

Appeal No: **SC/197/2022**
Hearing Date: **2nd February 2023**
Date of Judgment: **3rd March 2023**

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE LANE
UPPER TRIBUNAL JUDGE McWILLIAM
MRS JILL BATTLE

C13

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT

Representation:

For the Appellant: Mr Edward Grieves and Mr Anthony Vaughan
instructed by Bindmans LLP

For the Respondent: Ms Lisa Giovannetti KC and Ms Nicola Kohn
instructed by the Government Legal Department

OPEN JUDGMENT

A. INTRODUCTION

1. On 6 January 2022, the appellant’s solicitors filed on her behalf a notice of appeal against the respondent’s decision on 17 May 2017 to deprive the appellant of her British citizenship. Enclosed with the notice of appeal was a request that the Commission grant an extension of time under rule 8(5) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (“the SIAC Rules”). Rule 8 specifies the time limit for appealing to SIAC. Rule 8(5) provides that:-

“(5) The Commission may extend the time limits in this rule if satisfied that by reason of special circumstances it would be unjust not to do so.”

2. On 14 July 2022, the Government Legal Department wrote to the Commission to say that the respondent opposed the appellant’s request for an extension of time. On 26 July 2022, the GLD delivered closed material to the Commission and to the Special Advocates’ Support Office, in support of the respondent’s opposition. That opposition was maintained by the respondent, following consideration of witness statements, filed and served on the appellant’s behalf in connection with the rule 8(5) application.

3. By letter dated 23 August 2022, the appellant asserted that the respondent is not entitled to rely upon closed material in opposing an application for an extension of time to file a notice of appeal. On 10 November 2022, Jay J ordered that the appellant’s deprivation of citizenship appeal be stayed in both open and closed, pending resolution of the issue raised in the letter of 23 August 2022. A hearing was listed for 2 February 2023 to consider the matter as a preliminary issue.

4. On 2 February 2023, the Commission heard oral submissions from Mr Grieves, on behalf of the appellant, and Ms Giovannetti, KC, on behalf of the respondent. The Commission also had before it the skeleton arguments of counsel. We are grateful to Mr Grieves and Ms Giovannetti for the clarity and concision of their respective submissions.

B. THE APPELLANT’S CASE

5. The appellant’s case on the preliminary issue is that the question whether to extend time is distinct from the substantive appeal. The relevant legislation does not permit the use of closed material for the purpose of deciding whether time should be extended. At best, there is uncertainty concerning the legislative position. Given the matters at stake, which involve access to justice, the principle of legality means that anything less than full legislative certainty is insufficient for the respondent to make good her case on the preliminary issue. To allow the respondent, in these circumstances, to adduce closed material, and to permit the Commission to use that material in reaching its decision under rule 8(5), would be profoundly unfair. It would enable the respondent to rely on evidence in closed about which the appellant would have no idea. The consequence of failing to have time extended is that the appellant loses her right of appeal to the Commission.

6. Mr Grieves submits that it is difficult to see any damage to the public interest at all if the respondent is unable to rely on closed material in opposing the appellant's application for an extension of time.

C. LEGISLATIVE FRAMEWORK

7. By section 2B of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), a person may appeal to the Commission against a decision to make an order under section 40 of the British Nationality Act 1981 (deprivation of citizenship) if she is not entitled to appeal under section 40A(1) of that Act because of a certificate issued under section 40A(2).

8. In section 5(1) enables the Lord Chancellor to make rules:-

“(a) for regulating the exercise of the rights of appeal conferred by section 2 or 2B above,

(b) for prescribing the practice and procedure to be followed on or in connection with appeals under section 2 or 2B above, including the mode and burden of proof and admissibility of evidence on such appeals, and

(c) for other matters preliminary or incidental to or arising out of such appeals, including proof of the decisions of the Special Immigration Appeals Commission.”

9. Section 5(3) reads as follows:-

“(3) Rules under this section may, in particular-

(a) make provision enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,

(b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,

(c) make provision about the functions in proceedings before the Commission of persons appointed under section 6 below, and

(d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence.”

10. Section 5(6) says that:

“(6) In making rules under this section the Lord Chancellor shall have regard, in particular to-

(a) the need to secure that decisions which are the subject of appeals are properly reviewed, and

(b) the need to secure that information is not disclosed contrary to the public interest.”

11. Section 5(9) provides for what is generally known as an “affirmative resolution procedure” in respect of rules made under section 5.

12. Rule 3 (Scope of these Rules) of the SIAC Rules provides that:-

“These Rules apply to the following proceedings –

(a) appeals to the Commission;

...

(d) applications to the Commission for bail.”

13. Rule 4 (General duty of Commission) states:-

“(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 the public interest.

(2) Where these Rules require information not to be disclosed contrary to the public interest, that requirement is to be interpreted in accordance with paragraph (1).

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

14. Rule 7 (Starting an appeal or application for review) requires an appeal to the Commission to be made by giving notice of appeal.

15. Mention has already been made of rule 8 (Time limit for appealing or for applying for review).

16. So far as relevant, rule 10 (Secretary of State’s reply to an appeal) provides:-

“(1) Where the Secretary of State intends to oppose an appeal, he must file with the Commission –

(a) a statement of the evidence on which he relies in opposition to the appeal;
and

(b) any exculpatory material of which he is aware.

...

(3) Where the Secretary of State objects to a statement filed under paragraph (1) being disclosed to the appellant or his representative, rules 37 and 38 shall apply.

(4) Where a special advocate is appointed, the Secretary of State must serve on him a copy of the statement and material filed under paragraph (1).”

17. Rule 34 concerns the appointment of a special advocate. It provides:-

“(1) Subject to paragraph (2), the Secretary of State must, upon being served with a copy of the notice of appeal, application for review or other application under these Rules, give notice of the proceedings to the relevant law officer.

(2) Paragraph (1) applies unless –

(a) the Secretary of State does not intend to –

- (i) oppose the appeal or application; or
- (ii) object to the disclosure of any materials to the appellants; or
- (b) a special advocate has already been appointed to represent the interests of the appellant in the proceedings.

(3) Where notice is given to the relevant law officer under paragraph (1), the relevant law officer may appoint a special advocate to represent the interests of the appellant in proceedings before the Commission.

(4) Where any proceedings before the Commission are pending but no special advocate has been appointed, the appellant or the Secretary of State may at any time request the relevant law officer to appoint a special advocate.”

18. Rule 35 provides that the functions of a special advocate are to represent the interests of the appellant by making submissions to the Commission at any hearings from which the appellant and his representatives are excluded; adducing evidence and cross examining witnesses at any such hearings; and making written submissions to the Commission.

19. Rule 37(1) defines “closed material” as follows:-

“(1) In this rule, “closed material” means material which the Secretary of State would otherwise be required to disclose to the appellant or his representative under rule 10... but which the Secretary of State objects to disclosing to the appellant or his representative.”

20. Rule 38 provides for the process of considering an objection by the Secretary of State to the disclosure of closed material. Rule 38(7) requires the Commission to uphold the Secretary of State’s objection where it considers that the disclosure of the material would be contrary to the public interest. Where, however, the Commission overrules the Secretary of State’s objection or directs the Secretary of State to serve a summary of the closed material, the Secretary of State is not required to do so; but, if she does not, then the Secretary of State cannot rely on that material in the proceedings, in furtherance of her case. If the material in question supports the appellant’s case or damages that of the Secretary of State, the Commission has power to direct that the Secretary of State shall not rely on such points in her case or that she shall make such concessions etc. as the Commission may specify.

21. Rule 39(1) gives the Commission wide powers to make directions “relating to the conduct of any proceedings”. Pursuant to rule 39(2)(a), that power must be exercised subject to, in particular, “the obligation in rule 4(1) to ensure that information is not disclosed contrary to the public interest...”

22. Rule 39(5)(c)(i) enables directions to be given which require a party to file and serve “further details of his case, or any other information which appears to be necessary for the determination of the appeal or application”.

D. CASES

23. In RB (Algeria) and others v Secretary of State for the Home Department [2010] 2 AC 110, one of the issues before the House of Lords was whether the Commission had been entitled to have regard to closed material in concluding that there were no substantial grounds for believing that certain claimants would be exposed to treatment contrary to Article 3 of the ECHR, if they were returned to Algeria. The House of Lords held that section 5(3) of the SIAC Act contained no hint that rules made under it, providing for closed hearings, could only be made insofar as such a hearing was necessary in the interests of national security, as opposed to safety on return. There were cogent considerations of policy besides national security which were capable of justifying the use of closed material in deportation proceedings.

24. At paragraph 181, Lord Hoffmann said:-

“181. It seems to me clear that the statutory provisions about disclosure of materials are solely concerned with the ways in which disclosure may damage the public interest and not with the issue to which such evidence may be relevant. Thus section 5(6) of the 1997 Act says that in making procedural rules for SIAC the Lord Chancellor shall have regard in particular to "(b) the need to secure that information is not disclosed contrary to the public interest." This is a perfectly general statement and I find it impossible to construe it as limited to cases in which some particular issue arises. Likewise, rule 4, which I have already quoted, elaborates on the meaning of "contrary to the public interest" but is entirely general in its application. Reference was made to the "presumption of legality" by which general statements in statutes are construed as having a narrower application than their literal meaning might suggest if this would produce an unjust result and in particular would override basic individual rights: see *Stradling v Morgan* (1560) 1 Pl 199; *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115. But this is in the end a rule of construction (which has now been largely superseded, in its application to human rights, by section 3 of the 1998 Act) and cannot displace what appears to me the plain and obvious meaning of the legislation.

25. At paragraph 226 of the judgment, Lord Hope stated that he was in general agreement with, *inter alia*, what Lord Hoffmann said at paragraph 181. At paragraph 263, Lord Mance held that “On the issue whether it was open to SIAC to use closed material relating to the issue of safety on return, I share the view that the statute unequivocally permits this”.

26. In W (Algeria and others) v Secretary of State for the Home Department [2010] [EWCA] Civ 898, the Court of Appeal rejected the submission that rule 4 of the SIAC Rules should be “read down” so as to prevent the Commission from having regard to closed material in circumstances where it was not possible to provide the appellant with even the essence of that material.

27. In the course of the judgment of Sir David Keene, with whom the other members of the court agreed, attention focused on whether, in RB (Algeria), the House of Lords

had, in fact, considered the statutory provisions regarding the use of closed material in a wider context than that of safety on return.

28. Sir David Keene said this:-

“53. I turn finally to consider the submissions made about the decision in *RB (Algeria)*. It is right that in his speech Lord Phillips of Worth Matravers dealt with the use of closed material simply in respect of the issue of the deportee's safety on return and it seems that that issue was the focus of the argument. Even so, it is clear from Lord Hope's speech at paragraph 222 that there was some argument, albeit brief, about reliance on closed material in respect of national security. There is express reference to two of the appellants' submissions to that effect. But in any event, it appears to me that the reasoning of a majority of their Lordships applies and was intended to apply to cases of deportation where the issue is one concerning national security.

54. Lord Hoffman, as these appellants acknowledge, said so in terms. At paragraph 181, he stated:

"181. It seems to me clear that the statutory provisions about disclosure of materials are solely concerned with the ways in which disclosure may damage the public interest and not with the issue to which such evidence may be relevant. Thus section 5 (6) of the [SIAC] Act says that in making procedural rules for SIAC the Lord Chancellor shall have regard in particular to "(b) the need to secure that information is not disclosed contrary to the public interest." This is a perfectly general statement and I find it impossible to construe it as limited to cases in which some particular issue arises. Likewise, rule 4, which I have already quoted, elaborates on the meaning of "contrary to the public interest" but is entirely general in its application."

Lord Hope agreed generally both with Lord Phillips' analysis and with Lord Hoffmann's approach as set out in identified paragraphs, including paragraph 181 (see paras. 226), but he also dealt with the question of non-disclosure himself, in terms which did not distinguish between the issue of national security and that of safety on return. Thus at para 230, he stated:

"230. There remains however the question whether the use of closed material fails to meet the minimum standard of procedural fairness that is to be expected of any such tribunal in a democratic society. Procedure before SIAC is governed by the [SIAC] Act and by the rules that have been made under section 5. Section 5 (3), which describes what the rules may provide, rule 4 as it was at the time of the aliens' appeals, a description of the rules that provide for the appointment of special advocates and the procedure that is to be adopted where the Secretary of State objects to disclosure are all to be found in paras 13-17 of Lord Phillips' opinion. These procedures are intended to provide a fair balance between the need to protect the public interest and the need to provide the applicant with a fair hearing. As Mr Tam Q.C. for the Secretary of State pointed out, it is inherent that in any

forum in which sensitive evidence might be relevant some adjustment will have to be made to normal procedures."

He went on in the next paragraph to describe the approach of restricted disclosure as having been sanctioned by Parliament. Those passages were not confined to the issue of safety on return.

55. Lord Brown expressed his substantial agreement with Lord Phillips, Lord Hoffmann and Lord Hope, and while he referred to the fact that generally no case is being made against a deportee on the safety on return issue, the contrast Lord Brown was drawing was not with the national security issue but with control orders. Finally, Lord Mance dealt with the topic of non-disclosure in terms applicable just as much to the issue of national security, saying that:

"I do not consider that the use of the closed material in the present context of deportation offends against either Convention or domestic principles of fairness." (para. 264).

56. So, while the main focus of that case was on the issue of non-disclosure in so far as that related to safety on return, the majority of the House pronounced upon that issue in terms which are just as applicable to deportation appeals where the alleged threat to national security is being challenged. For my part I would treat the ratio of *RB (Algeria)* as one which applies to deportation appeals before SIAC, **whatever issue is being raised by the appellant**, and if that is right, then that case is binding on this court and is sufficient to determine this second matter with which we have to deal. I have, however, taken *RB (Algeria)* last in my reasoning, because even if that decision by their Lordships' House did not exist, I would have reached the same conclusion for the reasons set out earlier. [our emphasis]

57. It follows that I would reject the appellants' arguments on this issue of whether there is some irreducible minimum of information which must be provided to an appellant in SIAC proceedings in order to secure procedural fairness. How much information on the issue of national security is to be provided will be limited by whether its disclosure would be contrary to national security or to the public interest more generally. In many cases, it may well be possible for him to be provided with at least the essence of the closed material, but that will not always be so, and to the extent that that intrudes upon the fairness of the proceedings, that outcome has been clearly sanctioned by Parliament.

29. In L1 v Secretary of State for the Home Department (SC/100/2010), in a judgment dated 3 December 2013, the Commission relied upon both open and closed evidence in reaching a decision under rule 8(5) not to extend time. Although the Court of Appeal reversed that decision ([2013] EWCA Civ 906) it did not do so on the basis that the Commission could not have regard to closed evidence. On the contrary, Laws LJ said:-

"34. Whether or not as a matter of strict construction the provisions of paragraphs 10(1) and 10A(2) of the Rules apply to the conduct of a strike-out application such

as was made by the Secretary of State here, it seems to me that fairness requires that such a procedure be adopted at least if the Secretary of State seeks to deploy closed material on the strike-out, given that if the application succeeds that will dispose of the appeal. In the event "potentially exculpatory material" has been identified. In the circumstances the failure to undertake an exculpatory process at the time, and the discovery of that material now (whatever it amounts to), are best treated as grist to the conclusion that time should have been extended.

30. When L1 returned to the Commission, an issue arose as to the use of the closed material procedure on the remitted appeal. In a judgment dated 18 December 2013, the Commission held that it would receive such material. Irwin J (as he then was) said:-

“9... We see clear advantages to both sides in the capacity of the Commission to examine the closed material. It is often assumed, when submissions are made that closed material procedures should not be engaged, that closed material only favours the Secretary of State. That is not the experience of those who have conducted closed proceedings.”

31. In C11 v Secretary of State for the Home Department, in a judgment dated 14 April 2021, the Commission, in connection with a rule 8(5) application, rejected submissions that reliance wholly or mainly on closed material was inherently unfair. The Commission (per Jay J) found that this submission “founders on the rock of *W (Algeria) v SSHD ...*”.

32. Recently, in C12 v Secretary of State for the Home Department, in a judgment dated 6 September 2022, the Commission had regard to both open and closed material in deciding not to extend time under rule 8(5).

E. DISCUSSION

33. Despite the elegance with which Mr Grieves made his submissions, we are in no doubt that the appellant’s case on the preliminary issue is misconceived.

34. In their skeleton argument, Mr Grieves and Mr Vaughan submitted that section 5(3) “naturally tracks the decision subject to appeal i.e. following the use of closed evidence underlying the decision subject to appeal...”. In oral submissions, Mr Grieves appeared to disavow that stance. However, he maintained that the focus of section 5(3) is on what he described as the substantive appeal.

35. We can see no justification for that approach. Section 5(3) makes it evident that what are given in paragraphs (a) to (d) are merely particular instances of what the SIAC Rules may do. Even within those paragraphs, the expression used is “proceedings”, which plainly encompasses far more than the substantive appeal. There is no reference in section 5(3) to the “substantive appeal”, nor is there any context where a reference to “proceedings” must necessarily be interpreted so as to cover only certain limited forms of proceedings.

36. As can be seen from RB (Algeria) and W (Algeria), the higher courts have laid emphasis upon the width of section 5(6)(b) of the 1997 Act. As Lord Hoffmann described this provision at paragraph 181 of RB (Algeria), it "... is a perfectly general statement and I find it impossible to construe it as limited to cases in which some particular issue arises". That was echoed by Sir David Keene at paragraph 56 of W (Algeria), in holding that the ratio of RB (Algeria) "applies to deportation appeals before SIAC, whatever issue is being raised by the appellant...".

37. Mr Grieves seeks to extricate the appellant from this obvious difficulty by distinguishing the rule 8(5) stage from the substantive appeal. Both RB (Algeria) and W (Algeria) were concerned with issues arising in the course of a substantive appeal.

38. We are not persuaded that the ratio of those cases rests on the stage the proceedings had reached. In any event, however, even if those cases are not binding on the Commission, they nevertheless represent high level authority that section 5 and, importantly, rule 4 have a wide ambit and that, as a result, a good case needs to be made for the imposition of a jurisdictional fetter upon the closed material procedure.

39. Mr Grieves took us through the SIAC Rules in a way which was designed to demonstrate that the issue under rule 8(5) falls for determination before one reaches the provisions concerned with closed material, thereby demonstrating that those provisions have no part to play in the Commission's functions under rule 8(5).

40. This attempt, however, falls at the first hurdle. The first substantive provision of the SIAC Rules is rule 4. This imposes a general duty on the Commission to "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 the public interest". The duty arises when the Commission is "exercising its functions". That phrase can hardly be broader. It manifestly encompasses rule 8(5). Thus, the SIAC Rules envisage that, at this stage, information can be in play which may not be disclosed in the interests of national security, etc.

41. Mr Grieves emphasised the relationship between rule 10(1) and rule 37(1). The latter defines "closed material" as that which the respondent would otherwise be required to disclose to the appellant or his representative "under rule 10", but which the Secretary of State objects to disclosing. Rule 10(1) requires the respondent to file with the Commission a statement where "...the Secretary of State intends to oppose an appeal...". If the respondent objects to the statement being disclosed, then the closed material procedure in rules 37 and 38 applies.

42. Mr Grieves says that the words "oppose an appeal" are inapt to cover the position where, as here, the respondent is opposing the application to extend time under rule 8(5).

43. At paragraph 34 of the Court of Appeal judgments in L1, Laws LJ was evidently unconcerned "[w]hether or not as a matter of strict construction the provisions of paragraphs 10(1) and 10A(2) of the SIAC Rules apply to the conduct of a strike out application such as was made by the Secretary of State here". Ms Giovannetti relied

upon this passage as confirming that the Commission should invoke the closed material procedure in the SIAC Rules whenever, in the exercise of its functions, fairness requires it to do so.

44. We accept that proposition. It is fully compatible with what the higher courts have said about section 5 of the 1997 Act and with the Commission's general duty under rule 4.

45. In any event, as a matter of construction, we find that the phrase “intends to oppose an appeal” in rule 10(1) unambiguously covers opposition to an application to extend time under rule 8(5). It is noteworthy that rule 3(a) states in terms that the SIAC Rules “...apply to the following proceedings – (a) appeals to the Commission...”. Rule 3 makes no specific reference to rule 8 for the reason that the drafter saw no need to do so because rule 8 is about “appeals”. We also note that the definition of “appellant” in rule 2 means “a person appealing to the Commission”. Again, and for the same reason, the drafter did not see the need to expand that phrase to cover those whose notices of appeal are given out of time and who, accordingly, need an extension of time in order to prosecute the appeal.

46. Therefore, as a matter of ordinary legislative construction, rule 10(1) covers the present case.

47. Further difficulties with the appellant’s linear approach to the SIAC Rules can be seen in rule 34. This requires the respondent, upon being served with a copy of the notice of appeal, to give notice of the proceedings to the relevant law officer, so that arrangements can be made for the appointment of a special advocate. This requirement applies unless the respondent does not intend to oppose the appeal. In the present case, the relevant law officer has been notified. Mr Grieves said this represented in effect no more than a sensible precautionary step. We consider, however, that it shows the SIAC Rules operating in the way for which the respondent contends.

48. Ms Giovannetti also placed emphasis upon rule 39, which gives the wide power to the Commission to give directions “...relating to the conduct of any proceedings...”. That phrase is plainly wide enough to cover the present stage of these proceedings. The power under rule 39 is such as to enable the Commission, if it sees fit, to make directions, at this stage, which may trigger the general duty under rule 4 and, thus, the closed procedure. The logic of the appellant’s position would mean that, at this point, the Commission could not invoke the closed procedure and may, therefore, be unable to comply with its obligation under rule 4(3) to “...satisfy itself that the material available to it enables it properly to determine proceedings”. Such a problematic consequence underscores the erroneous nature of the appellant’s stance on the preliminary issue.

49. These findings mean that the appellant cannot rely upon the principle of legality. There is no ambiguity in the relevant legislation. In deference to the appellant, however, we shall explain why we do not, in an event, conclude that a consideration of closed material in connection with an application under rule 8(5) would necessarily amount to a serious breach of the principle of fairness.

50. Mr Grieves submitted that, if closed material were adduced, the appellant would necessarily have “no idea” about what this material might be. The same point, however, can be made about the use of closed material in a substantive appeal, where losing the appeal would have the same result as not being allowed to pursue the appeal in the first place.

51. Importantly, in neither scenario is it inevitable that the closed procedure will result in the appellant having “no idea” about the closed case against her. The purpose of the closed procedure is to ensure, not least through the use of the special advocate, that the appellant is given as much information as is compatible with rule 4. Furthermore, the special advocate is able to challenge the respondent’s case in closed session.

52. Mr Grieves submitted that, if closed material cannot be adduced in connection with rule 8(5), it is difficult to see how this would cause any damage to the public interest. The appeal would merely go forward in the ordinary way.

53. We do not agree. Part of the public interest is to avoid delay. Time spent upon a substantive appeal, which should never have come before the Commission in that form, is time not spent on a case where either there has been no rule 8(5) issue or special circumstances have been found whereby it would be unjust not to allow the appeal to proceed.

54. We have seen that, in L1, Irwin J pointed out it is wrong to assume that closed material “only favours the Secretary of State” (paragraph 9). By the same token, Ms Giovannetti submitted that, in a rule 8(5) case, closed material may, in fact, assist the appellant. It may show, for example, that an assertion of the appellant which on its face appears implausible is, in fact, correct.

55. We accept that point. Although the respondent can be expected not to oppose the application to extend time where she knows from security-sensitive material that there are special circumstances making it necessary to extend, it is possible to envisage cases where the closed material discloses matters supportive of the appellant’s case, and which should be considered by the Commission, even though the respondent remains of the view that time should not be extended.

56. Mr Grieves suggested that, if there were such exculpatory material available to the respondent, this could be conveyed in some way to the appellant in open. The fact that he did not, however, explain how, as a general matter, this could be done further demonstrates the problems with the appellant’s stance.

57. Mr Grieves said that the use of the closed material procedure in a rule 8(5) case would substantially lengthen the proceedings. But this submission, even if correct, has little to say about the issue of fairness. We accept that the appellant is, at present, outside the United Kingdom, living in what are likely to be difficult circumstances. Not all rule 8(5) cases will, however, involve appellants who are in such a position.

58. In any event, the closed material procedure can be tailored to address the issue which is before the Commission; namely, whether it would be unjust not to extend time. If there is closed material that is relevant, whether for or against such an

extension, it is difficult to see how the interest of fairness is served by excluding that material, merely on the basis that by doing so the case can be brought on sooner.

59. Overall, therefore, we do not accept that the existence of a closed material procedure in connection with an application under rule 8(5) would be inherently unfair to an appellant.

60. For the above reasons, the Commission concludes that it may have regard to closed material in determining, for the purposes of rule 8(5) of the SIAC Rules, whether to extend the time limit for appealing.