Neutral Citation Number: **[2026] EWHC 1524 (KB)**

Case No: KB-2022-004569

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2026

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

MUSTAFA MUHAMMAD MASUD AL-JADID AL-UZAYBI (ABU FARAJ AL-LIBI) **Claimant**

- and -

(1) THE HOME OFFICE

(2) THE FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE

(3) THE ATTORNEY GENERAL

Defendants

- -

Ben Jaffey KC (written submissions only) and **Jesse Nicholls** (instructed by **Bhatt Murphy Solicitors**) for the **Claimant**

Rory Phillips KC, James Stansfeld and Jonathan Worboys (instructed by the **Government Legal Department**) for the **Defendants**

Tim Buley KC and Rachel Toney (instructed by the **Special Advocates' Support Office**) as **Special Advocates**

Hearing date: 25th March 2026

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Approved Judgment

This judgment was handed down remotely at 10am on 19 June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Chamberlain:

Introduction

1. The issues the subject of this judgment arise from an incident that took place on 20 January 2026. The incident has caused significant concern to the claimant's OPEN representatives and Special Advocates in this case and to Special Advocates more widely. The issues are of broad significance to the operation of the Special Advocate system in closed material procedures ("CMPs").

2. In a CMP, the court can take into account and base its decision on CLOSED material. This is material withheld from one or more parties ("the excluded parties") on the ground that its disclosure would be contrary to the interests of national security or some other important public interest. Special Advocates are the security-cleared lawyers appointed by the Law Officers to act in the interests of the excluded parties in the CLOSED part of the proceedings.

Closed material procedures and Special Advocates

3. In *R (Ansari) v Chief Constable of North Wales Police* [2026] EWHC 472 (Admin), I said this:

> "8. One of the requirements of natural justice is that, when deciding disputed issues, a court must not take into account material deployed by one party unless all the other parties have been given the opportunity to see and respond to it. In some cases, however, disclosure of some or all of the evidence or submissions to one or more of the parties would be contrary to the interests of national security or some other important public interest…
>
> …
>
> 10. Closed material proceedings… involve a derogation from natural justice because they enable the court to take into account and base its decision on closed material, which has not been disclosed to one or more parties. Closed material regimes must therefore employ procedural mechanisms to attenuate the unfairness caused by non-disclosure. Typically, these mechanisms include the use of a special advocate to test the case for non-disclosure and to make substantive submissions in the interests of the excluded party."

4. There were several subject-specific statutory CMP regimes before the Justice and Security Act 2013 ("the 2013 Act"). These include the Special Immigration Appeals Commission Act 1997, the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Counter-Terrorism Act 2008, the Terrorism Prevention and Investigation Measures Act 2011. Special Advocates are central to all of these.

5. The 2013 Act provided for CMPs in any civil proceedings in the High Court, the Court of Appeal, the equivalent courts in Scotland and Northern Ireland and the

Supreme Court. As with the predecessor regimes, Special Advocates are central to the regime of the 2013 Act and CPR Part 82, which contains the rules applicable to proceedings under that Act.

6. CPR 82.9(1) provides that, where the Secretary of State decides to make an application for a declaration under s. 6(2) of the 2013 Act, she must immediately give notice of the proceedings to the Attorney General, who is empowered by s. 9 to appoint a Special Advocate. CPR 82.13(1)(b) provides that the Secretary of State may not rely on sensitive (i.e. CLOSED) material at a hearing on notice unless a Special Advocate has been appointed to represent the interests of the excluded party. The remainder of the procedural rules make extensive reference to the role and functions of the Special Advocate.

7. A common feature of the statutory regimes involving Special Advocates is that they are appointed by the Law Officers "to represent the interests of" the excluded party, but they are not responsible to that party. A Special Advocate does not, therefore, have a traditional lawyer-client relationship with the excluded party and does not take instructions from that party.

8. Although it had existed since the Special Immigration Appeals Commission Act 1997, the Special Advocate system first came under the spotlight in connection with the Anti-Terrorism, Crime and Security Act 2001. The policy of that Act, which involved the potentially indefinite detention of foreign national terrorist suspects who could not be deported for human rights reasons, was controversial. Some of the individuals subject to detention did not trust their Special Advocates. Although they were appointed by the Law Officers in the exercise of their public interest functions, the Law Officers were also the chief legal advisers to the Ministers responsible for detaining the excluded parties. The result was that, in some of the initial cases before the Special Immigration Appeals Commission ("SIAC"), appellants chose not to engage with the system at all: see e.g. *Abu Qatada v Secretary of State for the Home Department* (SC/15/2002, Open Judgment of 8 March 2004).

9. In 2004-2005, the House of Commons Constitutional Affairs Committee launched an inquiry into the Special Advocate system. In its report (*The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, HC-323-I (3 April 2005)), it made recommendations with a view to increasing confidence in the system. Among these were that the excluded party should be invited to nominate a Special Advocate or Special Advocates from a list of lawyers with the appropriate security clearance. The Government accepted this recommendation. The almost universal practice since then has been that the excluded party chooses his or her Special Advocate.

10. The evidence heard by the Committee also identified the need for greater support for the Special Advocates' work. The Government responded to this by proposing the creation of a Special Advocates' Support Office ("SASO") within the Government Legal Department ("GLD") to support and assist the Special Advocate in their work. SASO came into being in 2006. It was and is staffed by employees of the GLD but "acts independently of Government": see *A Guide to*

the Operation of Role of Special Advocates & the Special Advocates' Support Office: OPEN Manual (2d ed., 2022: "SASO OPEN Manual"), paragraph 4.

11. In *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, it was argued that the CMP which applied in employment proceedings was unfair and contrary to Article 6 ECHR. One of the reasons advanced was that SASO was located in the same premises as the GLD, and staffed by employees of that department. The Supreme Court rejected that submission. Lord Mance noted at [50] that "SASO… operates for all practical purposes as a separate unit, with an established Chinese wall arrangement dividing it from the rest of the Treasury Solicitor's Department". At [51] he added that the documents describing SASO's functions "evidence a serious intention to achieve such a separation, and there is no reason to doubt their genuineness or efficacy". He continued: "if any special advocate or court at any point suspected that the separation between SASO and other Government legal teams was in any way incomplete, this would at once be brought to light". Finally, Lord Mance approved an observation of Maurice Kay LJ in the Court of Appeal that "the system, although inherently imperfect, enjoys a high degree of confidence among the judges who deal with cases of this kind on a regular basis": [2010] EWCA Civ 462, [2010] ICR 1034, [32].

12. The types of support and assistance which SASO provides are outlined in the SASO OPEN Manual. They include "corresponding with the excluded party, the OPEN Representatives and the Information Owners' representatives about case management directions, conferences, evidence, and preparation for hearings", "corresponding with Information Owners and courts regarding communication requests" and "preparing CLOSED materials, and filing and serving on various parties": see paragraph 42. SASO has staff who can deal with CLOSED material and matters (known as "SASO CLOSED") and staff who liaise with the OPEN parties (known as "SASO OPEN").

13. The precise logistical arrangements under which SASO and Special Advocates handle CLOSED material are, for obvious national security reasons, not made public. It is, however, publicly known that, in order to enable them to work on CLOSED material without having to attend GLD or other government premises, special advocates in chambers whose premises meet specified security standards are generally permitted to keep CLOSED material, and the secure computers on which they make any electronic notes and draft their written submissions, in secure containers or safes located in their chambers. One of SASO's functions is to deliver CLOSED material to the safes in Special Advocates' chambers and to collect CLOSED documents from their secure computers for onward transmission to the lawyers representing the Government and to the Court. Staff in the Special Advocates' chambers admit SASO staff and permit them to access the Special Advocates' safes for this purpose.

14. At this stage, three general points can be made about CMPs and the Special Advocate system. First, because CMPs involve a derogation from the fundamental norms of procedural justice, their operation can and does engender considerable suspicion on the part of the excluded parties and the wider public. Special Advocates are the principal means by which the unfairness inherent in CMPs is attenuated. Secondly, as the early history of the Special Advocate system

shows, the mere presence of a Special Advocate is not enough to establish confidence in the fairness of CMPs. It is necessary to ensure that the system operates in such a way that Special Advocates are, and are seen to be, wholly independent of Government. The ability of the excluded party to choose his or her Special Advocate is a necessary but not a sufficient part of this. Thirdly, the ability of the Special Advocates to perform their important role depends on the availability of properly resourced support and assistance from an entity which operates, and is seen to operate, independently from Government and in particular from the security agencies which typically advise Government in CMP cases. From its inception, SASO was intended to be such an entity.

Summary of the claim

15. The claimant is detained by the US Government at Guantanamo Bay, Cuba. He says that he was captured by US intelligence on 2 May 2005 in Pakistan and then, later in May 2005, forcibly transferred by US forces to a number of secret CIA facilities or "black sites": first in Afghanistan; then in Amman, Jordan; then in Romania, where he remained until about November 2005. At some point in November 2005, he says that he was removed to another CIA black site, believed to be in Lithuania, Afghanistan or Poland, until September 2006, when he was removed (or "rendered") to Guantanamo Bay, where he has been detained for nearly 20 years. He claims to have suffered mistreatment and torture (including in interrogations) while detained at the CIA black sites and to have suffered stringent detention conditions giving rise to serious physical and psychological harm at Guantanamo Bay.

16. This claim is brought against those responsible for the Secret Intelligence Service ("SIS") and Security Service ("MI5"), which are alleged to have sent questions to be put to the claimant during interrogations at CIA black sites between May 2005 and at least September 2006. The claimant says that, when they did so, SIS and MI5 knew or ought to have known that the claimant was being arbitrarily detained and subjected to extreme mistreatment and torture during interrogations; and that, by sending the questions, they were complicit in that mistreatment and torture.

Relevant chronology of proceedings

17. These proceedings were issued protectively in the King's Bench Division of the High Court on 22 November 2022. Following inter partes correspondence, the Particulars of Claim were served on 5 January 2024. Initially, there was a stay. When that expired, the defendants applied on 29 May 2024 for a declaration under s. 6 of the 2013 Act. The claimant nominated Tim Buley KC and Rachel Toney to act as his Special Advocates and they were duly appointed.

18. The declaration under s. 6 of the 2013 Act was granted by consent on 4 June 2024. An OPEN Defence was served on 6 June 2024. The defendants served requests under CPR Part 18 and, later, a CLOSED Defence. The claimant responded to the Part 18 requests.

19. The defendants served their Disclosure Framework on 13 June 2025. The claimant responded with submissions on this on 25 July 2025, contending that the proposed searches were too narrow. The OPEN version of the Special Advocates' submissions on the disclosure framework was served on 7 August 2025. The Special Advocates supported the claimant's approach. They made the point that the use of "black sites" had been examined before in other litigation, in which the defendants had undertaken disclosure exercises and that these previous disclosure exercises should be used as a starting point.

20. One of these previous cases had been brought by Abu Zubaydah ("AZ"). AZ had also alleged complicity by UK intelligence agencies in his torture and mistreatment while held at CIA black sites. His case was settled on 17 July 2025. Rachel Toney had acted as one of the junior Special Advocates for AZ.

Evidence and approach

21. In light of the concern caused by the incident on 20 January 2026, the background to that incident has been the subject of a substantial volume of evidence. In addition to the accounts of the Special Advocates themselves and of the claimant's OPEN representatives, there are two witness statements from Elizabeth Mackie, the Deputy Legal Director in charge of the Defence and Security Division in the Litigation Directorate of the GLD and one from Emma Parker, one of the two Deputy Directors who lead the Ministry of Justice, General Public Law and SASO Litigation Team in the GLD (and the one who is practically responsible for SASO). A large volume of contemporaneous documents has also been disclosed, both in OPEN and in CLOSED.

22. I have read the evidence and documentation in its entirety and considered the very detailed and comprehensive OPEN and CLOSED written and oral submissions on it. I have set out below what I consider to be the key witness and documentary evidence and the key submissions.

23. I have summarised the evidence and expressed my conclusions entirely in OPEN, but in doing so have drawn on the entirety of the material, OPEN and CLOSED.

Facts material to the incident on 20 January 2026

24. As Special Advocate for AZ, Ms Toney was privy to the CLOSED material in that case. A number of files of the CLOSED material in the AZ case had been delivered to the safe in her chambers. On 25 July 2025, shortly after the settlement of the AZ case, Ms Toney contacted the SASO CLOSED team and asked whether some of the CLOSED files relating to that case could be taken back to GLD.

25. Meanwhile, on 8 August 2025, a caseworker at SIS ("SIS Caseworker 1") emailed staff in the National Security and Counter-terrorism ("NSCT") Team at GLD (the team instructed for the defendants in the AZ litigation and in this case) requesting collection of all bundles and material from counsel acting for the Government and from the Special Advocates, adding: "If SASO believe the material with SA comments needs storing for a period of time, then we can consider this but no material regarding this case should be left in offices for use on any other case."

26. On 12 August 2025, a member of the NSCT Business Management Team ("NSCT BMT 1") emailed a senior lawyer in SASO CLOSED to say that the information owner had asked for return of the Special Advocates' material from the AZ case.

27. There is no record of any further communication until 6 November 2025, though it is possible that there were telephone or Teams communications. At all events, on 5 November 2025, Ms Toney herself sent an email to SASO asking for "urgent repatriation of some of my [AZ] files".

28. On 6 November 2025, a member of staff in the SASO Business Management Team ("SASO BMT 1") emailed MI5 Legal Administration and NSCT BMT 1 to say that they had an "amount of concluded CLOSED materials that we have been asked to send back to yourselves". The email made clear that the materials were from the AZ case and that it was necessary to send these back because they were taking up space in the Special Advocates' safes that was needed to accommodate other material.

29. Meanwhile, a case management hearing in this case was listed on 26 November 2025. In advance, the defendants provided OPEN and CLOSED responses to the claimant's submissions on the Disclosure Framework. As usual in litigation of this sort, there was a meeting between the Special Advocate (Ms Toney) and counsel for the defendants. This took place on 20 November 2025. The discussion at the meeting made reference to the CLOSED material disclosed in the AZ case. It would have been obvious to anyone attending that meeting that Ms Toney had retained her materials from the AZ case and her notes on them and was referring to parts of that material and those notes for the purposes of the discussions about disclosure in this case.

30. The hearing on 26 November 2025 was listed before me. The main part of the hearing was in CLOSED. It is now possible to indicate in OPEN that the CLOSED submissions, both by Ms Toney and by counsel for the defendants referred extensively to the disclosure given in AZ's case. A prominent theme in the submissions made on both sides was whether and to what extent this case was materially similar to AZ so that the material disclosed in that case should also be disclosed here. It was obvious to me, and would have been obvious to anybody attending that CLOSED hearing (including leading and junior counsel for the defendants and the moderately large team of lawyers and officials sitting behind them), that Ms Toney had retained and was using some of the AZ materials (including her notes) to advance her case about the scope and pace of disclosure in this case. No-one suggested that she should not be doing so.

31. At the 26 November 2025 hearing, a further hearing was set for 16 December 2025. The defendants were required to produce a further document. It can now be disclosed in OPEN that one of the matters to be addressed in the further document was whether and if so why the defendants were suggesting an approach to disclosure which differed from that adopted in other similar cases, including in particular AZ's. This was the subject of a further discussion between the Special Advocates and counsel for the defendants on 1 December 2025.

32. On 2 December 2025, another caseworker at SIS ("SIS Caseworker 2") emailed RS and OP (two lawyers in the NSCT Team) asking them to ensure that all the AZ bundles provided to the SAs be retrieved as soon as possible, adding: "One of the SA's is on another case we are dealing with and she should not have access to that material. We are also not comfortable with the bundles just sitting in the SA's safes". OP responded that SASO would be asked to collect it all.

33. Between the 26 November and 16 December hearings, the defendants produced two further OPEN versions of the disclosure framework. The second of these, served on 10 December, referred expressly to the approach to disclosure in the AZ litigation. There was another meeting between Ms Toney and the defendants' counsel on 11 December, at which there was discussion about whether it was justifiable to depart from the approach to disclosure in AZ. Again, no-one suggested that there was any difficulty with Ms Toney retaining and using materials disclosed in AZ's case.

34. The hearing on 16 December took place largely in CLOSED. However, in the short OPEN hearing which followed, I informed the parties that Ms Toney had made robust submissions and I had ruled in her favour on issues relating to the scope of disclosure. The defendants were ordered to produce a detailed plan and timetable for disclosure in accordance with my rulings. A further hearing was listed for 23 February 2026.

35. On 14 January 2026, a member of staff at SASO emailed Ms Toney saying that the NSCT Team at GLD (the team which represented the defendants in AZ and represents the defendants here) "believes that we should get your materials today". Ms Toney emailed back as follows:

> "Thank you very much for your gatekeeping efforts on Zubaydah. It was certainly invaluable to have access to the files whilst preparing for the December Al-Libi hearing.
>
> Overall, I think there is a good chance that it would be useful to retain my remaining files until after the hearing in Al-Libi on 23 February. At that hearing, GLD's clients will inform the Court as to their proposals in relation to timings on disclosure in light of a disclosure process which will be based in significant part upon scope and extent of searches and disclosure that has already taken place in Zubaydah. For that reason, I think we should propose that I will retain my files until after that hearing. There is a risk that I would be at an unfair disadvantage (unnecessarily) if the files were to be removed before that hearing. I have retained the files since Zubaydah settled earlier in 2025 and I cannot see how it would be problematic in the circumstances for GLD's clients to permit retention for another month. Interestingly they have only pressed for their return since I informed the Ds' Counsel in Al-Libi that I still had access to them (in the course of discussions about disclosure in Al-Libi). If they disagree, then this may be something I would need to raise with Chamberlain J."

36. SIS Caseworker 2 sent a further email on 16 January 2026 asking for confirmation whether SASO had collected the remaining bundles "including those that are with Rachel Toney". The recipient understood that SIS was chasing because "Ms Toney had the most material and/or there was a risk she could use it in other cases".

37. On 19 January 2026, a lawyer from SIS (SIS Lawyer 1) called a member of staff at GLD and asked whether all the material held by the Special Advocates in AZ (including their notes and notebooks) had been collected. A member of staff at SASO told the GLD team that Ms Toney would hold on to the AZ material to use for the 23 February 2026 hearing and may make an application to the judge for permission to retain it. This was passed on to SIS Lawyer 1 in an email later on the afternoon of 19 January 2026.

38. SIS Lawyer 1 replied that SIS wanted the material to be collected as soon as possible, saying:

> "We are in a situation where someone is unliterally deciding to retain… classified material belonging to the security services without a legal basis on which to do so. Given that our trust in her to appropriately handle our material (i.e. return it when requested at the end of the litigation) has been dented, we would also ask that she is expressly asked to:
>
> - Confirm that she has not made any unauthorised copies of the material and has returned all copies that she holds;
>
> - Confirm that she has included all her notes /notebooks of material derived from the CLOSED bundles of disclosure (and for those picking up the material that notebooks are included);
>
> - Interrogate her secure laptop to ensure that all material relating to AZ is not being retained there. [All the material can then be retained] pending her application to the court.
>
> …
>
> In longer time, we are considering whether to make a referral to her vetting officer and/or her regulatory body. We will think on that more in the morning."

39. In a further email on 20 January 2026, MI5 Lawyer 1 said that the material should be collected as a matter of urgency and added:

> "Another thing to consider in addition to whether to make a referral to her vetting officer and/or her regulatory body is whether we should be writing to the AG (given that SA's are appointed at the AG's discretion)."

40. At 14.08 on 20 January 2026, a GLD security officer (referred to here as Security Officer 2) emailed Ms Toney as follows:

> "In my capacity as [security officer] for GLD, it has come to my attention that you are currently in possession of documentation pertaining to the Zubaydah case. As the case has now reached its conclusion, it is imperative that we collect all relevant materials at the earliest opportunity. Accordingly, we will be visiting your chambers today to retrieve all documents and notes/notebooks associated with this case, including any digital copies on your closed laptop. I understand that this may be frustrating for you but having checked with the information owners we have to follow this approach.
>
> I understand that you have applied to the judge for the rights to retain the information regarding the case. To ensure the integrity and security of these documents, we will seal them in tamperproof bags. This measure is intended to provide you with the assurance that no one, apart from yourself, will have access to the materials until the judge renders their decision. Should the judge rule in your favour and allow you to retain the information, we will make the necessary arrangements to return the materials to you as soon as possible to ensure that you are not hampered in any case preparation. However, until such a decision is made, the documents will need to be held by SASO."

41. Ms Toney replied to GLD Security Officer 2 at 14.31 on the same day as follows:

> "I'm afraid I am not going to be in Chambers this afternoon and have not had the opportunity to check through my documents. You will need my assistance to locate the relevant documents. I have not applied to the Judge, but have simply indicated to GLD (via SASO) that if they would not agree to me retaining the documents pending the forthcoming hearing in Al-Libi (23 February 2026), then I would consider applying to the Judge in order to retain the material pending a decision following that hearing (so that I am not placed at any disadvantage).
>
> I do not agree to any document being removed that I have created (or other SAs). That applies to hard copies and to electronic copies.
>
> I would be grateful if you could rearrange collection another time later this week."

42. It appears, however, that the Security Officer 2 had already left GLD en route to Ms Toney's chambers (via the Royal Courts of Justice and another set of chambers) when this email was sent and that, although he had his personal phone with him, he did not have access to his work emails on that device.

43. Elizabeth Mackie's statement explains what happened next. A GLD security officer, a member of the NSCT Team from GLD and a member of staff of SASO attended Ms Toney's chambers at some point after 15.00. A member of her chambers' staff gave them access to the safe in which her CLOSED materials and

computer were kept. The GLD staff opened the containers and looked through the material in them. The GLD security officer and the SASO member of staff identified the AZ files by looking at the labels on their spine. They also removed some files held by Ms Toney in her capacity as counsel to the Investigatory Powers Tribunal ("IPT"). When they realised what they were, they returned them to the safe. They accessed Ms Toney's CLOSED laptop and removed and double deleted the AZ folder.

What happened next

44. On the morning of the following day, 21 January 2026, Ms Toney emailed Security Officer 2 indicating that the removal of material from her chambers was "totally unacceptable" and that she was considering her position. Ms Toney later relayed her view that "the documents she has drafted are her documents and do not belong to anyone else". GLD Security Officer 2 took a different view: "anything drafted is ours (GLD) as it is drafted using material from a high classification and as such is marked the same for which we can retrieve or take back at any time".

45. GLD Security Officer 1 expressed concerns about the suggestion that Ms Toney should be allowed to come to GLD's premises to view the material taken. Ms Toney was nonetheless permitted to attend GLD to view the materials taken on 23 January 2026. Before she arrived, there was a discussion between GLD Security Officers 1 and 2 and SASO in which GLD Security Officer 1 said that if Ms Toney refused to allow the material to be taken from her safe she could have been in breach of the Official Secrets Act 1989 and liable to prosecution.

46. Ms Toney attended and was permitted to look at the material but only in the presence of GLD Security Officers. The material had been sealed in tamper-proof bags, so Ms Toney could be satisfied that no-one had accessed the material pending her application to the court. However, GLD Security said that they had to be present while Ms Toney was considering the material taken from her safe, since "anything [sic] material generated by SAs (as opposed to information owners) was owned by the GLD Security Team (rather than SASO, or the SAs themselves)". It was initially suggested that Ms Toney would only be permitted to look at the covers of the individual folders but it was agreed that, given that that particular folder contained her material generated by her, it would be "acceptable" for her to read it "with GLD Security present". Ms Toney marked one of the folders "LPP" (short for "legal professional privilege"). She was permitted to open her laptop, again with GLD Security present and moved some of her notes to a file to which she gave the title "LPP".

47. On 29 January 2026, the Special Advocates submitted a written request for directions from me, including a direction that the hard copy and electronic notes and records (including LPP material) about the AZ case which had been taken from her safe should be returned to her to enable her to prepare for the forthcoming hearing. The Special Advocates described what had occurred as "extremely unsettling" and "unprecedented" and said that the defendants conduct gave rise to a "legitimate inference… that the motivation for the exceptional and unique treatment of Miss Toney was to secure a litigation advantage by depriving

her of access to information which has been, and may continue to be, relevant to her in performing her role as SA in this case".

48. I directed a hearing on 6 February 2026, at which I heard OPEN and CLOSED submissions. At the conclusion of that hearing, following discussion in CLOSED, I made an order by consent in these terms:

> "1. All materials taken on 20 January 2026 from the safe used by Ms Rachel Toney (junior Special Advocate) and located in her chambers are to be returned to that safe forthwith by whichever Crown servant or agent currently holds them.
>
> 2. Mr Tim Buley KC and Ms Rachel Toney (Special Advocates) have permission to use the materials referred to in paragraph 1 for the purposes of preparing for the CLOSED hearing listed on 23 February 2026 and at that hearing."

49. The formulation "whichever Crown servant or agent currently holds them" was used because there was some doubt about whether the material and notes were being held by SASO or some other part of GLD. I wanted to make clear that, whoever had them, they were to be returned, so that the Special Advocates could prepare for the hearing on 23 February 2026. I also directed that there should be a separate hearing to consider what had happened on 20 January 2026 and what steps should be taken by the Court in relation to it.

50. Since then, GLD has reflected on what occurred on 20 January 2026. The then Treasury Solicitor, Susanna McGibbon KC (hon.), wrote to Ms Toney in these terms:

> "As Head of the Government Legal Profession, and on behalf of the relevant HMG legal teams, I am deeply sorry for the timing, manner and circumstances in which the Abu Zubaydah material was retrieved from your Chambers and for the concern and distress which the episode caused you. This was a collective failure.
>
> That retrieval was undertaken in haste and a more measured approach would have enabled the teams to work with you, as you suggested in your e-mail of 20 January, to identify which documents should be retrieved in the circumstances.
>
> HMG is conducting a comprehensive lessons-learned exercise, as described in Elizabeth Mackie's witness statement. As part of that exercise, we will consider the approach to be taken to managing national security material that is held in both HMG Counsel and Special Advocates' chambers, to ensure that the balance between protecting national security risk and supporting the critical work of the justice system is met.
>
> It is my expectation that this process will include consultation with Counsel across national security related litigation and I would

> welcome your involvement in that exercise. We recognise that Special Advocates, in particular, have a vital role to play in maintaining confidence in the Closed Material Procedure system.
>
> We will be working to ensure that the arrangements for access to, and retention of, national security material are sufficiently clear for all parties involved in relevant Court proceedings."

51. The "lessons learned" exercise is described in more detail in Ms Mackie's first witness statement. It will involve identifying all existing sources of guidance and relevant protocols and all existing practices and procedures (formal and informal) about the delivery, receipt, storage, handling, collection and return of classified material during and after litigation involving matters of national security or other sensitivities. It will consider areas where clarification or changes or new guidance is required. In considering these matters, GLD will be mindful of the professional obligations of counsel and GLD. The exercise of preparing a draft is underway and the draft will be presented to senior staff at GLD within 21 days of the handing down of my judgment on this issue. The draft guidance will then be shared with relevant stakeholders (including clients within government, counsel, Special Advocates and courts with CLOSED facilities) with a proposed timescale for responses of 28 days. Final guidance will then be promulgated. In her second witness statement Ms Mackie makes clear that, for these purposes, clients include the UK intelligence community.

Submissions

52. At the hearing on 25 March 2026, the parties and Special Advocates made OPEN and CLOSED submissions about what had happened on 20 January 2026.

53. Jesse Nicholls for the claimant submitted that the defendants' conduct amounted to an unlawful entry into Ms Toney's chambers, and an unlawful search and seizure of her papers, including confidential papers subject to LPP. It was done to secure an unfair litigation advantage, because Ms Toney had been effectively representing the claimant and was proving troublesome and frustrating to the defendants. This was a wilful abuse of executive power. Members of the executive sought unfairly to impugn the integrity of a highly experienced Special Advocate. The defendants have not properly recognised the gravity of their conduct. The Special Advocates do not require permission to use the AZ material in these proceedings, because material served on the Special Advocate is not "disclosed" within the meaning of CPR Pt 31, but if permission is required it should be granted.

54. Tim Buley KC for the Special Advocates submitted that what occurred was a matter of the utmost seriousness and would reduce trust in the system. The materials disclose the very real possibility that Special Advocates who do their job—and especially those who do it effectively—may face adverse consequences (referral to regulators, the Law Officers or even prosecution) as a result. It is extraordinarily troubling that, when told of an impending application to the court, the response of lawyers acting for SIS is to think of referring a Special Advocate to her vetting officer or to a professional regulator. Guarantees were required that

Special Advocates would not face similar treatment in the future. Mr Buley advanced an argument that CPR 31.22 did not apply because Special Advocates were not parties and material provided to them was not "disclosed".

55. Rory Phillips KC, James Stansfeld and Jonathan Worboys, who are not part of the counsel team in the main litigation in this case, represented the defendants in respect of the issues the subject of this judgment. Mr Phillips submitted that Ms Toney's expressed intention to retain the AZ material for use in another case had been seen as raising national security concerns. Her refusal of consent to the material being collected was not seen by the team tasked with collecting the material. There was no unlawful entry, search or seizure, because the team was given access to Ms Toney's safe by staff in her chambers. The material was not accessed or read by anyone acting on behalf of the defendants. It was held in tamper-proof bags and was returned shortly after the hearing on 6 February 2026. The defendants were prepared, in the particular circumstances of this case, to give permission pursuant to CPR 31.22(1)(c) to the use by the Special Advocates of the AZ material on the understanding that that material will be retained at a location within Government. However, the principle that CPR 31.22 applies to such material, so that such consent is required, was important.

56. Although he made reference to the Treasury Solicitor's apology, Mr Phillips did not initially make clear whether the defendants disavowed any criticism of Ms Toney's conduct. I therefore invited him to indicate whether any such criticism was advanced and, if so, to explain the basis for it precisely. He took instructions and confirmed that the defendants were "not suggesting that Ms Toney acted improperly in any way". This, some way into the hearing on 25 March 2026, was the first occasion on which that had been made clear.

Discussion

The law on use of material from one case in another

57. CPR 31.22 provides:

> "(1) A party to whom a document has been disclosed may use the document only for the purposes of the proceedings in which it has been disclosed except where—
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree."

58. In the light of Mr Phillips' concession that the Special Advocates have permission to use the AZ CLOSED material for the purposes of this case, it is not strictly necessary for me to reach a view about whether CPR 31.22 applies to CLOSED documents provided to a Special Advocate. However, since I have heard

argument on that question, and because the issue is likely to arise in other cases, I consider that it would be appropriate for me to express a view.

59. On a strict reading, CPR 31.22 applies only to "a party to whom a document is disclosed". CPR Part 82 makes clear that Special Advocates are not "parties". Nor are they agents or privies of a party: see *Kamoka v Security Service* [2017] EWCA Civ 1665, [89] (Flaux LJ).

60. In my judgment, however, to hold that a Special Advocate may use any CLOSED document received for the purpose of performing his or her functions in one case for the purposes of another case, without permission from the party who provided them or from the court, would be anomalous and unprincipled. I have reached that view for three reasons.

61. First, CPR 31.22 codifies a common law principle, which existed long before the CPR, that a solicitor to whom documents are disclosed receives those documents subject to an implied undertaking "not to use or allow the documents or copies of them to be used for any collateral or ulterior purpose of his own, his client or anyone else": *Harman v Home Office* [1983] AC 280, 304 (Lord Diplock). The principle is the quid pro quo for the stringent and onerous obligations imposed on parties by the disclosure rules. Like solicitors in ordinary civil litigation, Special Advocates who receive CLOSED documents in connection with a CMP receive them for a particular purpose: to perform their functions in relation to the CLOSED part of the case in question. The documents they receive are ones that, but for their sensitive nature, would have been disclosed to the excluded party. There is no sound reason of principle to suppose that the Special Advocates were intended to be free of the usual constraints imposed on a person who receives such documents.

62. I would reject the suggestion that the absence of a client makes any difference to the application of the principle. In Lord Diplock's formulation, the principle prevents collateral use, whether for the solicitor's own purposes or those of his client. In this respect, the fact that the Special Advocate is not legally responsible to the excluded party makes no difference. The point of the rule is to control the purpose for which documents provided pursuant to disclosure obligations can be used *by anyone*.

63. Likewise, I do not see why CLOSED proceedings should not engage the principle simply because they do not take place in public. The common law principle against collateral use went much wider than merely preventing use in other legal proceedings. It prevented *any* use for purposes collateral to the proceedings in which the document was disclosed. Use in other proceedings contravenes the principle even if the proceedings are CLOSED.

64. I would therefore hold that CLOSED documents provided to Special Advocates pursuant to CPR Part 82 may be used only for the purposes of the proceedings in which it has been provided save in the exceptional cases referred to in CPR 31.22(1)(a), (b) and (c). In the case of CLOSED documents, CPR 31.22(1)(a) is unlikely to apply, so in practical terms it will be necessary for a Special Advocate

who wishes to use such a document to obtain the permission of the Court or of the party who provided it.

65. I have borne in mind that there have been cases where a Special Advocate instructed in one case has used his or her knowledge of material from that case to identify a breach of the Government party's disclosure obligations, or of the duty of candour, in another case. Nothing I say is intended to prevent Special Advocates from doing this, but if the issue arises, the proper course (in a case where the Government party does not consent to the use of the material in the second case) is to seek the Court's permission. I note that this is precisely what Ms Toney had proposed to do in this case.

The motivation for seeking the return of the CLOSED AZ documents

66. The witness and documentary evidence indicates that the instruction to retrieve the CLOSED material provided to Ms Toney in her capacity as Special Advocate in AZ came from lawyers at SIS. The chronology makes clear that, although the relevant SIS personnel had asked for return of the AZ material before it became clear that Ms Toney was using it in this case, the urgency which they expressed in December 2025 and, especially, in January 2026 flowed directly from her use of that material in this case. No doubt the salience of the issue was raised by the fact that she had been using the materials and her notes on them very effectively, from the claimant's point of view.

67. This does not, however, mean that the SIS personnel were acting improperly in seeking return of the documents. They sought the return of those documents because, as they saw it, Ms Toney was using the documents and her notes on them for purposes which were not permitted; and there were generic national security reasons (which are set out in the CLOSED evidence and which I accept) to object to that use in principle. I therefore decline to find that the SIS officers acted for an improper purpose in seeking the return of Ms Toney's documents. Nonetheless, the conduct of those involved in retrieving the documents, and the way in which the documents were retrieved, gave rise and continues to give rise to serious concerns.

What went wrong?

68. There are five respects in which the conduct of GLD, SIS and SASO was unsatisfactory.

69. First, the documents before me evidence a perception on the part of MI5, SIS and (to a lesser extent) GLD that Ms Toney was acting improperly, even to the extent of suggesting that she ought to be referred to her vetting officer, professional regulator or the Attorney General. Even by the time of hearing, it took some time for Mr Phillips to confirm, in response to a pointed question from me, that the defendants were no longer suggesting that she had acted improperly in any way.

70. There was never, at any stage, any basis for such a suggestion:

(a) As Ms Parker confirms in her witness statement, Ms Toney is one of the most frequently requested, appointed and experienced Special Advocates on the Attorney General's panel. She had worked on a wide variety of significant and highly sensitive cases and appeared in numerous CMPs in the High Court and other tribunals.

(b) In this case, Ms Toney had *herself* twice asked for the CLOSED AZ documents to be collected. That did not happen.

(c) When she began to refer to the decisions taken with respect to disclosure in the AZ case in the course of discussions with the defendants' counsel and in court hearings about the Disclosure Framework in this case, it should have been obvious to all concerned that she was using either the AZ material itself or her notes on that material to make those submissions. As the judge listening to the submissions at the hearings, it certainly was obvious to me. The submissions she was making (at least five months after AZ had settled) could not realistically have been made from memory alone.

(d) Not only did no-one object; counsel for the defendants themselves made reference to the disclosure given in AZ, both in oral submissions and in the Disclosure Framework itself.

(e) If anyone had suggested at either of the hearings before me in November or December that they objected to Ms Toney using the material provided to her in AZ, or the notes she had made on that material, she would no doubt have applied to me for permission to retain that material and those notes. I would certainly have given that permission. That should have been obvious to anyone attending the hearing (including the moderately large legal and instructing team sitting behind counsel for the defendants).

(f) By January 2026, the AZ materials had remained in Ms Toney's safe for some six months since the settlement of that case. For most of that time, this was because no-one had bothered to collect it. The materials were returned to Ms Toney's safe soon after the hearing on 6 February 2026 as a result of an order made with the consent of the defendants. While there was (as I have said) a generic national security reason for the material to be returned, it is quite plain that there was no pressing reason for this to happen before the hearing on 23 February 2026.

(g) By contrast, there was a compelling reason for the AZ material to remain with Ms Toney. The claimants in the present case had been complaining about delays in the disclosure process in the present case. I had set a hearing to consider the timetable for disclosure precisely because I was not satisfied with the pace of that process. Depriving Ms Toney of her materials just at the point when she needed them to prepare her submissions for the hearing on 23 February 2026 was likely to cause further delay, for no good reason. This is why Ms Toney suggested applying to the Court for directions.

(h) Against this background, Ms Toney's stance—that she should retain the material pending the hearing on 23 February 2026—was entirely reasonable. She explained that stance courteously. She did not in fact refuse consent to the collection of any items until she received GLD's email of 20 January at 14.08. That email came not from SASO (the independent entity which supports Special Advocates) but from a GLD security officer. Even then, her response at 14.31 was simply that she should be present when the materials were collected, so she could identify the relevant files and that she did not consent to the removal of notes made by her or by other Special Advocates.

71. The fact that lawyers at MI5 and SIS thought that Ms Toney's conduct did or might warrant referral to her vetting officer, to her professional regulator or to the Attorney General is concerning. It suggests a complete misunderstanding of the litigation context (set out above) and a failure to appreciate the importance of the Special Advocates' function of representing the interests of the excluded party.

72. Secondly, GLD security staff appeared to think that "anything [sic] material generated by SAs (as opposed to information owners) was owned by the GLD Security Team (rather than SASO, or the SAs themselves)" and that "anything drafted is ours (GLD) as it is drafted using material from a high classification and as such is marked the same for which we can retrieve or take back at any time". It is unclear whether they were stating what they understood to be the legal position (i.e. that the notes were the property of the Government) or whether they were using the word "own" in some other way. Either way, these statements are troubling.

73. As a matter of law, the computers on which Special Advocates make electronic notes are, no doubt, Government property, though handwritten or printed notes made on their own stationery and stored in their safes probably are not, even if they are required to be given the same protective markings as the source material. But the question of who "owns" the materials in the strict legal sense is unlikely to be determinative of the legal rights in play. Much more important is the question on what terms the Special Advocates hold (a) the CLOSED material delivered to them, (b) the notes they make on that material and (c) the material they receive from the OPEN representatives.

74. It would not be appropriate in an OPEN judgment to go into detail about the types and classifications of the CLOSED material handled by Special Advocates. It is sufficient to note that it includes material of considerable sensitivity whose public disclosure would give rise to serious risks to the lives of individuals and/or serious damage to the national security of the United Kingdom. Assessments about whether it is safe to hold particular documents at particular locations may change from time to time. This means that it is likely to be necessary for the arrangements under which Special Advocates receive CLOSED material to include provision for the removal of that material (and of notes made from it) from Special Advocates' safes to a more secure location if security considerations so require.

75. But it is essential that these arrangements respect the independence of the Special Advocates and the need to maintain confidence in the Special Advocate system.

SASO was created precisely for that reason, so as to achieve a clear separation between those supporting the Special Advocates and those acting for the parties on the other side of the litigation. The suggestion that staff (whether lawyers or not) outside SASO, working for the department representing the opposing side in the litigation, can "take back" Special Advocates' notes "at any time" is guaranteed to undermine confidence in the integrity of the Special Advocate system.

76. Given the "lessons learned" exercise which is now being undertaken (as I described), it would not be appropriate for me to be too prescriptive about how the terms on which CLOSED material can be collected from Special Advocates safes should be formalised. However, at minimum, it seems to me essential that those terms should require that, if material needs to be collected, that is done by staff working under the aegis of SASO (an entity which is intended to operate independently) and not by staff working for other parts of GLD or other Government departments or agencies. Certainly, it was glaringly inappropriate that those attending Ms Toney's chambers and looking through her safe should have included anyone from GLD's NSCT Team.

77. Thirdly, although GLD and SASO did not act unlawfully when they entered Ms Toney's chambers and seized materials from her safe, their conduct had the potential to undermine the carefully calibrated regime under which SASO operates as a distinct and independent enclave within the GLD.

78. The chronology shows that GLD staff were not aware of the email in which Ms Toney had refused to consent to the collection of her (and other Special Advocates') notes, so there is no question of their knowingly acting contrary to that email. Moreover, the entry to her chambers was consensual in the sense that the staff at those chambers permitted them to enter and access her safe. It follows that this is not a modern-day equivalent of the unlawful searches and seizures that came to the attention of the courts in the 1760s (*Huckle v Money* (1763) 95 ER 768; *Entick v Carrington* (1765) 95 ER 807; *Wilkes v Wood* (1763) 98 ER 489).

79. But the circumstances in which the collection occurred were nonetheless unsatisfactory. There was no good reason why it had to happen less than an hour after the email to Ms Toney. There was no good reason why it was so urgent that it had to happen while Ms Toney was absent. There was no reason why it could not have been done by SASO staff alone.

80. The documents I have described do not reflect well on SASO. Even prior to the establishment of SASO, and before thought had been given to formal Chinese wall arrangements, there was an understanding that the solicitor within GLD who instructed and supported the Special Advocates had a sui generis role, which required him to act independently of his employers and sometimes contrary to the interests of the parties represented by his colleagues. The role was in practice performed with robust independence. The same was generally true of those who later worked under the aegis of SASO.

81. SASO has a delicate task to perform, because, at the same time as supporting the Special Advocates, they have to ensure that national security risks are minimised

and the CLOSED material is kept securely. Sometimes, however, their role will require them to push back firmly against suggestions made by the departments and agencies from which the material comes (who often are the opposing parties) and GLD (who represent those parties). It is important that it should be staffed by individuals with the experience and temperament to do so.

82. In this case, SASO could and should have pushed back much more strongly against the suggestion that it was necessary to collect Ms Toney's materials before the hearing on 23 February 2026. They could have drawn the attention of the SIS lawyers from whom the instructions came to the matters to which I have referred in paragraph 70 above. Certainly, they should have resisted the suggestion that it was necessary to collect Ms Toney's material and notes while she was not present and that it was appropriate for a member of the NSCT Team to be present at the collection.

83. Fourthly, inadequate thought was given to the need to maintain the inviolability of material that was subject to LPP or otherwise confidential as against the Government. Some of the material likely to be held by Special Advocates is plainly protected by LPP. This applies to the confidential communications sent by the OPEN representatives to their Special Advocates and to any of the Special Advocates' notes which reflect those communications. These attract either or both of legal advice and litigation privilege. It may be a more difficult question whether notes made by Special Advocates on CLOSED material attract LPP stricto sensu, given that Special Advocates do not have a traditional lawyer-client relationship with the excluded party. But again, that strict legal question seems to me to be beside the point, which is that it would be grossly unfair if such notes could be used—or even seen—by the departments or agencies which are the parties on the opposing side of the litigation, or by the lawyers representing them. This would give rise to a stark inequality of arms.

84. It is apparent that some thought was given to LPP. The material was placed in tamper-proof bags and was not in fact read by any lawyer acting for the defendants. But it is a matter of considerable concern that members of GLD staff not instructed by SASO (including a member of the NSCT Team which represented the opposing party) was part of a group which accessed Ms Toney's safe in her absence. The episode is likely to undermine the confidence of excluded parties in CMPs. It will be essential that the "lessons learned" exercise articulates clear protocols for the handling of material that is, in fact, subject to LPP or is otherwise confidential as against the Government in the way I have described. If, as seems likely, the arrangements provide for such material to be removed at the end of a case, the removal should be done by SASO, not any other department or agency (including other parts of GLD), and the material should be either kept securely by SASO or securely destroyed and not under any circumstances made available to the opposing party or those representing that party.

85. Fifthly, no thought seems to have been given to the fact that Ms Toney was using her safe to store CLOSED material for other cases, as many Special Advocates do. As it happens, Ms Toney was also acting as Counsel to the IPT and was using the safe in her chambers to store CLOSED material which she was holding in that capacity. As Counsel to the IPT, she was performing a role quite distinct from that

of Special Advocate. The IPT is a statutory tribunal whose functions include determining complaints and claims against the security and intelligence agencies, among others. Counsel to the IPT acts not in the interest of any party but at the direction of the Tribunal. The papers held by Counsel to the IPT may include papers that are confidential to the Tribunal. This was another reason why it was inappropriate for employees of GLD who were not part of SASO to have attended Ms Toney's chambers and gone through her papers.

86. The "lessons learned" exercise ought to include the formulation of policies to ensure that the confidentiality of material held in Special Advocates' safes in respect of other cases is preserved.

Conclusion

87. The hearing on 25 March 2026 was listed for argument on the question whether the Court should take any further steps in relation to the incident on 20 January 2026. I have set out above the respects in which the conduct of GLD, MI5, SIS and SASO was unsatisfactory. I have explained that a "lessons learned" process is already underway. It may be hoped that, once that process is complete, the protocol produced as a result will obviate the need for any further action by the Court in this case. It would be appropriate, however, to leave the final decision on that question until the protocol has been produced. I will invite the parties to agree directions for the protocol to be filed at Court and served on the parties and for a final decision to be taken in the light of the parties' submissions on it.