

**National Security (Legislative Provisions) Bill :  
Special Procedures for Appeals against Proscription**

This paper explains the proposed functions of a special advocate and how it is proposed that a special advocate should be selected in any particular case.

**Background**

2. Paragraph 45 of Paper No. 53 explains how it is envisaged that special procedures could be applied in respect of an appeal against a proscription. That paragraph reads as follows.

“45. *In particular –*

- (1) *the Court would decide whether the Secretary for Security may refuse to disclose to the appellant or its legal representative any particular information, reasons or evidence and, before so deciding, a special advocate could make representations on behalf of the appellant;*
- (2) *if and to the extent that it would be possible to do so without disclosing information contrary to the interests of the security of the PRC, the Secretary for Security would be required to provide a statement of the undisclosed material in a form which could be shown to the appellant;*
- (3) *the Court could only hear the proceedings or any party of them in the absence of the appellant and his legal representative if that was necessary in order to ensure that information was not disclosed contrary to the interests of the security of the PRC;*
- (4) *a special advocate could represent the interests of the appellant by –*
  - (a) *making submissions to the Court in any proceedings from which the appellant and his legal representative were excluded;*
  - (b) *cross-examining witnesses at any such proceedings; and*
  - (c) *making written submissions to the Court.”*

**Functions of the special advocate**

3. It is proposed that the functions of a special advocate would be modelled on English legislation on this subject. This provides that a special

advocate –

- (1) is to represent the interests of an appellant in any relevant proceedings from which the appellant and any legal representative of his are excluded;
- (2) shall not be responsible to the person whose interests he is appointed to represent.

4. The effect of these provisions is that a special advocate is under a **statutory** duty to represent the interests of an appellant, but there is not the usual client/lawyer relationship between the appellant and the special advocate.

5. Details of the functions of a special advocate are found in (for example) the Special Immigration Appeals Commission (Procedure) Rules 1998 (annexed). The following Rules are relevant : rules 7, 10(3), 11, 16, 22(2).

### **Selection of the special advocate**

6. In England, a special advocate is appointed by the Attorney General. However, it is not proposed that a government official should appoint a special advocate under the proposed legislation.

7. The details of the selection process will be contained in subsidiary legislation that will be subject to vetting by the Legislative Council. In preparing that subsidiary legislation, the following principles will need to be taken into account –

- (1) the need to comply with Articles 39 and 35 of the Basic Law;
- (2) the need to ensure that the appellant's interests are represented by an experienced and independent lawyer from the private sector; and
- (3) the need to ensure that information is not disclosed contrary to the interests of national security.

8. The current thinking of the Administration is that these three principles could be satisfied by regulations that allowed the appellant to select a special advocate from a panel of experienced and independent lawyers that had been approved by the Secretary for Justice.

Department of Justice  
June 2003

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STATUTORY INSTRUMENTS

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1998 No. 1881

IMMIGRATION

The Special Immigration Appeals Commission  
(Procedure) Rules 1998

*Made* - - - - - 30th July 1998

*Coming into force* 31st July 1998

ARRANGEMENT OF RULES

PART I

*General provisions*

1. Citation and commencement
2. Interpretation
3. General duty of Commission
4. Delegated powers
5. Notices etc.

PART II

*Appeals*

6. Application of Part II
7. The special advocate
8. Time limit for appealing
9. Notice of appeal
10. Secretary of State's reply
11. Consideration of Secretary of State's objection
12. Amendment and supplementary grounds
13. Directions
14. Failure to comply with directions
15. Applications by Secretary of State
16. Notification of hearing
17. Parties
18. Representation of parties
19. Proceedings in private

20. Evidence
21. Summoning of witnesses
22. Notification to appellant before determination
23. Promulgation of determination

### PART III

#### *Leave to appeal from Commission*

24. Application of Part III
25. Application for leave to appeal

### PART IV

#### *Bail applications*

26. Application for bail: procedure
27. Release on bail

The Lord Chancellor, in exercise of the powers conferred by sections 5 and 8 of the Special Immigration Appeals Commission Act 1997(a), makes the following Rules of which a draft has, in accordance with sections 5(9) and 8(4), been laid before and approved by resolution of each House of Parliament:—

## PART I

### GENERAL PROVISIONS

#### **Citation and commencement**

1. These Rules may be cited as the Special Immigration Appeals Commission (Procedure) Rules 1998 and shall come into force on the day after the day on which they are made.

#### **Interpretation**

2. In these Rules—

- “the 1971 Act” means the Immigration Act 1971(b);
- “the 1997 Act” means the Special Immigration Appeals Commission Act 1997;
- “the chairman” means the chairman of the Commission;
- “the Commission” means the Special Immigration Appeals Commission; and
- “the special advocate” means a person appointed under section 6(1) of the 1997 Act to represent the interests of the appellant.

#### **General duty of Commission**

3.—(1) When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm a public interest.

(2) Where the Rules require information not to be disclosed contrary to the public interest, the requirement shall be construed in accordance with paragraph (1).

(a) 1997 c.68.

(b) 1971 c.77, as modified by Schedules 2 and 3 to the Special Immigration Appeals Commission Act 1997.

(3) Subject to paragraphs (1) and (2), the Commission must satisfy itself that the material available to it enables it properly to review decisions.

#### **Delegated powers**

4.—(1) The powers of the Commission under the following provisions may be exercised by the chairman or by any other member of the Commission who falls within paragraph 5(a) or (b) of Schedule 1 to the 1997 Act:—

- (a) rule 12(1) and (3) (amendment and supplementary grounds);
- (b) rule 13 (directions);
- (c) rule 25 (application for leave to appeal);
- (d) rules 26 and 27 (bail proceedings).

(2) Instead of exercising a power under paragraph (1), the chairman or member may remit the matter to be dealt with by the Commission.

(3) Where the chairman or member exercises any power of the Commission, references to the Commission in the Rules shall as appropriate include references to him.

#### **Notices etc.**

5.—(1) Any document required or authorised to be given or sent to—

- (a) the Commission, shall be directed to the Secretary to the Commission;
- (b) the Secretary of State, shall be directed to the Appeal Support Section of the Asylum Directorate of the Home Office.

(2) The appellant must inform the Commission if an address given under rule 9(3) changes.

## **PART II**

### **APPEALS**

#### **Application of Part II**

6. This Part applies to appeals brought under section 2 of the 1997 Act and appeals mentioned at paragraph 5 of Schedule 2 to that Act, but the provisions of this Part shall not—

- (a) prejudice steps already taken in respect of an appeal mentioned at paragraph 5 of that Schedule, or
- (b) require any step to be taken under these Rules which is equivalent to a step which has already been taken in respect of such an appeal.

#### **The special advocate**

7.—(1) On receiving a copy of the notice of appeal, the Secretary of State shall inform the relevant law officer of the proceedings before the Commission, with a view to the law officer, if he thinks fit to do so, appointing a special advocate to represent the interests of the appellant in the proceedings.

(2) Paragraph (1) applies unless—

- (a) the Secretary of State does not intend to oppose the appeal, or
- (b) he does not intend to object to the disclosure of material to the appellant.

(3) If at any stage in proceedings before the Commission, paragraph (2)(b) ceases to apply, the Secretary of State shall immediately notify the relevant law officer as in paragraph (1).

(4) The function of the special advocate is to represent the interests of the appellant by—

- (a) making submissions to the Commission in any proceedings from which the appellant and his representative are excluded;
- (b) cross-examining witnesses at any such proceedings; and
- (c) making written submissions to the Commission.

(5) Except in accordance with paragraphs (6) to (9), the special advocate may not communicate directly or indirectly with the appellant or his representative on any matter connected with proceedings before the Commission.

(6) The special advocate may communicate with the appellant and his representative at any time before the Secretary of State makes material available to him under rule 10(3).

(7) At any time after the Secretary of State has made material available under rule 10(3), the special advocate may seek directions from the Commission authorising him to seek information in connection with the proceedings from the appellant or his representative.

(8) The Commission shall notify the Secretary of State of a request for directions under paragraph (7) and the Secretary of State must, within a period specified by the Commission, give the Commission notice of any objection which he has to the request for information being made or to the form in which it is proposed to be made.

(9) Where the Secretary of State makes an objection under paragraph (8), rule 11 shall apply as appropriate.

#### **Time limit for appealing**

8. The appellant must give notice of an appeal no later than—

- (a) 7 days after receiving notice of the decision being appealed in a case where an appellant in the United Kingdom appeals under section 2(1)(g) of the 1997 Act (claim for asylum);
- (b) 14 days after receiving notice of the decision being appealed in a case where an appellant in the United Kingdom appeals otherwise than under section 2(1)(g) of the 1997 Act;
- (c) 42 days after receiving notice of the decision being appealed where an appellant appeals from outside the United Kingdom.

#### **Notice of appeal**

9.—(1) An appeal to the Commission is made by sending to the Commission a notice of appeal.

(2) The notice of appeal must set out the grounds for the appeal.

(3) The notice of appeal must state the name and address of the appellant and the name and address of any representative of the appellant.

(4) The appellant or his representative must sign the notice of appeal.

(5) The appellant must attach to the notice of appeal a copy of the document which informed him of the decision being appealed.

(6) As soon as practicable after it receives a notice of appeal, the Commission shall send a copy to—

- (a) the Secretary of State, and
- (b) where the decision being appealed is a decision to refuse asylum, the United Kingdom Representative of the United Nations High Commissioner for Refugees.

**Secretary of State's reply**

10.—(1) If the Secretary of State intends to oppose the appeal, he must, no later than 42 days after receiving a copy of the notice of appeal,—

- (a) provide the Commission with a summary of the facts relating to the decision being appealed and the reasons for the decision;
- (b) inform the Commission of the grounds on which he opposes the appeal; and
- (c) provide the Commission with a statement of the evidence which he relies upon in support of those grounds.

(2) Where the Secretary of State objects to material referred to in paragraph (1) being disclosed to the appellant or his representative, he must also—

- (a) state the reasons for his objection; and
- (b) if and to the extent it is possible to do so without disclosing information contrary to the public interest, provide a statement of that material in a form which can be shown to the appellant.

(3) Where he makes an objection under paragraph (2), the Secretary of State must make available to the special advocate, as soon as it is practicable to do so, the material which he has provided to the Commission under paragraphs (1) and (2).

**Consideration of Secretary of State's objection**

11.—(1) Proceedings under this rule shall take place in the absence of the appellant and his representative.

(2) The Commission shall decide whether to uphold the Secretary of State's objection.

(3) Before doing so, it must invite the special advocate to make written representations.

(4) After considering representations made under paragraph (3), the Commission may—

- (a) invite the special advocate to make oral representations; or
- (b) uphold the Secretary of State's objection without requiring further representations from the special advocate.

(5) Where the Commission is minded to overrule the Secretary of State's objection, or to require him to provide material in a different form from that in which he has provided it under rule 10(2)(b), the Commission must invite the Secretary of State and the special advocate to make oral representations.

(6) Where—

- (a) the Commission overrules the Secretary of State's objection or requires him to provide material in a different form from that which he has provided under rule 10(2)(b), and

(b) the Secretary of State wishes to continue to oppose the appeal,  
he shall not be required to disclose any material which was the subject of his unsuccessful objection if he chooses not to rely upon it in opposing the appeal.

**Amendment and supplementary grounds**

12.—(1) With the leave of the Commission, the appellant may amend his notice of appeal or deliver supplementary grounds of appeal.

(2) Rule 9(6) applies to an amended notice of appeal and to supplementary grounds of appeal provided under paragraph (1).

(3) With the leave of the Commission, the Secretary of State may amend or supplement the material which he has provided under rule 10.

(4) Where the Secretary of State provides further objections under paragraph (3), the Commission shall consider them in accordance with rule 11.

### Directions

13.—(1) Subject to any decision which it makes under rule 11 and to the need to secure that information is not disclosed contrary to the public interest, the Commission may give directions for the conduct of proceedings.

(2) Directions may—

- (a) provide for a particular matter to be dealt with as a preliminary issue and for a pre-hearing review to be held;
- (b) limit the length of oral submissions and the time allowed for the examination and cross-examination of witnesses;
- (c) require any party to the appeal to give to the Commission—
  - (i) statements of facts and statements of the evidence which will be called at any hearing, including such statements provided in a modified or edited form;
  - (ii) a skeleton argument which summarises the submissions which will be made and cites all the authorities which will be relied upon, identifying any particular passages to be relied upon;
  - (iii) an estimate of the time which will be needed for any hearing;
  - (iv) a list of the witnesses who will be called to give evidence;
  - (v) a chronology of events;
  - (vi) a statement of any interpretation requirements,
 and to serve any such material on the other parties to the appeal.

(3) The Commission may, subject to any specific provisions of the Rules, specify time limits for steps to be taken in the proceedings and may extend any time limit.

(4) The power to give directions may be exercised in the absence of the parties.

### Failure to comply with directions

14.—(1) Where a party fails to comply with a direction, the Commission may send him a notice which states—

- (a) the respect in which he has failed to comply with the relevant direction;
- (b) the time limit for complying with the direction; and
- (c) that the Commission may proceed to determine the appeal on the material available to it if the party fails to comply with the relevant direction within the time specified.

(2) Where the party in default fails to comply with the notice under paragraph (1), the Commission may proceed in accordance with paragraph (1)(c).

### Applications by Secretary of State

15.—(1) This rule applies to the notification to the appellant by the Commission of—

- (a) any order or direction made or given in the absence of the Secretary of State,
- (b) any summary prepared under rule 22, and
- (c) its determination under rule 23.

(2) Before the Commission notifies the appellant as mentioned in paragraph (1), it must first notify the Secretary of State.

(3) If the Secretary of State considers that compliance by him with an order or direction or notification to the appellant of any matter under paragraph (1) would cause information to be disclosed contrary to the public interest, he may apply to the Commission to reconsider the order or direction or to review the proposed summary or determination.

(4) At the same time as he makes his application, or as soon as practicable afterwards, the Secretary of State must send a copy of it to the special advocate.

(5) An application by the Secretary of State must be made within 14 days of receipt of notification under paragraph (2), and the Commission shall not notify the appellant as mentioned in paragraph (1) before the time for applying has expired.

(6) Rule 11 shall apply as appropriate to the Commission's consideration of the Secretary of State's application.

#### Notification of hearing

16. The Secretary to the Commission must send notice of the date, time and place fixed for any hearing to the special advocate and every party entitled to attend that hearing.

#### Parties

17.—(1) The parties to an appeal shall be the appellant and the Secretary of State.

(2) If the United Kingdom Representative of the United Nations High Commissioner for Refugees (the "United Kingdom Representative") gives written notice that he wishes to be treated as a party to the appeal, he shall be so treated from the date of the notice.

(3) Any restriction imposed by or under these Rules in relation to the appellant as to the disclosure of material, attendance at hearings, notification of directions or decisions and communications with the special advocate, applies to the United Kingdom Representative.

#### Representation of parties

18.—(1) The appellant may act in person or be represented or appear by—

- (a) a person having a qualification referred to in section 6(3) of the 1997 Act,
- (b) a person appointed by any voluntary organisation for the time being in receipt of a grant under section 23 of the 1971 Act, or
- (c) with the leave of the Commission, any other person.

(2) The Secretary of State and the United Kingdom Representative may be represented by any person appointed by them respectively for that purpose.

#### Proceedings in private

19.—(1) Where the Commission considers it necessary for the appellant and his representative to be excluded from the proceedings or any part of them in order to secure that information is not disclosed contrary to the public interest, it must—

- (a) direct accordingly, and
- (b) hear the proceedings, or that part of it from which the appellant and his representative are excluded, in private.

(2) The Commission may hear the proceedings or part of them in private for any other good reason.

#### Evidence

20.—(1) In any proceedings on an appeal, the evidence of witnesses may be given either—

- (a) orally, before the Commission, or
- (b) in writing, in which case it shall be given in such a manner and at such time as the Commission has directed.

(2) The Commission may also receive evidence in documentary or any other form.

(3) The Commission may receive evidence that would not be admissible in a court of law.

(4) No person shall be compelled to give evidence or produce a document which he could not be compelled to give or produce on the trial of an action in the part of the United Kingdom in which the proceedings before the Commission are taking place.

(5) Every party shall be entitled to adduce evidence and to cross-examine witnesses during any part of the hearing of the appeal from which he and his representative are not excluded.

(6) The Commission may require a witness to give evidence on oath.

**Summoning of witnesses**

21.—(1) Subject to rules 3 and 20(4) and paragraph (2) of this rule, the Commission may require any person in the United Kingdom to attend as a witness at any proceedings before the Commission and to answer any questions or produce any documents in his custody or under his control which relate to any matter in question in the appeal.

(2) No person shall be required to travel more than 16 kilometres from his place of residence unless the necessary expenses of his attendance are paid or tendered to him.

(3) Where a party requests the attendance of a witness, that party must pay or tender those expenses.

**Notification to appellant before determination**

22.—(1) Where the appellant or his representative have been excluded from the hearing of the appeal or any part of it, the Commission must, before it makes a determination, give the appellant a summary of the submissions and evidence received in his absence if and to the extent it is possible to do so without disclosing information contrary to the public interest.

(2) Where the Commission provides such a summary, it shall afford the special advocate and the parties an opportunity to make representations and adduce evidence or further evidence to the Commission in respect of the material contained in it.

**Promulgation of determination**

23.—(1) The Commission must record its determination and, if and to the extent it is possible to do so without disclosing information contrary to the public interest, the reasons for it.

(2) The Commission shall publish its determination and send written notice of it to the special advocate and the parties.

## PART III

### LEAVE TO APPEAL FROM COMMISSION

**Application of Part III**

24. This Part applies to applications for leave to appeal, on a question of law, to the Court of Appeal, the Court of Session or the Court of Appeal in Northern Ireland, as the case may be, from a final determination of an appeal by the Commission.

**Application for leave to appeal**

25.—(1) An application to the Commission for leave to appeal shall be made not later than 10 days after the party seeking to appeal has received written notice of the determination.

(2) The Commission may decide an application for leave without a hearing unless it considers there are special circumstances which make a hearing necessary or desirable.

## PART IV

### BAIL APPLICATIONS

**Application for bail: procedure**

26.—(1) Subject to the provisions of this rule and rule 27, these Rules apply to—

(a) applications for bail by a person who brings an appeal under section 2 of the 1997 Act, and

(b) applications to the Commission under paragraphs 22 to 24 of Schedule 2 to the 1971 Act,

with appropriate modifications.

(2) References in the Rules to the appellant shall be read, in relation to bail applications, as if they were references to the applicant.

(3) Rules 8 and 9 shall not apply to bail applications.

(4) Rule 10(1) (time limit for Secretary of State to reply) shall apply as if "14 days" were substituted for "42 days".

(5) An application to the Commission to be released on bail must be made in writing and shall contain the following particulars—

- (a) the full name of the applicant;
- (b) the address of the place where, and the reason why, the applicant is detained at the time when the application is made;
- (c) the date of any notice of appeal which has been given;
- (d) the address where the applicant would reside if his application for bail were to be granted;
- (e) the amount of the recognizance in which he would agree to be bound;
- (f) the full names, addresses and occupations of two persons who might act as sureties for the applicant if his application for bail were to be granted, and the amounts of the recognizances in which those persons might agree to be bound; and
- (g) the grounds on which the application is made and, where a previous application has been refused, particulars of any change in circumstances which has occurred since that refusal.

(6) In its application to Scotland, this rule shall have effect as if, for paragraph (5)(e) and (f), there were substituted—

- “(e) the amount, if any, to be deposited if bail is granted;
- (f) the full names, addresses and occupations of such persons if any, who offer to act as cautioners if the applicant's application for bail were to be granted;”.

(7) A bail application shall be signed by the applicant or by a person duly authorised by him for that purpose or, in the case of an applicant who is a minor or who is for any reason incapable of acting, by any person acting on his behalf.

(8) The application must be delivered, or sent by post, to the Commission.

#### Release on bail

27.—(1) Where the Commission directs the release of an applicant on bail and the taking of the recognizance is postponed under paragraph 22(3) or 29(6) of Schedule 2 to the 1971 Act, it shall certify in writing that the applicant has been granted bail and shall include in the certificate—

- (a) particulars of the conditions to be endorsed on the recognizance with a view to the recognizance being taken subsequently;
- (b) the amounts in which the applicant and any sureties are to be bound; and
- (c) the date of issue of the certificate.

(2) The person having custody of an applicant shall release him—

- (a) on receipt of a certificate signed by the Commission stating that the recognizances of any sureties required have been taken or on being otherwise satisfied that all such recognizances have been taken, and
- (b) on being satisfied that the applicant has entered into his recognizance.

(3) In its application to Scotland, this rule shall have effect as if for paragraph (2), there were substituted—

“(2) The person having custody of an appellant shall release him—

- (a) on receipt of a certified copy of the decision to grant bail, and
- (b) on being satisfied that the amount, if any, to be deposited has been so deposited.”.

**EXPLANATORY NOTE**

*(This note is not part of the Rules)*

These Rules prescribe the practice and procedure to be followed on appeals and bail applications under the Special Immigration Appeals Commission Act 1997. They include provision for—

- (a) appeals to be heard in the absence of the appellant and his representative where necessary;
- (b) the circumstances in which a special advocate is to be appointed to represent the interests of the appellant;
- (c) the right of the appellant to be legally represented; and
- (d) applications for leave to appeal on a point of law from the Commission's determination.