For information

LegCo Panel on Administration of Justice and Legal Services

Appointment of Special Advocates

Purpose

This paper informs Members of

(1) the systems in other jurisdictions concerning appointment of special advocates; and

(2) the conditions which have to be satisfied and guidelines which the Administration should follow in future in relation to the procedure for appointment of special advocates.

Background

2. We briefed this Panel on 28 February 2005 on matters relating to the appointment of special advocates including the rationale and functions as well as the procedure for their appointment (LC Paper No. CB(2)917/04-05(01)). We undertook to provide a paper on the systems in other jurisdictions for the Panel's reference and further explain the guidelines for the appointment of special advocates.

Systems in other jurisdictions

3. Enquiries have been made with the relevant authorities in the United Kingdom, Canada and Australia to ascertain whether those jurisdictions have a system in place whereby special advocates would be appointed to deal with situation where confidential material is used against an affected person in *in camera* hearings from which the affected person and his legal representatives are excluded.

4. The common law jurisdictions that we have looked at have all enacted some form of legislation to protect sensitive information with special procedures devised to achieve the objective of striking the right balance between the competing public interests of protecting sensitive information from disclosure and the need for disclosure to ensure justice in a particular case. England, however, appears to be the only jurisdiction that has enacted legislative provisions in respect of the appointment of special advocates.

5. In dealing with novel situations, the courts of those jurisdictions have been willing to improvise and devise special procedure to achieve the objective, usually with the consent of the affected person, as in the case of *Ribic*[1] in Canada. Similarly, in England, in cases where there is no legislative backup, the court has also shown willingness to adopt the special procedure modelled on the legislation on special advocates to ensure justice is achieved[2].

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1 *Ribic v Canada (A.G.)* (2003) FCA 246

2 For example, see *R v H and others* [2004] 2 WLR 335, *Regina (Roberts) v Parole Board and another* [2005] 2 WLR 54 (the CA held that the Board had inherent power to devise procedure to protect a source of evidence who may be at risk of life or limb if his identity is known by adopting special advocate procedure although there was no express provision for the Board to do so), *Regina v Shayler* [2003] 1 AC 247 (the HL recognized that specially appointed advocate

A summary of the respective systems in the United Kingdom, Canada and Australia is set out at the **Appendix** for reference.

Guidelines for the appointment of special advocates

6. As we have stressed, the appointment of special advocates is always extraordinary, to be used only in exceptional circumstances and as the last resort. It may not be ordered by the court unless and until the judge is satisfied that no other course, e.g. the provision of documents in an edited or anonymised form, would adequately meet the overriding requirement of fairness to the affected person.

7. The guidelines derived from the *PV* case and the relevant English authorities may be summarised as follows :

(i) The appointment of a special advocate might in an appropriate case be necessary in the interests of justice to ensure the affected person's interests are safeguarded but only where the judge is satisfied that no other course would adequately meet the overriding requirement of fairness to the affected person. What amounts to an appropriate case is to be decided by the court on a case by case basis. It is envisaged that such procedure is likely to be deployed in cases where a claim of public interest immunity (PII) has been

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arrangement could be made to represent the applicant's interest at the hearing of an application for judicial review if it were necessary for the court to examine material said to be too sensitive to be disclosed), *Secretary of State for the Home Department v Rehman* [2003] 3 ALL ER 778 (in order to dispose justly of an appeal, the court acting under its inherent jurisdiction could request a special advocate to appear without the advantage of statutory backing).

upheld by the court but it is necessary to use the evidence against the interests of the affected person in circumstances where the evidence cannot be disclosed to the affected person and/or his legal representatives as it would be injurious to the public interest to do so. By way of illustration only, the court may consider the appointment of a special advocate arising from a PII claim in respect of unused materials to be withheld from the defence, as in the *R v H and others*. The appointment of a special advocate will provide an additional protection to the interests of the affected person as he could assist the court by ensuring the Government's contentions are fully tested and considered.

(ii) The general principle is whether it is necessary in the interests of justice to ensure the overriding requirement of fairness to the affected person can be achieved and that no other course would adequately meet such objective. It is not confined to any particular type of proceedings and irrespective of whether there is any legislative backup as the court has power to make such an order under its inherent jurisdiction.

(iii) While the consent of the affected person would be highly desirable in the absence of legislative backing, it is not an absolute requirement as the arrangement is intended to give additional protection to the affected person and not be a derogation of his right or interests. The alternative would be the use of the PII material against him without his knowledge or consent and the

evidence being admitted without being properly tested under an adversarial process.

(iv) Although not considered by the court in the *PV* case, the English court has suggested that a special advocate may be used in certain circumstances to assist a court in undertaking the balancing exercise required to determine whether a PII claim should be upheld[3]. Our courts will no doubt consider in due course whether a special advocate should be appointed when addressing the same problem.

As the law is still developing in this area, we envisage that more guidelines will be laid down by our courts in future cases having regard to the development in other jurisdictions.

The special advocate procedure as adopted in the *PV* case

8. Future courts are likely to follow the procedure adopted in the *PV* case modelled on the English procedures, namely :

i. The appointed special advocate, prior to being given access to the documents subject to PII, will take instructions of a general nature from the applicant and his legal representatives.

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3 Para. 36 (4), *R v H and other* [2004] 2 WLR 335.

ii. After being given access to the PII material, the special advocate will not take further instructions from the applicant or his legal representatives.

iii. An *in camera* hearing will then take place in which the special advocate will participate in an adversarial process whereby he and the counsel representing Government will make submissions on the PII material. Neither the applicant nor his legal representatives would be present at the hearing.

iv. With the *in camera* hearing concluded and the special advocate having discharged his responsibilities, the judge will adjourn into the open court to allow the applicant's counsel to make final submissions.

v. The judge would deliver two judgments, one in respect of the hearing in public and the other, which is a confidential one, in respect of the *in camera* hearing. The latter one would only be provided to the counsel representing Government and to the special advocate because of the confidential information contained in it.

Terms of appointment of special advocate

9. In the absence of legislation, and because of the restrictions imposed on the special advocate not to take full instructions from the affected

person, the following terms of appointment for a special advocate adopted in the *PV* case are likely to be adopted in future cases :

i. to represent the interests of the affected person whenever the affected person and his legal representatives are excluded from any PII proceedings, by making oral and written submissions to the Court and cross-examining witnesses in any such proceedings;

ii. the special advocate shall not be responsible to the person whose interests he is appointed to represent, i.e. there is not the usual client/lawyer relationship between the applicant and the special advocate; in particular, he must not disclose any confidential information which is subject to the PII to the applicant or his representative at any time;

iii. the special advocate should obtain instructions from the affected person before the confidential material which is subject to PII is made available to him;

iv. if the special advocate or the affected person needs to meet each other after the PII material has been disclosed to the special advocate, a direction should be sought from the judge hearing the PII application with an opportunity be given to the counsel representing Government to be heard;

v. the costs of the appointment of and the representation by the special advocate are to be borne by Government.

Way forward

10. Given the extraordinary and developing nature of the special advocate arrangement, we agree with the Bar Association that legislation may not be the appropriate way forward.

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Appendix

United Kingdom

1. UK appears to be the only jurisdiction that has provided by way of legislation for the appointment of a special advocate in respect of special types of proceedings e.g. anti-terrorism, immigration, planning and compulsory purchase and privacy etc. The practice is different with regard to the appointment of a special advocate in PII cases which has emerged from case law.

2. The Attorney General, acting as the unpartisan guardian of the public interest in the administration of justice, is responsible for the appointment of special advocate. It is the Court who requests or directs the appointment, and the Attorney General who appoints a special advocate to represent the rights of the defendant. Counsel is expected to assist the Judge in ensuring that the Judge has gone through the series of questions outlined in the judgment of *R-v- H and others (para. 36 of the judgment),* and articulates why there is no other course of action other than to seek the appointment of a special advocate, bearing in mind the safeguards and procedures set out in *R v H and others.*

3. The appointment of a special advocate is made by the Attorney General. Where appropriate, the Judge may suggest an alternative. There is a panel of special advocates. The advocates are all experienced practitioners.

4. Where the Attorney General has appointed a special advocate, a guidance note would be sent to the counsel on the role of the special advocate.

5. In view of the nature of the information to be protected, security clearance is a prerequisite to being appointed as a special advocate.

6. In relation to special advocates in Special Immigration Appeal Commission cases, a small recruitment exercise was conducted in 2003. The exercise was intended to recruit lawyers who were prepared to act as special advocates in immigration cases of great sensitivity. Candidates for these posts were asked to complete a discrete section of the application form setting out the particular qualities they believe they possess which fit them for this type of work, and detailing their experience of immigration work. Successful applicants form a panel of special advocates from whom the Attorney General can call for special advocate work. The recruitment advertisement specifically referred to the need of the candidate to undergo an intensive form of security clearance.

Canada

7. Before the various amendments to and the final repeal of the Immigration Act 1976 in 2001 by the Immigration and Refugee Protection Act, there used to be some arrangement in place in Canada akin to the UK special advocate arrangement. This was practised in a specialised type of tribunal, namely, the Security Intelligence Review Committee (SIRC). Only security-cleared lawyers would be appointed to assist the tribunal. The tasks of the counsel acting for SIRC included cross-examining in the *in camera* portion of the

proceedings and negotiating with the counsel representing the Canadian Security Intelligence Service (CSIS) on the form of evidence to be disclosed from this portion of the hearings. Additionally, counsel acting for SIRC liaised with the complainant's counsel to ensure that all appropriate questions would be asked in the closed session. However, SIRC has since been stripped of its role to review deportation decisions relating to national security. It has now been replaced by the Canadian Federal Court procedures which provide for *ex parte* hearings without allowing representation by proxy.

8. Currently, Canada has no legislation comparable to the UK for appointing special advocates. However, Canadian courts of general jurisdiction possess an inherent jurisdiction to appoint *amicus curiae,* or disinterested or neutral person appointed to assist the court when required. *Amicus curiae* is normally appointed in three situations:

a) where there is a matter of public interest in which the court invites the Attorney-General or some other capable individual to intervene;

b) to address the court to prevent an injustice, for example, to make submissions on points of law that may have been overlooked ; or

c) to represent the unrepresented[4].

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4 *Attorney General of Canada et. al. v. Aluminum Co. of Canada et. al.; B.C. Wildlife Federation, Intervener*, (1987) 35 DLR (4th) 495 (B.C.C.A); *Grice v The Queen Ex Rel. Press* (1957) 11DLR(2nd) 699 (Ont.H.C.)

9. Although all Canadian Courts have rules governing their procedure, courts or tribunals created by statute do not have inherent jurisdiction to appoint *amicus curiae.* There is no formal process or criteria for the selection of *amicus curiae*. They are appointed on an *ad hoc* basis, based on reputation and experience in the relevant field of law. The local bar is not usually involved and does not appear to have devised special rules of conduct for *amicus curiae.*

10. Further, the Federal Court has allowed, upon the consent of all parties, for the use of **unusual procedures** to protect sensitive information while protecting the interests of the applicant. In the *Ribic* case[5], the appellant, an accused person in a criminal trial, was seeking disclosure of the information revealed or to be revealed by the two witnesses, to which the Attorney General opposed. The appellant consented to allow another counsel for the Attorney General to act on his behalf in examining the two witnesses. The examination was conducted on the basis of areas of questioning identified by counsel for the appellant. Counsel for the appellant were to remain available in order to provide to the counsel conducting the examination further explanations and suggestions on possible areas of questioning.

11. This process was devised to assist the Trial Division in determining the relevancy of the two witnesses' information to the prosecution of the appellant as well as identifying the sensitive information which could not be disclosed. The process was also conceived to obviate the lack of security clearance of the appellant's counsel. Some of the information was accessible on a need to know basis only and required security clearance at the

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5 *Ribic v Canada (A.G.)* (2003)FCA 246

highest level. The Court of Appeal characterized this process as 'unusual', but stated that 'unusual' is not necessarily synonymous with 'unfair'. The process was dictated by "**urgency** and **necessity**."

12. Further, Canada has enacted legislation for protecting sensitive information[6] while allowing its limited use: the Canada Evidence Act, the Immigration and Refugee Protection Act and the Charities Registration (Security Information) Act in court proceedings. In particular, on a case involving sensitive information, the Attorney General is given an opportunity to be heard *ex parte* as to the protection and disclosure of such sensitive information.

Australia

13. Australia does not have legislation comparable to the UK for appointing special advocates. A claim for PII is one of the most common ways in which information can be protected in Australian court proceedings. The common law on PII is largely reproduced in section 130 of Evidence Act 1995, which applies to the admission of evidence. Section 130(1) provides that the party arguing that the evidence is subject to PII must show that the public interest in preserving secrecy or confidentiality outweighs the public interest in admitting the information or document into evidence. Mechanisms available to protect evidence governed by the statute include: (a) evidence being taken *in camera*; (b) restriction on the publication of evidence; (c) suppressing the names of parties and witnesses; (d) limiting access to evidence to a party's legal advisors;

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6 Defined in s.38 of the Canada Evidence Act to mean information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

and (e) absolute immunity.

14. Section 93.2 of the Criminal Code Act 1995 allows a judge or magistrate, at any time before or after the hearing of an application or proceedings, to make any of the following orders where it is satisfied that it is in the interests of national security or defence to do so: (a) an order that some or all of the public be excluded during the whole or part of a hearing; (b) an order that no report of the proceedings be published; and (c) such order or direction as is necessary for ensuring that no person has access to documents used in the application or the proceedings. Similar powers allowing for *in camera* hearings also exist in other Australian legislation, including the Crimes Act 1914 and the Federal Court of Australia Act 1976.

15. The admissibility or otherwise of classified and security sensitive information was usually tested through a claim for PII. After hearing all of the arguments in a particular case, the court might rule that the classified and security sensitive information must be disclosed or protected from disclosure.

16. In December 2004, a new Act, namely, the National Security Information (Criminal Proceedings) Act 2004, was enacted on the basis of the recommendations of the Australian Law Reform Commission to provide a regime for dealing with national security information in the course of prosecution. The Act provides for a mechanism to determine issues in relation to the disclosure of national security information in federal criminal proceedings. It provides a scheme whereby the Attorney General is given timely notice of the potential for the disclosure of national security information and to intervene in

proceedings as he deems appropriate. It also enables the court to be notified and fully informed regarding national security information and to then make appropriate orders in relation to the protection of the information and its use in court.

17. In every case, the court would determine admissibility and rule on precisely how the material is to be handled and protected in the proceedings. However, the Attorney General would retain the power to certify that the national security information in question is so sensitive that it simply cannot be used under any circumstances. In such a case, the court would retain the final power to determine whether and how the proceedings may proceed in the absence of that material.

18. The 2004 Act provides for closed hearings and non-disclosure or witness exclusion orders. If the court considers that the disclosure of the information concerned would be likely to prejudice national security, the defendant or his legal representative or any court official who has not been given a security clearance at the appropriate level may be excluded from the closed hearings. The Attorney General may intervene in such closed hearings. Under the Act, the court must allow defendant's legal representative, who has been given a security clearance at the appropriate level[7], to have access to the record of the hearing provided the prosecutor and the Attorney General do not consider that to do so is likely to prejudice national security.[8]

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7 For details, please see Part 4 of the National Security Information (Criminal Proceedings) Act 2004.

8 Part 3, Division 3 on Closed hearings and non-disclosure or witness exclusion orders of the 2004 Act.