate's inability to "alert the appellant" of the existence of the "closed material"; (ii) the special advocate's inability to "make fresh claim representations" to the Secretary of State; (iii) the judicial review Court's inability to evaluate the closed material. In light of those concerns, the Secretary of State's "continuing duty" was insufficient by way of protection.

17. Secondly, there was this response from the Court of Appeal, describing the scenario where that Court was seized of proceedings and became aware of new closed material which could support a fresh claim (at §63):

> ***If, in the course of an appeal, the Court's attention is drawn to the existence of closed material that would be capable of founding a fresh claim, there can be no objection to its stating that bare fact in its open judgment, thereby alerting the appellant to the possibility of a fresh claim.***

This passage reflects the idea that the Court itself "alerting the appellant to the possibility of a fresh claim" would address the concern raised. Rewinding the chronology in the present case, that would be akin to the Court of Appeal having raised an alert with the Claimant's lawyers, in the same way that the Secretary of State raised an alert with SASO leading to the Communication of 24 August 2021.

18. Thirdly, what followed immediately was this (at §63):

> ***Subject to that, however, it seems to me that the matter has to be left to the Secretary of State in the discharge of her obligations to act compatibly with the Convention.***

In my judgment, it is clear what this passage was saying. It was addressing the question of how there would be action "alerting" the individual facing deportation "to the possibility of a fresh claim", based on "closed material", beyond the idea of that alert coming from the Court in the context of extant appeal proceedings. This alerting of the individual was the "matter" which was "left to the Secretary of State". Such an alert would be necessary, in the "discharge" of the Secretary of State's "obligations" to act compatibly with ECHR rights. The duty to alert the affected individual would be triggered by "closed material that would be capable of founding a fresh claim", so as to be "alerting … the possibility of a fresh claim". This obligation to give an alert would apply generally, extending to situations beyond a Court giving the alert.

19. This solution to the 'protection gap' may mean that the fresh claim representations would come from the individual and their lawyers, and not from any appointed special advocate. But the Secretary of State would be duty-bound to consider the "closed material". As the Court of Appeal went on to say (at §63):

> ***[I]f XX chooses to make fresh claim representations, it will be necessary for the Secretary of State to take into account not only the representations themselves but also any relevant closed material that has become available since SIAC considered XX's case.***

This was describing a situation where what the Secretary of State may have are representations from the individual, and the "closed" material. It was not being assumed that there would be representations from a special advocate. The whole problem which had been identified (at §62) was that a special advocate might not be in a position to "make fresh claim representations". The point is that there would nevertheless be effective judicial protection, because the judicial review Court could scrutinise the Secretary of State's decision responding to the fresh claim, a decision made with a duty to consider the "closed material". Effective judicial protection would be by way of judicial review, with a special advocate if necessary to secure such protection.

20. What this means is that the Court of Appeal supplied a clear and straightforward answer to the very 'protection gap' which Mr Southey KC identifies, and which Mr Watkins as Special Advocate described orally as "conceptually present" in this case. There was

within the reasoning in XX no missing and unanswered question of 'how' effective judicial protection would be secured. The Secretary of State has a continuing responsibility of "alerting" the Claimant's lawyers "to the possibility of a fresh claim", if there is some change of circumstances which means there is "the existence of closed material that would be capable of founding a fresh claim". If, in those circumstances, the Claimant's lawyers confirmed that he wanted to make a fresh claim, it would become "necessary" for the Secretary of State to make a decision and in doing so "to take into account" the "closed material". If the Secretary of State's decision rejects the fresh claim, the Claimant would have access to effective judicial protection, including as appropriate a special advocate mechanism.

21. Importantly, in the present case, the Secretary of State has expressly confirmed – through Mr Blundell KC – that this is how she understands her continuing responsibility, and that she would alert the Claimant's lawyers were there the "possibility of a fresh claim", because of some change of circumstances which means there is "the existence of closed material that would be capable of founding a fresh claim". Mr Blundell KC told me on instructions – and I record in this judgment – that the Secretary of State recognises that responsibility, to act in that way, in those circumstances. I am quite sure that this provides the answer to the 'protection gap' arguments made on behalf of the Claimant. The contrary is not arguable, in my judgment, with any realistic prospect of success. The continuing responsibility identified by the Court of Appeal, and recognised by the Secretary of State, is necessary but also sufficient. It is not necessary that the Special Advocates be retained while legal proceedings are no longer on foot.

Other Points

22. There are a number of further points with which I should deal. The first is to record that a continuing responsibility on the part of the Secretary of State, to give an 'alert' to "the possibility of a fresh claim", there being "the existence of closed material that would be capable of founding a fresh claim", is plainly necessary on any view. It would be necessary, even if the Special Advocates continued to be deployed. As the Special Advocates pointed out in an OPEN Communication dated 16 May 2022:

> ***… even if we remained appointed in a matter post proceedings and before action being taken that does not mean we would learn about further CLOSED developments unless informed of them by the [Secretary of State].***

It follows that there is a necessary, and unavoidable, gatekeeping function.

23. Secondly, the present case is one in which the Court can have a high degree of confidence that the Secretary of State and her legal team recognise the importance of the ongoing responsibility and scrupulous adherence to it. That is not just because of the express recognition given by Mr Blundell KC to the responsibility, as recorded above. It is also because of what happened which led to the Special Advocates' Communication of 24 August 2021. As I explained at the outset of this judgment, it was action by and on behalf of the Secretary of State which provided the alert, concerning new "matters" constituting a change in circumstances and CLOSED materials which could support a fresh claim. This proactive and protective unilateral action, in line with what the Court of Appeal had said in XX at §63, provides concrete reassurance.

24. Thirdly, I do not accept that any serious concern arises from Mr Southey KC's broader points. The fact of the continuing responsibility necessitates that active and enquiring thought is given to the evolving available information, but it does not require the replication of regulation 10A outside SIAC proceedings. The fact that the Special Advocates would not be able to draft CLOSED fresh claim representations, or assist with whether judicial review should be claimed, does not undermine effective judicial protection. If there were an "alert" at some future stage in this case, and if a fresh claim were made and rejected, a judicial review claim to secure effective judicial protection with a CMP could be instituted. Those safeguards were provided in the present case, and would – I have no doubt – be provided again, if such a situation arose.

25. Finally, I asked Mr Southey KC whether his legal logic would not equally apply across the board to safety on return deportation cases after SIAC proceedings have run their course. His answer portrayed this case as special and a one-off. I doubt whether that would be right. But I put the point about 'where the line would be drawn' to one side. If a protection gap exists and protection is necessary, then it should in principle be provided wherever these things are so.

Conclusion

26. For the reasons which I have given, I am satisfied that there is no human rights 'protection gap', requiring the Special Advocates to be retained while no extant proceedings are on foot. The contrary is not in my judgment arguable with any realistic prospect of success. There is a clean 'knock out blow'. I will refuse permission for judicial review.