Neutral Citation Number: [2017] EWCA Civ 1665

Case No: T3/2016/2583 & 2584

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR JUSTICE IRWIN) [2016] EWHC 769 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2017

Before:

LORD JUSTICE FLAUX
LORD JUSTICE MOYLAN
and
SIR STEPHEN RICHARDS

- -

Between:

(1) ISMAIL KAMOKA **Appellants**
(2) ZIAD ALI HASHEM
(3) ABDEL NASSER BOUROUAG
(4) KHALED ABUSALAMA AL ALLAQI
(5) ALIA BIBI HASSAN
(Administratrix for the Estate of FARAJ HASSAN AL-SAADI)

- and -

(1) THE SECURITY SERVICE **Respondent**
(2) THE SECRET INTELLIGENCE SERVICE
(3) THE ATTORNEY GENERAL
(4) THE FOREIGN & COMMONWEALTH OFFICE
(5) THE HOME OFFICE

Thomas De La Mare QC, Danny Friedman QC, Charlotte Kilroy and Helen Law (instructed by **Birnberg Peirce & Partners**) for the **Appellants**

Rory Phillips QC, Kate Grange QC and Richard O'Brien (instructed by **the Government Legal Department**) for the **Respondents**
Angus McCullough QC and Jennifer Carter-Manning (instructed by **Special Advocates' Support Office**) as **Special Advocates**

Hearing dates: 18 – 21 July 2017

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The present appeals and applications for permission to appeal relate to the decision of Irwin J to strike out the claims of the appellants (the first five claimants in proceedings also brought by other claimants) in the Particulars of Claim as an abuse of process pursuant to the common law doctrine enunciated in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. Those claims, in the barest summary, are that detention of the appellants by the Home Secretary pending their appeals to SIAC against the decision to deport them and the subsequent restriction of their liberty by Control Orders were unlawful. The appellants claim damages against the various defendants for the torts of false imprisonment, trespass (to person and property) and misfeasance in public office.

2. In relation to three of the Grounds of Appeal (A to C) the appellants appeal with the permission of the judge. In relation to the remaining four Grounds (D to G), the judge having refused permission to appeal, the appellants renew their applications to this Court. Given the extent of overlap between the various Grounds, we took the course of hearing the totality of the argument on both sides in relation to all the Grounds. To a large extent, it has proved possible to deal with the Grounds compendiously. We heard submissions in OPEN over three days and then held a CLOSED hearing on the fourth day of the appeal. These are the OPEN judgments and we hand down CLOSED judgments herewith.

Relevant background and outline of the claims

3. Each of the appellants is or was (the third and fifth appellants are deceased and their claims are pursued by their widows) of Libyan origin and are alleged to have been at all material times members or associates of the Libyan Islamic Fighting Group ("LIFG") formed in the 1990s in opposition to the regime of Colonel Qadhafi. They had all sought asylum in the United Kingdom.

4. Following the 9/11 terrorist attacks, the UK government formed an increasingly close relationship with the Qadhafi regime. It was only in October 2005, during that period of rapprochement with the regime, that the LIFG was proscribed as a terrorist organisation in the United Kingdom. The chronological history thereafter of each of the claimants is helpfully set out by Irwin J at [8] to [12] of his open judgment of 22 January 2015 ([2015] EWHC 60 (QB)) which I gratefully adopt:

> "8. Claimant 1 was served with a Notice of Intention to Deport on 3 October 2005 and detained. He appealed to SIAC. In December that year he was arrested and charged with terrorist offences. His SIAC appeal was stayed. In June 2007, along with Claimants 3 and 4, he pleaded guilty to terrorist offences in the Kingston-upon-Thames Crown Court and he was sentenced to 3 years 9 months' imprisonment. He completed his custodial sentence on 21 October 2007, and re-entered immigration detention. He was made the subject of a Control Order on 2 April 2008. He was, with Claimants 2 to 5, the

subject of review in November 2008, wherein Mitting J found that the LIFG remained "a risk to the national security of the United Kingdom", see: *SSHD v AR and Others* [2008] EWHC 2789 (Admin). He was then subject to an individual review: *SSHD v AU* [2009] EWHC 49. His Control Order was upheld. His Control Order was renewed in April 2009 but revoked in November of that year. Claimant 1 did not attempt an appeal from the review by Mitting J. He did seek to appeal the renewal, but withdrew that appeal following the revocation.

9. Claimant 2 was served with a Notice of Intention to Deport on 3 October 2005, and appealed to SIAC. His case was anonymised as "DD" and was heard alongside that of Claimant 5 [as "AS"]. In the course of SIAC proceedings, the Claimant submitted that the SSHD's case on safety on return was bound to fail, since the Memorandum of Understanding ["MoU"] agreed, and the attendant arrangements for monitoring the MoU, were insufficient to protect him if he were deported to Libya. Following a hearing in October and November 2006, in April 2007 SIAC allowed Claimant 2's appeal (along with that of Claimant 5) on the ground that although he was a threat to national security, there was a real risk of breach of Article 3 of the European Convention on Human Rights if he was returned to Libya. The appeal by the Secretary of State from this decision failed; see: *AS and another v SSHD* [2008] EWCA Civ 289 (Admin). On 4 April 2008, Claimant 2 was also served with a Control Order. Claimant 2 was a party to the decision of Mitting J of November 2008. His Control Order was upheld by Mitting J in December 2008: *SSHD v AR* [2008] EWHC 3164 (Admin). He did not seek to appeal that decision. His Control Order was renewed on 31 March 2009. He appealed that decision, and his appeal has not been withdrawn. The Control Order was revoked on 22 January 2010.

10. In May 2004 Claimant 3 admitted offences contrary to the Forgery and Counterfeiting Act 1981, and was sentenced along with Claimant 4. Claimant 3 received 3½ years' imprisonment. He was released from prison in June 2005. On 3 November 2005 he was served with a Notice of Intention to Deport and detained. He appealed to SIAC. In December 2005, he was charged with terrorist offences and moved from immigration detention into custody. His SIAC appeal was stayed in December 2005. On 11 June 2007 he pleaded guilty to an offence contrary to s.17 of the Terrorism Act 2000 and was sentenced to 1 year 10 months' imprisonment. He completed the sentence and re-entered immigration detention, being released on bail in July 2007. A Control Order was served on him on 4 April 2008. He too was a subject of the judgment in the Control Order review of 14 November 2008, where the Court found that the LIFG remained a risk to national security.

> His Control Order was upheld on 20 March 2009; see *SSHD v AT* [2009] EWHC 512 (Admin). The Order was renewed in April 2009 and revoked in August of that year. Claimant 3 appealed against the Order upholding his Control Order and was successful on 7 February 2012, the matter being remitted to the High Court. It has not yet been heard.
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> 11. Claimant 4 also admitted forgery offences on 12 May 2004 and received 3½ years' imprisonment. He too was served with Notice of Intention to Deport on 3 November 2005, and appealed to SIAC. He was made subject to immigration detention. On 12 December 2005 he was arrested and charged with terrorist offences and remanded into custody. His SIAC appeal was stayed on 15 December. On 11 June 2007 he too pleaded guilty to an offence contrary to the Terrorism Act 2000 and was sentenced to 1 year 10 months' imprisonment. On the same day he entered immigration detention, and on 2 July was released on bail by SIAC. A Control Order was served on 4 April 2008. Claimant 4 was another subject of the judgment of 14 November 2008. On 16 March 2009 a fresh Control Order was made, the first Order being quashed in a judgment of 20 March: *AW v SSHD* [2009] EWHC 512 (Admin). The second Control Order was revoked on 26 June 2009. Claimant 4 sued for false imprisonment in respect of the first Control Order, and his claim was settled in May 2011. The Claimant sought to challenge the second Control Order, but withdrew the challenge after the Order was revoked.
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> 12. …Claimant 5 was served with Notice of Intention to Deport on 14 December 2005 and was detained. He appealed to SIAC and his case was heard with that of Claimant 2. He was party to an application for further disclosure in October 2006. The appeal was heard in October and November 2006, leading to the judgment in April 2007 allowing the appeal on the basis of a lack of safety on return. Claimant 5 was released on bail on 17 May 2007. He was a respondent to the unsuccessful appeal by the SSHD in February and March 2008. Claimant 5 was the subject of a Control Order served on 4 April 2008, renewed on 1 April 2009. The Order was revoked by Mitting J, on the ground it was no longer necessary. Mitting J declined to quash the Control Order on the ground of non-disclosure. Claimant 5 does not seek damages for the period during which he was subject to a Control Order."

5. For the purposes of the present appeals and applications, an important point to note is that only the second and fifth appellants had their SIAC appeals actually heard. Although SIAC concluded that both appellants were a danger to national security, they both won their appeals, as Irwin J noted, on the basis that they would not be safe on return to Libya, notwithstanding the memorandum of understanding ("the MOU") between the United Kingdom and Libya: *AS & DD v SSHD* SC/42 and SC/50/2005,

judgment dated 27 April 2007. After the appeal of the Secretary of State to the Court of Appeal failed: *AS (Libya) v SSHD* [2008] EWCA Civ 289, the case against all five appellants was abandoned. It follows that the first, third and fourth appellants never had their appeals heard by SIAC.

6. The genesis of the present claims was documentation obtained from the archives of the Libyan intelligence service after the fall of the Qadhafi regime during the uprising in the autumn of 2011. Those documents (to which I will refer as "the newly discovered material") are relied upon as showing the extent to which the UK Security Services had knowledge of and complicity in the unlawful conduct (including torture and extraordinary rendition) of the Libyan Security Services and other foreign state agencies.

7. As emerges from the detailed and lengthy Particulars of Claim served by the appellants, an important aspect of their case against the various respondents is that the UK Security Services actively assisted the United States intelligence agencies in the unlawful rendition to Libya of a number of detainees alleged to be members of the LIFG, in particular, Messrs Belhaj and Al Saadi. At this point it is worth noting that, by its judgment dated 17 January 2017 (*Belhaj v Straw and others* [2017] UKSC 3; [2017] 2 WLR 456), the Supreme Court held that the claims by Mr Belhaj and his wife against the former Foreign Secretary and others for damages for false imprisonment and other torts were justiciable and not barred by state immunity or the foreign act of state doctrine. As matters stand, those claims will proceed in the Queen's Bench Division.

8. It is also alleged that the Security Services participated in the interrogation by the Libyan intelligence service of Libyans unlawfully rendered to Libya, knowing that they had been unlawfully rendered and were being held under or at risk of mistreatment or torture, including prolonged detention incommunicado.

9. The appellants' pleaded case is that none of those matters (and other related matters) was disclosed to SIAC in the OPEN proceedings and the appellants infer that there was no such disclosure in the closed SIAC proceedings either. It is said that this constituted a breach of the duty of candour. At [362] of the pleading it is said that if the duty of candour had been properly complied with, the appellants infer, *inter alia* that (i) no attempt would have been made to deport the appellants as it would have been evident such a course was legally hopeless; (ii) SIAC could not have made the national security findings it did against the LIFG and the individual appellants. Mr Rory Phillips QC for the respondents focuses on the latter allegation as demonstrating that the present proceedings constitute a collateral attack on the decision of SIAC, a conclusion which Irwin J reached in the judgment under appeal. For reasons I will elaborate later, this is misconceived.

10. It is pleaded at [381]-[382] that the appellants infer that these breaches of the duty of candour continued in the Control Order proceedings before Mitting J, which had a direct and material bearing upon the legality of the decision of the Home Secretary to impose Control Orders and on the evidence before the court, not least because the undisclosed matters go directly to the credibility of the Security Services and the weight to be given to their assessments.

11. At [436] it is pleaded that the appellants do not know whether the matters now relied upon were disclosed to the Home Secretary but that if they were not, the decisions to deport and to detain pending such deportation were unlawful because those matters were, by reason of their necessary impact upon the issues under consideration by the Home Secretary, relevant considerations without contemplation of which no lawful decision could be taken.

12. The obverse is pleaded at [437] which provides as follows:

> "437 Further and/or alternatively, if such matters were disclosed in whole or in part, the Home Secretary's Deportation Decisions were unlawful because no decision-maker, directing herself reasonably on the full facts as they were or ought to have been known to her (assuming other Defendants having acted with due candour in making relevant disclosures to her), could have reached the conclusion that there was a reasonable prospect of **C1-C5** being deported, as:
>
> 437.1 The Defendants knew that **C1-C5** faced a risk of torture on return to Libya.
>
> 437.2 The only method of reducing that risk to a level where a deportation could lawfully take place contemplated by the Defendants was by obtaining assurances.
>
> 437.3 The reliability of those assurances depended fundamentally on an assessment that Colonel Qadhafi would abide by them, it being assessed that Colonel Qadhafi was a pragmatic character who would do so only if he considered it in his own self-interest.
>
> 437.4 Accordingly, in circumstances where Colonel Qadhafi and/or his Security Services knew that:
>
> > 437.4.1 the Security Services (at least) were willing to participate in the covert abduction of Bel Hadj and Al Saadi and/or to solicit detailed information from their subsequent interrogations when either no assurances or no adequate assurances were in place as to their treatment (as aforesaid);
> >
> > 437.4.2 the Security Services had participated in the covert abduction of Bel Hadj and Al Saadi as a precursor to the visit of the Prime Minister Tony Blair by way of reward to Libya for its past and future co-operation and had explicitly recorded this fact in the 18 March 2004 letter from a senior MI6 officer Mark Allen;

> 437.4.3 the Security Services had been complicit in the subsequent abuse and arbitrary detention of the Libyan Detainees as set out …above; and
>
> 437.4.4 the Defendants had a high interest in maintaining good relations with Libya as failure to do so could mean the revelation of their role in the unlawful rendition and subsequent interrogations of Bel Hadj and Al Saadi,
>
> no reasonable decision-maker could have concluded prior to 3 October 2005, and maintained that conclusion until 7 April 2008, either that the balance of advantage in the developing relationship lay with Libya and was far more crucial to it, or that Colonel Qadhafi would consider it necessary to comply with the assurances in order to maintain good relations with the UK. On the contrary the Security Services' covert role in the abduction, rendition, arrest and/or subsequent interrogation of Bel Hadj, Al Saadi, **Abushima (C6)** and/or **Khalifa (C9)** and other Libyan detainees made it far more likely that Colonel Qadhafi and/or his Security Services would conclude that the request for an MOU was a public relations exercise designed to please the courts as opposed to a genuine request that Libya abide by the assurances.
>
> 437.5 Further and/or alternatively, and for the same reasons, no reasonable decision-maker could have anticipated that SIAC, if it were possessed of all these facts as it should have been, would conclude that the assurances were sufficient to contain the risk to the Claimants."

13. Thus, at the heart of that critical plea is the contention that the assurances given by Colonel Qadhafi and his regime as to safety on return were unreliable because it was likely that, given that the UK Security Services had participated in the covert abduction and rendition of Belhaj and Al Saadi and in their subsequent interrogation, the regime would conclude that the request for an MOU was a public relations exercise designed to please the courts rather than a genuine request that Libya abide by the assurances. In his submissions, Mr de la Mare QC made it clear that this allegation was not one of bad faith on the part of the respondents but was an allegation that, in the circumstances, the Qadhafi regime would have regarded the MOU as "window dressing" and any assurances they purported to give as not to be taken seriously.

14. At [439] to [441] the same criticisms are made of the Control Orders. It is said that the decisions to impose such orders were unlawful and the orders thus void *ab initio* either because the Home Secretary failed to take account of relevant matters known to the Security Services which were material to the Home Secretary's decision or because the Home Secretary and/or the Security Services failed to disclose those matters to the court in the Control Order proceedings.

The strike out application and the judgment below

15. The Particulars of Claim was originally served in October 2013. The response of the respondents was to issue an application to strike out the proceedings and for summary judgment. Those applications came before Irwin J in July (and subsequently September and October) 2014. The judge recorded the basis for the applications at [6] of his OPEN judgment dismissing the applications ([2015] EWHC 60 (QB)):

> "Essentially, the Defendants submit that the statutes providing for SIAC appeals and for Control Orders circumscribe any challenge of the kind made here. They say the only proper course for Claimants 1 to 5 is to seek to appeal the relevant decisions of SIAC and the Control Orders. Even if statute does not require that course, pursuit of private law action represents an abuse of process of the Court."

16. In relation to what was contended by the respondents to be a statutory bar under the Special Immigration Appeals Commission Act 1997, the judge found that the statute did not preclude the bringing of these private law claims. At [52] to [54] he concluded as follows:

> "52 I have concluded that the SIAC Act does not represent an absolute bar to private law action in all circumstances which might call into question some or all of the basis of conclusions of SIAC. The question is not easy. As will appear below, my conclusion on this issue does not represent a simple answer as to whether these cases can proceed.
>
> 53 The facts of the case must be borne in mind. Any appeal here would of necessity be by a winning SIAC Appellant, or an Appellant whose SIAC appeal was conceded. It seems unlikely Parliament had that in mind when restricting the rights of challenge. Moreover, the essence of the Claimants' case is that SIAC was prevented from reaching a proper conclusion by a withholding of material, in breach of the Defendants' duty of candour, discovered after the event. If such a breach were alleged or discovered during the currency of a SIAC appeal (or an appeal from SIAC) then the statute would almost certainly compel the Claimants, in the Court of Appeal, to raise the matter in SIAC, or potentially by way of judicial review in the face of an adverse ruling by SIAC.
>
> 54 However, on the unusual facts of this case, it seems to me that the language of Section 1(A) is not of sufficient clarity on its own to found a strike-out of these claims. The Claimants do not in essence "question" a "decision" taken by SIAC, much less suggest there was a "hard-edged error of law" at the time. The claim is that the outcome, favourable to the Appellants, was reached despite a then-undiscovered abuse of process, which led to conclusions by the Commission adverse to the Appellants but not determinative of their appeals. On those facts, and bearing in mind the need for strict construction when

> considering the abrogation of important rights and remedies at common law, I conclude this issue in the Claimants' favour."

17. He went on to conclude at [71] to [73] that the former statutory regime in relation to Control Orders under the Prevention of Terrorism Act 2005 did not constitute a statutory bar to the present private law claims. Nonetheless, he recorded later in his judgment the extent to which both statutory regimes were intended to confine challenges to SIAC or Control Order judgments, saying at [85]:

> "However, both sets of statutory provisions are intended to confine or constrain challenges to SIAC or Control Order judgments. The legislative schemes in each case underline the need, at the very least, for the Court to be highly vigilant to prevent abuse."

18. The judge went on to consider the alternative ground for the strike out application, abuse of process. He recorded at [88] that, at that stage, he had not considered any of the evidence which had been before SIAC, either in open or in closed:

> "At the heart of these claims is the suggestion of a suppression of evidence which would or should have altered the conclusions of SIAC (if not the outcome of the appeals) and the outcome of the Control Order proceedings. That is a serious allegation which at least if credible, would require a potential remedy. At the moment, it is not possible for me to compare the ambit of the evidence said to be fresh, or to be clear as to the extent of duplication with the earlier proceedings. I am not able to say whether the evidence advanced is fresh, since I have not been made privy to the CLOSED evidence in either case."

19. He noted that the respondents were submitting that the burden was on the appellants to establish that the newly discovered material constituted evidence which would entirely change the case, the requirement identified by Ralph Gibson LJ in *Walpole v Partridge* [1994] QB 106 at 115E but he rejected that submission, holding at [89] that in a case where there had been a closed material procedure to which the claimant was not privy, the burden must be on the defendants:

> "The Defendants argue that it is for the Claimants to show that the evidence is fresh, in the sense that it "entirely changes the case", a requirement identified by Gibson LJ in *Walpole v Partridge and Wilson* [1994] QB 106, at paragraph 115E. However, I do not see how such a requirement can apply where CLOSED proceedings in the earlier litigation means a Claimant is not privy to all the evidence that was laid against him. He cannot say if it is fresh. Where there is any credible basis for considering that there may be important fresh evidence, then it must be for the Defendants, who seek to strike out the claims, to show that the evidence is not fresh, or not sufficiently material. The same problem would arise if the Claimants were to seek to re-open the SIAC appeals or the Control Order proceedings."

20. The judge then referred to the alternative application for summary judgment, on the basis that the claims had no real prospects of success. He noted at [91] that little or no argument had been advanced on this basis. He declined to rule on this part of the application at that stage, but indicated that the respondents could renew this part of their application if they renewed their application to strike out. He directed a stay of the proceedings for 56 days, within which period the respondents should indicate whether they intended to renew the application to strike out by inviting the court to look at the CLOSED material which was before SIAC and the court in the Control Order proceedings.

21. On 2 April 2015, the respondents indicated that they intended to renew their strike out and summary judgment applications on the basis of closed material in relation to which they proposed to make an application under section 6 of the Justice and Security Act 2013. On 1 July 2015, Irwin J made a declaration under section 6 of that Act and subsequently on 30 July 2015 handed down an OPEN judgment giving reasons for making the declaration. There was also a CLOSED judgment following a closed hearing.

22. On 25 September 2015, the respondents served their OPEN renewed strike out application and outline of their defence. On 15 October 2015, Irwin J gave a ruling under section 8 of the Justice and Security Act to the effect that in these cases there was no irreducible minimum of disclosure required to be given by the respondents in OPEN.

23. On 28 October 2015, the Government Legal Department wrote to the appellants' solicitors asking for clarification that the appellants did not challenge the conclusions of the Home Secretary and SIAC that the second and fifth appellants were a danger to national security or the conclusions of the Home Secretary and the Administrative Court in the Control Order proceedings in relation to all five appellants that there were reasonable grounds for suspecting that they were or had been involved in terrorism-related activity and that it was necessary, for purposes connected with protecting the public, to make Control Orders imposing obligations on them.

24. On 16 November 2015, the appellants' solicitors responded that the aspect of the Particulars of Claim dealing with these national security and terrorism-related activity findings was limited solely to the assertion that the SIAC and court decisions were unlawful on basic public law principles because, as a result of the respondents' non-disclosure, the Home Secretary and/or the courts were not able to and did not take into account materially relevant factors and/or took into account irrelevant factors. The letter explained that the appellants did not seek to challenge any of the explicit OPEN national security or terrorism-related activity findings on any other grounds but could not concede CLOSED findings they knew nothing about. The letter also repeated what had been said in the skeleton argument for a case management conference in September (which is what had prompted the Government Legal Department to seek this clarification) that the appellants would not contest explicit OPEN findings of fact contained in the OPEN judgments and relied upon by SIAC to meet the statutory test of a decision to deport where such findings were incapable of being tainted by the matters not disclosed.

25. There was a section 8 of the Justice and Security Act 2013 disclosure hearing in CLOSED before Irwin J on 17 November 2015 at which he refused the application by

the Special Advocates for the disclosure of certain material to the appellants in OPEN. Part of his CLOSED judgment was moved into OPEN in which the judge indicated that whilst he was refusing the application at the current strike out stage, if the proceedings were not struck out and continued, a different judgment might apply because at that stage disclosure would have taken place and it would be clear what documents were being relied upon by the appellants.

26. On 2 December 2015, a general gist was served by the respondents in OPEN pursuant to section 8 of the Justice and Security Act. The hearing of the application to strike out, both in OPEN and in CLOSED followed on 14-18 December 2015. In the event, the respondents did not pursue their alternative summary judgment application at the hearing.

27. The judge handed down OPEN and CLOSED judgments on 15 April 2016. At the outset of his OPEN judgment, he said that it should be read in continuation of his earlier judgment ([2015] EWHC 60 (QB)). At [3] of the judgment, he set out what he described as "the essence of the claim" as suppression of evidence, a breach of the duty of candour, in these terms:

> "The essence of the claim advanced by the Claimants is that there has been a suppression of evidence, a breach of the "duty of candour", and that had evidence not been suppressed, the proceedings in SIAC, and the Control Order proceedings, could not have been mounted. It is said it would have been unreasonable of the Defendants (in particular the SSHD) to have sought to deport the Claimants to Libya, had the information now revealed in the course of the fall of the Qadhafi regime been made available to the relevant decision-maker: there would never have been a viable national security case, nor a reasonable prospect of removal in the face of what the Claimants term the "new material". It is said that, but for the suppression of evidence, the Claimants would never have been subject to immigration detention and/or the restriction imposed by Control Orders. Those propositions underpin the claims of false imprisonment and misfeasance in public office."

28. At [7] he accepted the respondents' categorisation of the appellants' allegations as falling under seven heads, which were also adopted by the respondents before the Court of Appeal:

> "i) SIS/SyS's knowledge of rendition of individuals by the United States to Libya;
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> ii) SIS/SyS's reason to be concerned about the treatment of the Libyan Detainees;
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> iii) SIS/SyS's involvement in US renditions;
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> iv) SIS/SyS's claim to entitlement to special access;

> v) SIS/SyS's "direct" and "indirect" interrogation of Libyan Detainees;
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> vi) SIS/SyS's "awareness" that Bel Hadj was being mistreated;
>
> vii) Joint operations between SIS/SyS and the Libyan Security Services; and
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> viii) The role of the Qadhafi Development Foundation (QDF) as cover or "proxy" for the Libyan Security Services."

29. It is to be noted that this summary does not really address what seems to me to be the critical point being made by the appellants in the proceedings, which in a sense, is the conclusion they seek to draw from (i), (iii) and (v), that, because of the collusion of the UK Security Services in unlawful rendition and interrogation of those they knew were being mistreated, there was a risk that the Qadhafi regime would conclude the MOU was "window-dressing" not intended to be taken seriously, rendering any assurances the regime gave unreliable. It is contended that from this it follows that the Secretary of State would never have been able to deport the appellants. The decision to do so and to detain the appellants pending deportation was unlawful either on the basis set out at [436] or on the basis set out at [437] of the Particulars of Claim. The decision to impose the Control Orders is said to have been unlawful on the same bases at [439]-[441] of the Particulars of Claim.

30. At [8] to [12] of the judgment, the judge deals in detail with the application for bail made by the second appellant to SIAC in January 2006, which he describes as an "interesting touchstone for this application". Having cited passages from the submissions of Mr Friedman, counsel for the second appellant, the judge concluded at [12]:

> "The implication of these passages is straightforward. Those representing the Claimants were already alive to questions of rendition, the reliability of information resulting from detainee reporting, the sharing of intelligence and relationships between the Security Services of Libya, Britain and the US, and the link between those issues and the Fifth Defendant's case on safety on return to Libya. The Special Advocates representing the interests of the Claimants must be taken to have been alive to the way matters were put, since within the Rules of SIAC, the role of the Special Advocate is to further the case presented by an Appellant's ordinary lawyers."

31. Obviously, a large part of the analysis undertaken by the judge was of the evidence adduced in CLOSED before SIAC, which he dealt with in his detailed CLOSED judgment and which we have considered for the purposes of our own CLOSED judgment. In his OPEN judgment, the judge stated at [14]:

> "I am able to state here only that there was wide disclosure of top secret documents bearing on the Claimants' concerns as well as important closed oral evidence. A review of the

> disclosure made to SIAC leads to my clear conclusion that there was no *suppressio veri*."

32. The judge then considered the detail of the OPEN evidence given in SIAC by Edward Oakden (former Director of Defence and Strategic Threats at the Foreign and Commonwealth Office) and Anthony Layden (Special Representative for Deportation with Assurances and former British Ambassador to Libya). He also recorded that in the SIAC appeals, counsel for the Home Secretary, Mr Ian Burnett QC, took the decision not to rely on material which came from or might have come from detainees, in deliberate response to concern about their treatment in Libya and the reliability of information. In his Conclusions on Fact, at [27] the judge said there was no basis for a finding of suppression of evidence. At [28] he said:

> "The Special Advocates who appeared in SIAC were alive to the concerns about rendition, and considered evidence bearing on the issues. There were "sometimes vigorous" arguments about disclosure in SIAC. However, there were no submissions by the Special Advocates that the Secretary of State had breached the duty of disclosure. They did not make submissions to the effect that the Secretary of State's case was all along predictably hopeless. They did not make submissions to the effect that the Secretary of State, or any other Defendant to this action, acted in bad faith."

He said at [29] that he saw no basis for concern in either OPEN or CLOSED evidence that the findings of SIAC or the High Court in the Control Order proceedings were tainted by reliance on detainee reporting.

33. The judge then considered the law. At the outset of this section of his judgment, at [32]-[33], he considered the role of the Special Advocate in proceedings involving a CLOSED material procedure:

> "32 It is necessary to focus on the role of the Special Advocate. At the conclusion of the case, I asked the parties and the Special Advocates to suggest the answer to the following hypothetical question: if in the course of closed proceedings Special Advocates were to conclude that closed material may reveal the basis for a private law claim on the part of an Appellant, what should they do? What may they do? The answers were, again, extensive. But in summary all are agreed that the role and functions of a Special Advocate are confined by statute; that although Special Advocates act in the interests of the party concerned, he or she is not "responsible to the person whose interests he is appointed to represent", see: SIAC Act 1997, Section 6(a) and paragraph 7(5) of the Schedule to the Prevention of Terrorism Act 2005. They have specified functions [SIAC Procedure Rules 2015, Rule 35; CPR 76.24], in effect confined to adducing evidence, cross-examining witnesses and making submissions, as to admissibility, procedure and substance. Special Advocates do not represent an excluded party, there is no lawyer/client relationship in the

> ordinary sense and the attendant professional obligations do not arise. Perhaps most important is the fact that, once seised of the closed evidence, the Special Advocate cannot communicate with the party whose interest he or she represents, save to a limited extent with the consent of the other party, and/or the Court or Commission.
>
> 33 How then can the excluded party be fixed with the actions and decisions of the Special Advocate once in closed proceedings? Not only does the excluded party not give instructions which, provided they are proper, are acted upon: the excluded party remains ignorant of what decisions and actions the Special Advocates take, unless and until they are revealed, as in some measure at least, I have been able to do here."

34. The judge then went on at [34] to consider whether in those circumstances, *Hunter*-type abuse of process should have no application where there were CLOSED material proceedings, concluding that this would produce anomalous results:

> "Does all that mean that abuse of process in the *Hunter* sense simply has no application where closed material proceedings arise? On one level that would be an obvious answer. It would however produce anomalous results. The limitations arising from closed procedures operate prospectively as well as retrospectively. If the instant case were to proceed to full trial, the great part of the critical evidence would (again) be heard in closed. The Claimants would again be ignorant of it, and still be unrepresented in the full sense. That would be so here, despite the existence of the material discovered in Libya which has stimulated these claims. Would that mean that, if these Claimants were dissatisfied following a full trial of their claims, the most significant parts of which were in closed, they could simply begin again? The answer to that question must be "no", because to permit that second action would be to permit a collateral challenge to the Court's ruling, and thus to sanction a *Hunter* type abuse. If the answer must be "no", then why should it be otherwise now?"

35. The judge then reiterated the point made in his earlier judgment, that the two statutory regimes underlined the need for the Court to be highly vigilant to prevent abuse. He said at [36] that it was helpful to go back to first principles and cited from *Hunter* itself and subsequent cases (*Johnson v Gore Wood* [2002] 2 AC 1 and *Amin v The Security Service* [2015] EWCA Civ 653, considered in more detail below) which enunciate the same key element of the doctrine that the Court must prevent a collateral attack on previous decisions.

36. The *ratio* of the judge's decision then appears at [39] to [41]:

> "39 I am in no doubt that the instant proceedings, viewed objectively, represent a collateral challenge to the judgments in

> the Control Order proceedings and to the decision of SIAC in relation to C2 and C5. Those decisions were final decisions of courts of competent jurisdiction. The Claimants did not have "a full opportunity to challenge the decision[s] in the court[s] by which [they] were made", because the proceedings were closed. However, they had as full an opportunity as could be devised, given the constraints imposed by the requirements of national security, as expressed in the relevant statutory provisions. Perhaps more to the point, they have now had, in effect, as full an opportunity as they would get if the litigation proceeded. They also have this judgment, written in the light of and concomitant with the closed judgment, the latter involving an extremely full consideration of all the evidence, with the Claimants' concerns in mind.
>
> 40 I have recorded my conclusions about the evidence above, and addressed the evidence at very much greater length in the closed judgment. I was only able to reach my conclusions after that detailed scrutiny. Given the very unusual facts in this case, the Claimants and their legal advisers had some basis for considering that they might have acquired material capable of altogether changing the nature of the case. Perforce they could not be sure of it. I therefore cannot regard it to have been an abuse of process to have commenced the proceedings in these exceptional circumstances, or to have prosecuted the proceedings thus far.
>
> 41 However, as matters now stand, it would in my judgment represent an abuse of process if proceedings were further prolonged, to the extent I now indicate."

37. The judge then held that the claims of the second and fifth appellants were an abuse of process. He recognised that the other appellants' cases required more consideration, but concluded at [44]:

> "In respect of C1, C3 and C4, their cases require a little more consideration. I can see no distinction between their cases and those of C2 and C5 either in respect of the detainee evidence issue, or in respect of safety on return; or indeed in respect of any of the concerns raised by C2 and C5. That identity of interest is reinforced by the fact that the Secretary of State conceded their appeals in the aftermath of the successful appeals by C2 and C5. However, I am not in a position to be sure that no valid distinction can be made. I therefore will permit a moderately short period, if these Claimants desire it, during which C1, C3 and C4 may seek to distinguish their position if they see fit."

38. Thereafter, by Order dated 10 June 2016, Irwin J also struck out the claims of the first, third and fourth appellants, noting in "Observations" following [1] of the Order that: *"I am not persuaded that C2 and C5 were agreed or ordered to be "lead*

actions" in a formal sense. However, there appears to be no proper ground for doubting the identity of their cases and interests" with those of the second and fifth appellants.

The Grounds of Appeal

39. The Grounds of Appeal are lengthy but they are helpfully summarised by the appellants in their Skeleton Argument in these terms:

A. The common law abuse doctrine *per se* is inapplicable to conduct of an original CLOSED hearing by Special Advocates.

B. There has been no abuse of process looked at in the round and in the light of all material factors.

C. The strike out in these procedural circumstances amounts to a denial of access to court and a subversion of the Justice and Security Act.

D. The logic of *Henderson v Henderson* is inapplicable to actions or omissions of Special Advocates.

E. There was no "full opportunity" for the appellants in earlier proceedings to litigate the issues that are now the subject of the *Hunter* objection to re-litigation; and the strike-out judgment could not supplement or correct earlier deficiencies.

F. The Court operated under an erroneous conclusion that non-disclosure to SIAC was the appellants' only case.

G. The Court reached an erroneous conclusion that there had been full disclosure to SIAC.

40. As already noted at the outset of this judgment, although Irwin J only gave permission to appeal on the first three Grounds, there is a considerable overlap between all of them. In large measure they are all amplifications of two central and again overlapping aspects of the appeal: (i) that the present proceedings are not an abuse of process either because the *Hunter* doctrine is inapplicable to cases involving a CLOSED material procedure or, if it could be applicable in such a case, it is inapplicable in the particular circumstances of the present case; and (ii) that the *Henderson v Henderson* doctrine is inapplicable in the present case because there was no privity between the appellants and the Special Advocates in the earlier proceedings and therefore no question of the appellants having had an opportunity, let alone a full one to present in the earlier proceedings the case they now pursue in the present proceedings. In the circumstances, we heard full argument on all the Grounds of Appeal.

41. Given that many of the Grounds involve those two central aspects of the appeal which I have identified, I propose to set out the law on abuse of process, privity and the role of Special Advocates before considering those aspects in more detail.

The law on abuse of process

42. The power of the courts to strike out proceedings for abuse of process has developed in parallel with issue estoppel and *res judicata* (often but not invariably to be deployed when issue estoppel and/or *res judicata* are not applicable) essentially to protect two interests: "the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated": per Simon LJ in *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1 Lloyd's Rep 136 at [48(1)].

43. The classic exposition of the principles underlying abuse of process is that of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. That was the case of the Birmingham six, one of whom sought damages in civil proceedings for alleged assault by the police in circumstances where he and his co-defendants had made the allegation that they had been assaulted by the police and that their confessions had been procured by such physical mistreatment at their criminal trial for murder before Bridge J and a jury. Following an eight day voir dire in the absence of the jury, Bridge J had rejected those allegations and found that the confessions were voluntary and admissible. The allegations were then repeated before the jury, but the defendants were convicted.

44. At the outset of his speech at 536, Lord Diplock said:

> "This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

45. At 541B-C, Lord Diplock described the nature of the abuse of process in that case:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

46. The rationale for the two policies which underlie discouragement of re-litigation of disputes was explained by Lord Hoffmann in *Arthur J S Hall & Co (a firm) v. Simons* [2002] 1 AC 615 at 701A-C:

> "The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The first is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: autrefois acquit, res judicata and issue estoppel. The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules."

47. Many of the authorities in this area emphasise the need for a flexible approach to the doctrine of abuse of process and for a careful fact-specific analysis in determining whether proceedings are an abuse. These authorities were helpfully cited to us, but it is not necessary to set them all out in this judgment. One of the seminal judgments is that of Lord Bingham of Cornhill in *Johnson v Gore-Wood* [2002] 2 AC 1, in which he analyses the law on abuse of process, encompassing both *Hunter*-type abuse and the so-called doctrine of *Henderson v Henderson* (1843) 3 Hare 100 (where in an appropriate case a litigant is precluded from pursuing a claim which he could and should have brought in earlier proceedings). After reviewing many of the earlier authorities, Lord Bingham summarised the applicable principles at 31A-E:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been so as to render the raising of it in later

> proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

48. Mr de la Mare QC submitted that the *Hunter* doctrine of abuse of process was at its most stringent where the subsequent civil proceedings involved what was in effect a collateral attack on a criminal conviction, but was weaker and less likely to be applied where the only earlier proceedings are civil proceedings and where the doctrine of *Henderson v Henderson* is inapplicable (as he contended was the case here). There is no doubt that the cases where the subsequent civil proceedings involve a collateral attack on a criminal conviction, such as *Hunter* itself, provide the clearest examples of where the doctrine of abuse of process will be applied. Lord Hoffmann in *Hall v Simons* at 702B-C explained that criminal proceedings are in a special category:

> "Criminal proceedings are in my opinion in a special category because although they are technically litigation between the Crown and the defendant, the Crown prosecutes on behalf of society as a whole. In the United States, the prosecutor is designated "The People." So a conviction has some of the quality of a judgment in rem, which should be binding in favour of everyone. As Lord Diplock pointed out in *Saif Ali v. Sydney Mitchell & Co.* [1980] AC 198, 223, this policy is reflected in section 13 of the Civil Evidence Act 1968, which provides that in an action for libel or slander, proof of the plaintiff's conviction is conclusive evidence that he committed the offence of which he was convicted."

49. However, to the extent that Mr de la Mare QC sought to suggest that *Hunter*-type abuse does not really arise in cases where the earlier proceedings are civil proceedings and there is no identity or privity between the parties in the two sets of proceedings, so that neither the doctrine in *Henderson v Henderson* (1843) 3 Hare 100 nor issue estoppel applies, it seems to me that suggestion is not supported by the authorities. There are cases, albeit relatively rare, where the court has found subsequent proceedings abusive because they involve an attempt to re-litigate what was decided in an earlier civil case, albeit there is not identity of parties.

50. One such case is *Reichel v Magrath* (1889) 14 App Cas 665, which is one of the cases which Lord Hoffmann (immediately after the passage in *Hall v Simons* at 701A-C cited above) gives as an example of the application of the policy against re-litigation even where the parties are not the same. There a vicar had brought an action against his bishop for a declaration that he had not resigned his living, which was decided against him. The new vicar appointed then brought proceedings to oust him from the

vicarage and he sought to raise the same argument by way of defence. All the Courts held that this was an abuse of process and struck it out.

51. In *Bragg v Oceanus Mutual Underwriting Association* [1982] 2 Lloyd's Rep 132, it was argued that the amendments to Oceanus' points of defence permitted by the judge at first instance were an abuse of the process, because the same issues had been raised by and decided against Oceanus in the earlier action brought by C.T.I., although it was accepted that neither *res judicata* nor issue estoppel applied, because neither the plaintiff Lloyd's underwriters nor the second defendant brokers in the later action had been parties to the earlier action. The Court of Appeal recognised that, even where *res judicata* and issue estoppel did not apply, the re-litigation of issues decided in an earlier action may be an abuse of process. Kerr LJ at 137 lhc stated the applicable principles in these terms:

> "…it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of *res judicata* or issue estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorise the situations in which such a conclusion would be appropriate. However, it is significant that in the cases to which we were referred, where this conclusion was reached, the attempted re litigation had no other purpose than what Lord Diplock described as "mounting a collateral attack upon a final decision … which has been made by another court of competent jurisdiction in previous proceedings in which … (the party concerned) had a full opportunity of contesting the decision of the court by which it was made."

52. Kerr LJ cited two authorities in support, *Hunter* itself and *Reichel v Magrath,* of which he said: "In effect, as was pointed out by Sir David Cairns during the argument before us, the issue in that case involved a question of status which had been determined finally in the first action."

53. Sir David Cairns stated the principles in these terms at 138-9:

> "Since the cases in which the retrial of an issue (in the absence of an estoppel) has been disallowed as an abuse of process are so few in number, it would be dangerous to attempt to define fully what are the circumstances which should lead to a finding of abuse of process. Features tending that way clearly include the fact that the first trial was before the most appropriate tribunal or between the most appropriate parties for the determination of the issue, or that the purpose of the attempt to have it retried is not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose.
>
> It would in my judgment be a most exceptional course to strike out the whole or part of a defence in a commercial action, or to refuse leave to amend a defence in such an action, simply because the issue raised or sought to be raised had been decided

> in another commercial action brought against the same defendant by a different plaintiff. The facts that the first action had been fairly conducted and that the issue had been the subject of lengthy evidence and argument could not, in my view, be sufficient in themselves to deprive the defendant of his normal right to raise any issue which he is not estopped from raising.
>
> If further the defendant was at some disadvantage in the earlier proceedings from which he would be free in the later ones, that is a positive reason why he should not be deprived of the opportunity of raising the issue afresh."

54. In the particular circumstances of that case, the Court of Appeal decided that the amendments to the defence were not an abuse of process, because although Oceanus had raised the issue in the earlier proceedings, they had been at a disadvantage both in relation to disclosure and cross-examination of witnesses. Furthermore, Oceanus had originally applied unsuccessfully for the consolidation of the two sets of proceedings and, as Kerr LJ said at 138 lhc: "But where, as here, consolidation was in fact sought by the party in question, I cannot begin to see how any question of abuse of the process of the court could be said to arise."

55. *Ashmore v British Coal Corporation* [1990] 2 QB 338 was a case where the applicant was one of some 1,500 colliery canteen workers who complained to an industrial tribunal that they were employed on less favourable terms than their male counterparts, in breach of the Equal Pay Act. The tribunal ordered sample cases to be selected for trial raising common issues, but that the decision, although persuasive, would not be binding on other claims. The other claims were stayed pending determination of the sample claims. The applicant was fully informed of this process and, despite ample opportunity to do so, did not put forward her claim for selection as one of the sample claims. After a full investigation of the evidence, the tribunal found that the applicants in the sample proceedings were not employed in like work to the chosen comparator and dismissed the claims. This decision was upheld by the Employment Appeal Tribunal.

56. The applicant then sought to pursue her claim and applied for the stay to be lifted. The employers sought to strike out the claim as frivolous or vexatious. The industrial tribunal held that although the earlier decision on the sample claims was not technically binding on her, it was an abuse of process to seek to re-litigate the factual issue and so struck out her claim. That decision was upheld by the Employment Appeal Tribunal and the Court of Appeal. Before the Court of Appeal, it was accepted by the defendants that the claim was not a collateral attack on the decision of the industrial tribunal in relation to the sample cases, but it was submitted that it was analogous to a collateral attack. That argument was accepted by the Court of Appeal. In giving the principal judgment, Stuart-Smith LJ said 348H-349A:

> "Mr. Goldsmith accepted that the applicant's claim is not a collateral attack on the decision of the tribunal in *Thomas v National Coal Board* [1987] ICR 757; but he submits that it is analogous to it. He submits that, where sample cases have been chosen so that the tribunal can investigate all the relevant

> evidence as fully as possible, and findings have been made on that evidence, it is contrary to the interests of justice and public policy to allow those same issues to be litigated again, unless there is fresh evidence which justifies re-opening the issue. I agree; it is no answer to say that, if the applicant's claim fails, the employers can be compensated in costs."

57. Stuart-Smith LJ recognised that this decision would go further than earlier authorities, but was not deterred from doing so. At 349H he said: "Mr. Baker has submitted that, if we uphold this decision, we are going further than courts have previously done. This may be so, although in my opinion we should not hesitate to do so if the interests of justice and public policy demand it." He went on to consider the judgments in *Bragg v Oceanus*, rejecting the dictum of Stephenson LJ that a claim should only be struck out as an abuse of process if it is a sham or dishonest or not bona fide. At 352D-F, he stated the principle and its application in that case in these terms:

> "With all respect to Stephenson L.J., I do not agree that the claim can only be struck out as being an abuse of the process if it is a sham, not honest or bona fide. On the contrary, I prefer the views of the other members of the court that it is dangerous to try and define fully the circumstances which can be regarded as an abuse of the process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend upon all the relevant circumstances. In the present case there was a large number of claims which raised similar issues against the same employers. The tribunal went to great length to devise arrangements which would enable the legal representatives of the parties to put forward their best cases so that as many issues of fact as possible could be raised and decided upon after the fullest inquiry and investigation. If the applicant or her advisers wished her case to be one of the sample cases, they could have applied at any time before the hearing for that to be done; she did not do so."

58. Whilst it is important to emphasise the flexibility of the doctrine, one factor which will, in many cases, be indicative of an abuse of process is where the proceedings in question involve a collateral attack (or its equivalent, as in *Ashmore*) on the decision in earlier proceedings. The most obvious example of this is the collateral attack on a criminal conviction in earlier proceedings, as in *Hunter* itself or *Amin*, but the abusiveness of a collateral attack is by no means limited to criminal convictions. Nor, contrary to Mr de la Mare QC's submissions, is the potential application of the doctrine limited to collateral attacks on decisions of courts of competent jurisdiction. This is illustrated by *Ashmore* where the relevant decision was of an industrial tribunal.

59. The potential width of the application of the doctrine, even where the earlier proceedings were not those of a court of competent jurisdiction, is also illustrated by the decision of Jonathan Parker J in *Re Barings plc (No. 3)* [1999] 1 BCLC 226, that a conclusion that subsequent proceedings are an abusive collateral attack is not precluded by the fact that the decision being impugned was not of a court of competent jurisdiction, but of the Securities and Futures Authority.

60. Having cited the passage from Lord Diplock's speech in *Hunter* at [1982] AC 529, 541B-C which I set out above, Jonathan Parker J said at [1999] 1 BCLC 226, 234c-d:

> "Thus, it is clear on authority that the court's inherent jurisdiction to prevent abuse of process in civil proceedings extends to cases where, notwithstanding that the doctrines of res judicata and issue estoppel are inapplicable, the circumstances are such that the issue or prosecution of proceedings would be vexatious or oppressive as amounting to an attempt to relitigate a case which has already in substance been disposed of by earlier proceedings – where, to use Lord Diplock's expression, the proceedings amount to a collateral attack on a decision in earlier proceedings. This aspect of the court's inherent jurisdiction to prevent abuses of its process is sometimes referred to as 'the double jeopardy rule'. In my judgment, however, the expression 'double jeopardy rule' is misleading in so far as it implies the existence of some absolute rule: as I see it, the question whether proceedings should be struck out or stayed on grounds of double jeopardy must remain a matter for the discretion of the court, in the light of the circumstances of each particular case. Lord Diplock's disavowal of the word 'discretion' in this context makes it clear that once the court has concluded, after weighing all the relevant circumstances, that a particular proceeding is an abuse of its process, it has a duty to act to prevent that abuse continuing. I would prefer to call the relevant principle the 'collateral attack principle', and I will use that term hereafter in this judgment."

61. He went on to cite *Reichel v Magrath* and *Ashmore* as applications of that collateral attack principle. In his conclusions, the judge said at 242a-b in relation to the passage at 541B-C of Lord Diplock's speech:

> "However, I do not understand Lord Diplock to be saying that the collateral attack principle cannot apply unless the earlier decision has been made by a court of competent jurisdiction. Lord Diplock introduced that passage I have just quoted with the words: 'The abuse of process which the instant case exemplifies ...' As I read that passage from his speech, Lord Diplock is focusing on the particular factors present in *Hunter*'s case: I do not understand him to be delimiting the circumstances in which a collateral attack on an earlier decision may constitute an abuse of process."

62. In reaching that conclusion, the judge followed the earlier decision of Laddie J in *Iberian UK Ltd v BPB Industries plc* [1997] ICR 164, who had applied the collateral attack principle where the previous decision was that of the European Commission in competition proceedings and even though he found the proceedings of the Commission were administrative and not judicial.

63. In the particular circumstances of that case, Jonathan Parker J held that the issues in the director's disqualification proceedings before him were not the same as the issues in the proceedings before the SFA and concluded that the proceedings before him were not an abuse of process. In refusing permission to appeal, the Court of Appeal upheld the judge's conclusion. In relation to the potential application in an appropriate case of the *Hunter* doctrine of abuse of process, the Court of Appeal focused on the words of Lord Diplock in *Hunter* at 536. As Waller LJ said at [1999] 1 WLR 1985, 1994D-F:

> "It is furthermore common ground that the limits of that jurisdiction are not clearly defined; that they go beyond circumstances in which the doctrines of res judicata or issue estoppel is clear. The jurisdiction indeed exists if proceedings are being used for some improper or collateral purpose. However, it is not a jurisdiction that will be exercised lightly, and it is not for the court to interfere in the decisions of parties to litigate and bring their proceedings to court unless there is an abuse, that is to say some factor which makes the continuation of the proceedings "manifestly unfair to a party in litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people"."

64. Chadwick LJ noted at 1989H that it was accepted that the case before the Court did not involve a collateral attack on the findings of the SFA, but, in citing what Lord Diplock said at 536, was obviously accepting that the application of the principle was not limited to such cases. At 1990B-E, he considered the application of the principle to cases of double jeopardy in these terms:

> "The application of the principle to cases of double jeopardy — in which the defendant is at risk of being tried twice for offences arising out of the same facts — is well illustrated by two decisions in the *Supreme Court of New South Wales: Cooke v. Purcell* (1988) 14 N.S.W.L.R. 51 and *Gill v. Walton* (1991) 25 N.S.W.L.R. 190. The latter case went, on appeal, to the *High Court of Australia, sub nom. Walton v. Gardiner* (1993) 177 C.L.R. 378. The judgment of the majority (Mason C.J., Deane and Dawson JJ.) contains the following statement of the law in Australia, at pp. 392–393:
>
> > "The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness."
>
> The overriding consideration, as it seems to me, is the need to preserve public confidence in the administration of justice. The court is entitled — indeed bound — to stay the proceedings where to allow them to continue would threaten its own integrity. In the words of Lord Diplock, proceedings should be

> stayed where to allow them to continue would bring the administration of justice into disrepute among right-thinking people."

65. The potential application of the principle of abuse of process in cases where the earlier proceedings were civil was also recognised by the Court of Appeal in *Secretary of State for Trade & Industry v Bairstow* [2003] EWCA Civ 321; [2004] Ch 1. Having reviewed a number of the earlier authorities, Sir Andrew Morritt V-C summarised the law as follows at [38]:

> "38 In my view these cases establish the following propositions:
>
> a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.
>
> b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of ss. 11 to 13 Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as to whether the evidence to displace such presumption must satisfy the test formulated by Earl Cairns in *Phosphate Sewage Co. Ltd v Molleson* (1879) 4 App Cas 801, 814, cf the cases referred to in paragraphs 32, 33 and 35 above.)
>
> c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
>
> d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

66. The decision of the Court of Appeal in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748 was that there was no rule of law or inflexible principle that there cannot be an abuse of process where the defendants in subsequent civil proceedings are different from the defendants in earlier civil proceedings. As Thomas LJ (as he then was) said at [10]: "The fact that the defendants to the original action and to this action are different is a powerful factor in the application of the broad-merits based judgment; it does not operate as a bar to the application of the principle."

67. In that case, the claimant had not sued the defendants to the second action in the first action for good reason. Thomas LJ considered that in those circumstances, the second proceedings were not an abuse of process, since the claimant was not vexing or harassing these defendants a second time: see [26]. Longmore LJ put the same point in somewhat stronger terms at [41]:

> "As Lord Bingham observed in *Johnson v Gore-Wood* [2002] 2AC 1 at page 31 C: '… there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party.' It might be fair to say it is harassing for WSP and Aspinwall to have to face a second action; I cannot see that it is unjust when they are facing a claim from Aldi for the first time."

68. Mr de la Mare QC relied upon these passages in support of his case that the claims by the first, third and fourth appellants could not be an abuse of process because they had not had their SIAC appeals heard at all, so that it could hardly be said that they were harassing any of these respondents a second time. I agree that *Aldi* militates strongly against the claims by those appellants being an abuse of process for that reason.

69. The applicability of the principle of abuse of process in an appropriate case, even where the issues and parties are not the same as in the earlier proceedings, whether those earlier proceedings are criminal or civil, was recently recognised by Moore-Bick LJ in *Amin v The Security Service* [2015] EWCA Civ 653 at [44]:

> "I agree that the question whether subsequent proceedings amount to an abuse of process is to be determined objectively in the sense that, like the man on the Clapham omnibus, the reference to the right-thinking person is simply a means of describing what is in fact an objective assessment of the position. However, I am unable to accept that in cases where the former decision was made in criminal proceedings it is appropriate simply to compare the particular issues, whether of fact or law, which arise in the subsequent proceedings with those that arose in the former, as Mr. O'Connor suggested. Even in cases where the former decision was made in civil proceedings the approach of the courts is not as mechanistic as that, requiring, as Lord Bingham said in *Johnson v Gore Wood*, a broad merits-based approach. If the former decision was made in criminal proceedings leading to a conviction, it is proper to focus attention on the question whether the later proceedings, if successful, would in substance undermine the conviction. The differences between civil and criminal proceedings, to which Lord Hoffmann drew attention in *Arthur J S Hall & Co v Simons*, explain the difference in approach. Accordingly, although I accept that many of the individual issues to which the particulars of claim give rise are different from those which the judge had to decide on the voire dire, I consider that it is necessary to take a broader view of the matter."

70. That restatement of principle recognises that the doctrine is a flexible one which is not dependent upon identity of parties or issues and in an appropriate case is equally applicable whether the previous proceedings were criminal or civil. Accordingly, I reject any suggestion by Mr de la Mare QC that *Hunter*-type abuse cannot arise where the earlier proceedings were civil and there is no identity or privity between the parties. The authorities to which I have referred do not support any such wide proposition.

71. Nonetheless, when the subsequent litigation does not involve an issue previously decided between the same parties or their privies, that subsequent litigation will rarely be an abuse of process. That is clear from the speech of Lord Hobhouse (with whom the other Law Lords agreed) in *In re Norris* [2001] UKHL 34; [2001] 1 WLR 1388. At [26] his analysis of the principle was as follows:

> "In *Hunter* the plaintiff was engaged in trying to relitigate in a civil court a factual issue which had already been decided against him in a criminal case in which he had been a party. It involved a collateral attack upon a decision in previous proceedings to which he had been a party, fully represented and with complete control over the evidence he wished to put before the court. The plaintiff had "had a full opportunity of contesting the decision in the court by which it was made": per Lord Diplock at p 541. The present case does not have those features. The *Ashmore* case is essentially a case of the marshalling of litigation. Where a civil court (or tribunal) is faced with an incident for which a defendant may be liable and which injured a large number of people or some situation where a large number of people similarly placed wish to make a contested claim against another, as was the case with the sex discrimination claim against the British Coal Board being made in the *Ashmore* case, the court, as a necessary part of the administration of justice, has to be prepared to make orders requiring the interested parties to come forward so that appropriate cases can be selected for trial and the parties can address the court upon whether their case raises any different issues from those selected. Each party has an opportunity to persuade the court that its case requires special treatment and should not follow the result of the selected cases. Any aggrieved party may seek to appeal such a procedural order. Where some interested party has been content not to intervene and awaits the outcome of the substantive trial, he must abide by the result, even if adverse, save possibly for seeking belatedly to intervene in order to support an appeal against the substantive decision. Simply to seek to relitigate the whole thing over again is an abuse of process and will not be allowed, as is more fully explained in the judgment of Stuart-Smith LJ in that case, [1990] 2 QB 338, at 345-355. These are illustrations of the principle of abuse of process. Any such abuse must involve something which amounts to a misuse of the litigational process. Clear cases of litigating without any honest

> belief in any basis for doing so or litigating without having any legitimate interest in the litigation are simple cases of abuse. Attempts to relitigate issues which have already been the subject of judicial decision may or may not amount to an abuse of process. Ordinarily such situations fall to be governed by the principle of *estoppel per rem judicatem* or of issue estoppel (admitted not to be applicable in the present case). It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse."

72. That analysis was recently approved and applied by the Court of Appeal in *JSC BTA Bank v Ablyazov (No. 15)* [2016] EWCA Civ 987; [2017] 1 WLR 603: see per Gloster LJ at [57]-[62]. At [62] she said:

> "For all the above reasons…whilst I do not accept Mr. Sheehan's proposition that the principle of abuse of process by means of collateral attack does not extend beyond a case where at least one party or his privy was party to the previous proceedings giving rise to the judgment which is allegedly under attack, in my judgment the judge was wrong, as a matter of principle, to conclude that the circumstances amounted to an abuse of process involving a collateral attack on the committal judgment… As Lord Hobhouse said in *In re Norris*, at paragraph 26:
>
> > 'It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse.'
>
> Although the judge paid lip service to this principle in his judgment, he did not to my mind provide adequate reasons why the present case was "a rare case". It was unfortunate that he was apparently not referred to *In re Norris*…"

73. A critical question in the present case is whether the issues which the appellants seek to have determined in these proceedings are ones previously determined in SIAC or the Control Order proceedings between the same parties or their privies. I will consider this question in more detail when dealing with the principal questions raised by the appeal.

74. As part of his argument that *Hunter*-type abuse has a limited role where the previous proceedings were civil because of the availability of other remedies such as *res judicata* proper or issue estoppel (an argument which, as I have found, is not supported by the authorities), Mr de la Mare QC went so far as to contend that the principle of abuse of process does not apply to SIAC proceedings, primarily for two reasons. First, because, as he submitted, determinations by SIAC were not final decisions of a court of competent jurisdiction within the meaning of *Hunter*, but essentially evaluations of risk, which, since they could not be subject to issue estoppel, could not lead to subsequent proceedings, even between the same parties involving the same issues, being an abuse of process. Second, because where SIAC

proceedings involved CLOSED hearings in which, by definition, the claimant did not participate, the principle of abuse of process could not apply, because it could never be said that the claimant had had a "full opportunity of contesting the decision in the court by which it was made."

75. So far as the first reason is concerned, I consider it misconceived. As is apparent from the authorities to which I have already referred, the application of the principle of abuse of process is not limited to final decisions of courts of competent jurisdiction, but extends, in appropriate cases, to decisions of industrial tribunals or administrative bodies such as the European Commission or the FSA. The touchstone for the application of the principle is not whether the earlier proceedings led to a final determination of a court of competent jurisdiction but whether the pursuit of the subsequent proceedings is "manifestly unfair to a party to the litigation…or would otherwise bring the administration of justice into disrepute among right-thinking people". Furthermore, contrary to Mr de la Mare QC's submissions, where as in the present case, the determination by SIAC involved a full merits review, the doctrine of issue estoppel does apply: see the judgment of SIAC in *Al-Jedda v Secretary of State for the Home Department* [2014] UKSIAC SC/66/2008 at [58]-[60]. Furthermore, as that judgment goes on to hold, even if the doctrine of issue estoppel does not apply as such in public law, it is well-established that the parallel principles of abuse of process will be applied where appropriate in public law cases: see [61]-[65] of the judgment.

76. In relation to his submission that the principle of abuse of process could not apply where the earlier proceedings involved a CLOSED material procedure, Mr de la Mare QC relied upon the innate hostility of the common law to such procedures and submitted that, where such procedures were created by statute, whether the Special Immigration Appeals Commission Act 1997 or the Justice and Security Act 2013, it was inappropriate for a common law principle to strike down later proceedings as an abuse of process. Any extension of the *Hunter* principle in such circumstances should only be imposed by statute. Mr de la Mare QC relied upon the judgment of Lord Dyson MR in *Begg v HM Treasury* [2016] EWCA Civ 568; [2016] 1 WLR 4113. Having cited at [20], a passage from his own judgment in the Supreme Court in *Al-Rawi v Security Service* [2011] UKSC 34; [2012] 2 AC at [12] where he said: "Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side", Lord Dyson continued at [21]:

> "To allow a party to rely on closed evidence is to sanction a serious invasion on this important principle. It calls for compelling justification. Where it is justified, the resulting unfairness should be mitigated so as to ensure, so far as possible, that there is equality of arms. Given the disadvantage to which CMPs inevitably expose litigants, the courts should be vigilant to ensure that the procedures do not operate in any way that is more unfair, or exacerbates the inequality between the parties to a greater extent than is necessary."

77. Whilst I see the force of that submission, it seems to me undesirable to lay down some general rule that *Hunter*-type abuse of process cannot ever apply in cases which have involved a CLOSED material procedure, particularly where at the inception of the modern law on abuse of process in *Hunter* itself, Lord Diplock cautioned against imposing fixed categories of case where there could be an abuse of process and that need for flexibility is emphasised in many of the other cases. Furthermore, the broad, merits-based judgment which Lord Bingham advocated in *Johnson v Gore-Wood* is necessarily flexible and fact-specific. Since, for the reasons set out below, exercising such a broad, merits-based judgment, I have reached the very firm conclusion that, contrary to the decision of the judge, the present proceedings are not an abuse of process, it is neither necessary nor advisable to lay down any such general rule applicable to all cases where there is a CLOSED material procedure.

78. The so-called doctrine of *Henderson v Henderson* has developed in parallel with *Hunter*-type abuse. As Lord Sumption JSC said in the recent and authoritative exposition of the legal principles in this area in his judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [24]:

> "The principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in *Yat Tung*. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, *Johnson v Gore-Wood & Co* [2002] 2 AC 1, in which the House of Lords considered their effect."

Lord Sumption then cited the passage from the speech of Lord Bingham at 31A-E which I set out at [47] above.

79. The doctrine or principle of *Henderson v Henderson* cannot apply where, although the party to the current proceedings was a party to earlier proceedings, he was not aware at the time of the earlier proceedings of the availability of the particular cause of action or issue, nor is there any basis for saying he ought to have been aware of the availability of that cause of action or issue. By definition in such a case, it cannot be said that the particular issue or claim is one which could or should have been run in the earlier proceedings or, to put it another way, the claimant has a very good reason for not having run the point in the earlier proceedings, that he was unaware of it.

80. However, as Lord Bingham recognised in *Johnson v Gore-Wood* at 32, the doctrine or principle does not just apply where the party in question was party to the earlier proceedings, but also where a privy of that party was party to the earlier proceedings. In the light of the judge's conclusions at [39] to [41] of his judgment, which the respondents seek to uphold, it is necessary to consider the law on privity in more detail and, in particular to consider whether, as the respondents contend, the Special Advocates in the SIAC and Control Order proceedings were in effect the privies of the appellants.

The law on privity of interest and the role of the Special Advocates

81. The test of what constitutes privity of interest was stated by Megarry V-C in *Gleeson v J Wippell & Co* [1977] 1 WLR 510 at 515, where having considered earlier authorities including the decision of the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853, the Vice-Chancellor said:

> "Privity for this purpose is not established merely by having "some interest in the outcome of litigation." So far as they go, I think these authorities go some way towards supporting the contention of Mr. Jacob that the doctrine of privity for these purposes is somewhat narrow, and has to be considered in relation to the fundamental principle nemo debet bis vexari pro eadem causa.
>
> I turn from the negative to the positive. In *Zeiss No. 2 [1967] 1 A.C. 853*, 911, 912, Lord Reid suggested that if a plaintiff sued X and established some right in that action, a servant or third party employed by X to infringe the right and so raise the whole question again should be regarded as being a privy of X's in subsequent proceedings, for it would be X who would be "the real defendant." Lord Reid agreed with a statement which applied the rules of res judicata to subsequent proceedings brought or defended "by another on his account," that is, on X's account.
>
> This is difficult territory: but I have to do the best I can in the absence of any clear statement of principle. First, I do not think that in the phrase "privity of interest" the word "interest" can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is not party without it being suggested that the decision is binding upon him.
>
> Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to

> the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest." Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa.
>
> Third, in the present case, I think that the matter may be tested by a question that I put to Mr. Skone James in opening. Suppose that in the Denne action the plaintiff, Miss Gleeson, had succeeded, instead of failing. Would the decision in that action that Wippell had indirectly copied the Gleeson drawings be binding on Wippell, so that if sued by Miss Gleeson, Wippell would be estopped by the Denne decision from denying liability? Mr. Skone James felt constrained to answer Yes to that question. I say "constrained" because it appears that for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses. As was said by Buckley J. in Zeiss No. 3 [1970] Ch. 506, 541 (where the question was rather different) 'The relationship cannot be conditional upon the character of the decision.'"

82. This formulation of the test for privity of interest was approved by Lord Bingham of Cornhill in *Johnson v Gore Wood* [2002] 1 AC 1 at 32. It was also approved by Floyd LJ in the Court of Appeal in *Resolution Chemicals v Lundbeck A/S* [2013] EWCA Civ 924; [2014] RPC 5) where, having reviewed the earlier authorities, at [31]-[32] he formulated the test in a more general way, but one which still suggests that a mere general or commercial interest in the outcome of the litigation will not suffice to make someone a privy:

> "31 It is not necessary for the purposes of this appeal to seek to define precisely what interest in the subject matter of the previous litigation is required. The sort of interest dismissed by Sir Robert Megarry in Gleeson in his first principle is clearly inadequate. There are passages in the judgment of Aldous L.J. in *Kirin-Amgen Inc v Boehringer Mannheim GmbH* [1997] FSR 289 which suggest that a legal interest may be necessary in the subject matter of the previous action as opposed to a commercial interest: see pp.307–309. I have not found that a particularly helpful criterion in the present case which is solely concerned with successive revocation actions. At one level Arrow and Resolution had the same legal interest in the revocation of the Patent, but that was a legal interest which they shared with all the world. If Resolution is to be bound, it must I think be possible to identify some more concrete consequence for its business which revocation of the Patent would have achieved. Unless that is so, although it can be said that

> Resolution could have joined the 2005 proceedings, there is no reason to hold that they should.
>
> 32 Drawing this together, in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation."

83. That formulation of the test was recently approved by the Court of Appeal in *Standard Chartered Bank v Independent Power Tanzania* [2016] EWCA Civ 411; [2016] 1 CLC 750: see per Longmore LJ at [31].

84. In the present case, two critical questions arise in relation to privity of interest, namely whether, applying that test, (i) there can be said to be any privity of interest between the second and fifth appellants on the one hand and the first, third and fourth appellants on the other and (ii) the Special Advocates can be said to be the privies of the appellants.

85. So far as the first question is concerned, as is apparent from [8] to [12] of the judge's OPEN judgment of 22 January 2015 which I quoted at [4] above, the facts of each appellant's case were different and each appellant had his own distinct appeal to SIAC. Although their respective appeals were stayed, that was because in each case the appellant had been arrested and charged with terrorist offences, not because the appeals of the second and fifth appellants were test cases to be determined before the others. It is accepted that those appeals were not test cases or "lead cases", as the judge himself found in his "Observations" following [1] of his Order of 10 June 2016. In determining the appeals of the second and fifth appellants, SIAC was thus not purporting to determine the appeals of the other appellants, who were not parties to those appeals. In no sense could it be said that the first, third or fourth appellants were, in reality, the parties to the appeals of the second and fifth appellants.

86. Of course, it could be said that the first, third and fourth appellants had an "interest" in the second and fifth appellants' appeals to SIAC succeeding on the safety on return issue, since if they did, then it was likely that either their own appeals would succeed on that issue as well or the Secretary of State would recognise that their appeals were likely to succeed on that issue and withdraw the case against them (as indeed happened-see [5] above). However, that sort of general interest in the outcome of litigation is never enough to establish privity of interest. In the context of commercial litigation, a general commercial or financial interest in the outcome of litigation will not be enough to establish privity of interest: see [31]-[34] of the judgment of Longmore LJ in the *Standard Chartered* case. In principle, the position can be no different in relation to the sort of general interest in the outcome of the second and fifth appellants' appeals which the other appellants had.

87. One of the ways of testing whether there is privity of interest is to ask what would have happened if the second and fifth appellants' appeals to SIAC had failed. In those circumstances, whilst as a matter of practicality, the other appellants' appeals might also have failed, it would simply not have been open to the Secretary of State to argue that the first, third and fourth appellants were bound by the result of the second and fifth appellants' appeals and were not entitled to full merits appeals of their own. Since the result of the litigation cannot determine whether there is privity of interest, it must follow that there is no privity of interest between the second and fifth appellants on the one hand and the first, third and fourth appellants on the other: see [148] of my judgment at first instance in the *Standard Chartered* case [2015] EWHC 1640 (Comm); [2016] 1 All ER (Comm) 233.

88. In relation to the second question concerning the status of the Special Advocate in the CLOSED proceedings in SIAC and the Administrative Court, the judge records at [32] of his judgment that it was common ground that the role of the Special Advocate is limited by statute: although he or she acts in the interests of the party concerned, he or she is not "responsible to the person whose interests he is appointed to represent" (see section 6(a) of the Special Immigration Appeals Commission Act 1997 and paragraph 7(5) of the schedule to the Prevention of Terrorism Act 2005). As the judge also correctly states, the Special Advocate does not represent the appellant and there is no lawyer/client relationship in the usual sense and no concomitant professional obligations. As the judge said: "Perhaps most important is the fact that, once seised of the closed evidence, the Special Advocate cannot communicate with the party whose interest he or she represents, save to a limited extent with the consent of the other party, and/or the Court or Commission."

89. Given those limitations on the role of the Special Advocate, there can be no question of their being privies of the appellants in their conduct of the CLOSED proceedings in SIAC or before the Administrative Court, or for that matter of their being agents for the appellants.

No abuse of process

90. Because the assessment in any particular case of whether there has been an abuse of process is a broad, merits based judgment, a multi-factorial exercise, the decision of the judge at first instance should be accorded particular respect and the Court of Appeal should be reluctant to interfere. As Thomas LJ said in *Aldi Stores Ltd v WSP Group plc* EWCA Civ 1260; [2008] 1 WLR 748 at [16]:

> "In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted by Aspinwall that the decision to be made is not the exercise of a discretion; WSP were wrong in contending otherwise. It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. Nonetheless an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors; see the discussion in *Assicurazzoni Generali v Arab Insurance Group* [2002] EWCA Civ 1642); [2003]1 WLR 577 and the cases cited in that decision and *Mersey Care NHS Trust*

> *v Ackroyd* [2007] EWCA Civ 101 at paragraph 35. The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him."

91. In the present case, although it is not possible in this OPEN judgment to analyse the CLOSED material which the judge considered in reaching his decision that these proceedings were an abuse of process, it is clear that he engaged in careful and anxious scrutiny of that material. Furthermore, as Mr Phillips QC emphasised, the decision of Irwin J should be accorded particular respect given his experience in this field, particularly as President of SIAC.

92. In my approach to this appeal, I have carefully borne that important consideration in mind. Nonetheless, in my judgment, the judge did not take sufficiently into account factors which militate against there being an abuse of process, so that it is permissible and appropriate to interfere with his decision. I have reached the firm conclusion that the present proceedings are not an abuse of process for a number of reasons.

93. First and foremost, at the time of the earlier proceedings in SIAC and the Control Order proceedings, the appellants did not have access to the newly discovered material and were thus unaware that they had any cause of action against the Security Services and others for false imprisonment etc. It was thus not possible for the appellants to raise points as to the lawfulness of their detention or restriction (pursuant to the Control Orders) either in the earlier proceedings or in parallel proceedings at the same time. Where a claimant does not know that he has a cause of action at the time of the earlier proceedings, I do not see how it could be said that proceedings on that cause of action after he becomes aware of its existence are abusive.

94. The judge went some way towards recognising the force of this point when he said at [39] of the judgment that the appellants had not had, in Lord Diplock's words: "a full opportunity to challenge the decision[s] in the court[s] by which [they] were made", because the proceedings were CLOSED. However, he went on to find that they had as full an opportunity as could be devised given the constraints imposed by the requirements of national security and they had now had in effect as full an opportunity as they would get if the litigation proceeded. In my judgment, that reasoning is flawed. Once the judge had concluded that the appellants had not had a full opportunity to challenge the decisions of SIAC and the Administrative Court, because those earlier proceedings were CLOSED, he should have recognised that, as a consequence, the appellants were unaware of the availability of the cause of action upon which they now rely and that, accordingly, the pursuit of the present proceedings is not an abuse of process.

95. It is no answer to conclude, as the judge appears to have done, that because the national security case had to be dealt with in CLOSED, that rendered these

proceedings abusive. That reasoning simply fails to address the point that, because of those constraints, the appellants were unaware, at the time of those earlier proceedings, of the cause of action upon which they now rely. The appellants were under exactly the sort of disadvantage in the earlier proceedings which, as Sir David Cairns said in *Bragg v Oceanus* (quoted at [53] above) should be a positive reason for not depriving them of the opportunity to run the points in the current proceedings.

96. Equally, the other aspect of the judge's reasoning, that the appellants had now had as full an opportunity as they would get if the litigation proceeded, is not a basis for concluding that the pursuit of the proceedings has now become abusive. The fact that some parts of the current proceedings may have to be dealt with in CLOSED is surely irrelevant to whether they are an abuse or not. Furthermore, the judge has overlooked the point he made himself at the end of his ruling of 17 November 2015 on disclosure, that whilst at the strike out stage material might have to remain in CLOSED, when disclosure in the proceedings has taken place (assuming they are not struck out) and it is clear what it is that the appellants are relying upon from the newly discovered material, the Court may make a different judgment as to what documents and evidence remain in CLOSED or are moved into OPEN. Accordingly, it does not seem to me that it is correct to say that the appellants have now had as full an opportunity as they would have if the proceedings continue.

97. In the last sentence of [39], the judge says: "[the appellants] also have this judgment, written in the light of and concomitant with the closed judgment, the latter involving an extremely full consideration of all the evidence, with the Claimants' concerns in mind." That is no doubt factually correct, but in my judgment, it is also irrelevant to the question whether the current proceedings are an abuse of process.

98. I also agree with Mr de la Mare QC that in this part of his judgment, the judge seems to have treated the application before him as akin to a summary judgment application. That was not an appropriate approach, since the respondents did not pursue their summary judgment application before the judge. However, in any event, there was no basis for a conclusion that the current claims should not be allowed to proceed to trial because they had no real prospect of success.

99. As Mr de la Mare QC correctly submitted, the judge has not grappled in his judgment with the full gravamen of the case now being made by the appellants, which was never run by them in SIAC or in the Control Order proceedings, namely the case that because of the collusion of the Security Services in unlawful rendition and mistreatment, the Qadhafi regime may well have concluded that the MOU was no more than window-dressing, rendering any assurances given by the regime about safety on return unreliable. The appellants' case is that if those matters were not disclosed to the Secretary of State then the decisions to deport and detain pending deportation were unlawful because of failure to take into account relevant matters ([436] of the Particulars of Claim); alternatively if they were disclosed to the Secretary of State, the decisions to deport and detain pending deportation were unlawful because no reasonable decision-maker could have concluded that there was a reasonable prospect of the appellants being deported ([437] of the Particulars of Claim).

100. In his judgment, the judge relies extensively on the second appellant's bail application, but the conclusions he draws at [12] fail to recognise that the case now

being run was not being run in SIAC or in the Control Order proceedings for the simple reason that the appellants were unaware that they had a cause of action against the respondents on the basis that the decisions to deport and to detain pending deportation were unlawful from the outset until they obtained access to the newly discovered material in 2011.

101. Second, despite Mr Phillips QC's strenuous submissions to the contrary, on a close analysis, the present proceedings do not represent a collateral attack on the earlier judgment of SIAC or on the decisions of the Administrative Court in relation to the various Control Orders. Given the clarification from the appellants' solicitors in their letter of 17 November 2015 that they were not challenging the OPEN national security findings of SIAC or the OPEN terrorism-related activity findings of the Court imposing the Control Orders or any of the OPEN findings of fact (save in one relatively minor respect in relation to [70] of the SIAC judgment), it is difficult to see how the claim can be said to be a collateral attack on those findings (which of course was the only aspect of those earlier decisions where findings were made against the appellants, the safety on return issue having been decided in the second and fifth appellants' favour, allowing their SIAC appeals).

102. Mr de la Mare QC repeated the assurances given by his solicitors in that letter in his oral submissions before us. He made it clear that the only aspect of the national security case which was questioned was in relation to [70] of the OPEN SIAC judgment as to when the Libyan intelligence service first showed an interest in the second appellant, because, as set out in [339] of the Particulars of Claim, the Libyan intelligence service had been providing the Security Service with intelligence about him since 2003 and the Security Service had asked the Libyans to ask detainees questions about him. That relatively narrow point could not sensibly be described as a collateral attack on the earlier decision of SIAC.

103. Mr de la Mare QC made it clear that the appellants' case was that the collusion of the UK agencies in unlawful rendition and mistreatment of detainees was on any view relevant to both the national security case and the issue of safety on return and the MOU. What is being contended is that, if the evidence now available of such collusion was not taken into account by the decision maker or put before the court, that calls into question the legality of the decisions to deport and to detain pending such deportation and to seek Control Orders. That case does not involve any challenge to the national security case either in SIAC or in the Control Order proceedings. In the circumstances, I accept Mr de la Mare QC's submission that the respondents' case that the proceedings are a collateral attack on the earlier decisions of SIAC and the Administrative Court is misconceived. It necessarily follows that the judge's conclusion at [39] of the judgment under appeal that the proceedings represent a collateral challenge to the judgments of SIAC and in the Control Order proceedings is equally misconceived and fails to take proper account of the clarification given by the appellants' solicitors in correspondence prior to the hearing before Irwin J in December 2015. That fundamental misconception must vitiate the rest of his reasoning in [39] and [40].

104. The basis for the judge's conclusion at [40]-[41] that it had not been an abuse to commence the proceedings or to prosecute them to the stage then reached, was that the appellants and their legal advisers had a basis for considering that they had material capable of altogether changing the nature of the case. In other words, what he

had in mind was that, although he considered that the current proceedings were a collateral attack upon the decisions of SIAC and the Administrative Court, the appellants had a basis for considering that the newly discovered material would satisfy the test laid down by Earl Cairns in *Phosphate Sewage Co.Ltd v Molleson* (1879) 4 App Cas 801, 814, pursuant to which it will not be an abuse of process to seek to re-open issues the subject of a previous decision if fresh evidence has come to light which fundamentally changes the nature of the case.

105. Although in cases where the previous proceedings were criminal, it is well-established that fresh evidence will have to satisfy the *Phosphate Sewage* test (see most recently per Moore-Bick LJ in *Amin*), the Court of Appeal in *Bairstow* left open whether, in cases where the previous proceedings were civil, fresh evidence would have to satisfy that test. Since, for the reasons I have given, I consider that the judge erred in concluding that the current proceedings were a collateral attack upon the earlier decisions of SIAC and the Administrative Court, it is unnecessary to decide whether the *Phosphate Sewage* test applies, or whether it would be satisfied in this case.

106. In any event, even if the present proceedings did represent a collateral attack on the earlier SIAC and Control Order proceedings, it does not seem to me that they would be abusive. The classic example of cases where the later proceedings are abusive because of a collateral attack on earlier proceedings is where the earlier proceedings are criminal proceedings leading to the conviction of the claimant in the later proceedings and, in those later proceedings, the claimant seeks to challenge the safety of the conviction. One of the reasons why any such challenge is abusive is because the claimant had had an opportunity to challenge the safety of the conviction in the Court of Appeal, Criminal Division, which as Lord Diplock said in *Hunter* is the proper means of challenging a criminal conviction. At 541C-E he said:

> "The proper method of attacking the decision by Bridge J. in the murder trial that Hunter was not assaulted by the Police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous, a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do. Had he or any of his fellow murderers done so, application could have been made on that appeal to tender to the court as "fresh evidence" all material upon which Hunter would now seek to rely in his civil action against the Police for damages for assault, if it were allowed to continue. But since, quite apart from the tenuous character of such evidence, it is not now seriously disputed that it was available to the defendants at the time of the murder trial itself and could have been adduced then had those who were acting for him or any of the other Birmingham Bombers at the trial thought that to do so would help their case, any application for its admission on the appeal to the Court of Appeal (Criminal Division) would have been doomed to failure."

107. Although that analysis of the facts of that case ultimately proved wrong in the light of the subsequent successful appeal of the Birmingham six, the principle that the proper means of challenging the safety of the conviction is by appeal to the Court of Appeal,

Criminal Division, so that subsequent civil proceedings which challenge the conviction were an abuse of process, is clearly correct. However, there may well be exceptions to that principle, so that in the particular circumstances of the case, even though the subsequent proceedings represent a collateral attack on an earlier conviction or the decision in earlier proceedings, they are not an abuse of the process.

108. This is demonstrated by the decision of the Court of Appeal in *Walpole v Partridge* [1994] QB 106. The plaintiff was convicted before magistrates and his appeal to the Crown Court was dismissed. He then instructed the defendant solicitors (who had not acted for him previously) to advise him on the merits of an appeal. The plaintiff commenced proceedings against them four years later claiming that, in breach of retainer and/or negligently, they had failed to act with due care and skill, in that they had not carried out his instructions with due expedition, in particular, they had failed to lodge an appeal despite counsel's advice that there were valid grounds for appeal by way of case stated on the basis that the Crown Court had erred in law. The defendants applied to strike out the claim as an abuse of process because it amounted to a collateral attack upon a final decision of a court of competent jurisdiction. The judge struck out the claim, but the plaintiff's appeal was allowed by the Court of Appeal.

109. In the principal judgment, Ralph Gibson LJ recognised that there may be exceptions to the *Hunter* principle even if the subsequent proceedings represent a collateral attack upon the earlier decision. At 116A-B, he said:

> "The decision of their Lordships in Hunter's case, however, was, in my judgment, not that the initiation of such proceedings is necessarily an abuse of process but that it may be. The question whether it is so clearly an abuse of process that the court must, or may, strike out the proceedings before trial must be answered having regard to the evidence before the court on the application to strike out. There are, in short, and at least, exceptions to the principle."

110. He then referred to the exception recognised in *Hunter* itself, where the claimant relies on fresh evidence which satisfies the *Phosphate Sewage* test. He then stated at 117A-D that the facts of that case, where the claim was against the solicitors for breach of duty in failing to lodge an appeal upon a point of law constituted another exception to the principle:

> "Since new proceedings are not necessarily an abuse of the process of the court, merely because the court will be required to consider whether a decision against the plaintiff in earlier proceedings would have been made, or made in the same terms and to the same effect, having regard to the new matters and factors to be proved or established by the fresh evidence, it is necessary to consider whether the contention that the plaintiff's solicitors, acting for him in the earlier proceedings, failed in breach of duty to advance an appeal upon a point of law, which would have caused the decision against the plaintiff to be set aside, may also constitute an exception to the principle. It was common ground that, so far as counsel have been able to

> discover, this point has not before been considered in any reported case in this country. It seems to me to be clear beyond question that such a contention may constitute an exception. Let it be supposed that the plaintiff, having instructed his solicitors to pursue an appeal against the decision of the Crown Court, is deprived of the right to appeal by the defendants' breach of duty. Let it be supposed further that his claim shows that an obvious error of law was made by the Crown Court which, on appeal by case stated, must have resulted in the conviction being set aside. I can see no reason why the court should refuse to entertain such proceedings, and I can see no arguable basis for regarding such proceedings, by reason only of the collateral attack upon the decision of the Crown Court, as an abuse of process. It would, to the contrary, be an abandonment of the duty and of the function of the court to refuse to decide the issues in such proceedings."

111. That the principle in *Hunter* was not intended to be inflexible but that there could be exceptions to it was also recognised by the Court of Appeal in *Smith v Linskills* [1996] 1 WLR 763. At 769C, Sir Thomas Bingham MR, giving the judgment of the Court, said: "It was not, as we understand, the intention of the House in the Hunter case to lay down an inflexible rule to be applied willy-nilly to all cases which might arguably be said to fall within it. Lord Diplock was at pains to emphasise the need for flexibility and the exercise of judgment." He then cited with approval the passage from the judgment of Ralph Gibson LJ in *Walpole* cited at [107] above. He went on at 769H-770A to give examples in civil cases where a collateral attack on a previous decision would be permissible:

> "It is evident in civil cases particularly that a party may lack any opportunity to resist a hostile claim, as for example where judgment is entered against him on the ground of procedural default, or may lack a full opportunity, as when summary judgment is given against him. We understand Lord Diplock to have been intending to preserve a party's right to make a collateral attack on a decision made against him in such circumstances."

112. In my judgment, the present case, where the appellants were not aware at the time of the earlier OPEN proceedings in SIAC and in the Administrative Court of the availability of the cause of action upon which they now rely or the critical aspect of their claim as set out at [436] and [437] of the Particulars of Claim, can and should represent an exception to the *Hunter* principle, even if Mr Phillips QC were right that the proceedings represent a collateral attack upon the earlier decisions. Mr Phillips QC placed great emphasis in his submissions on the statutory framework pursuant to which SIAC was set up and pursuant to which Control Orders were granted and the need for the Court to be vigilant to prevent abuse, the point the judge made at [85] of his first OPEN judgment. However, at times, those submissions verged on repetition of the respondents' case that there was a statutory bar to the current proceedings, the point on which they lost in that first judgment and which was not the subject of an appeal. I have kept well in mind the need for the Court to be vigilant to prevent abuse,

but far from the proceedings being an abuse of process, like Ralph Gibson LJ in *Walpole*, I would regard it as an abandonment of the duty and function of the Court to decline to decide the issues in the present proceedings and strike them out. As Mr de la Mare QC said, that would be a denial of access to the Court in respect of a legitimate claim.

113. It is no answer to say that the Special Advocates had had the opportunity to advance a case in CLOSED in SIAC and before the Administrative Court in relation to unlawful rendition and detainee reporting. In his Conclusions on Fact at [28] of the judgment, the judge said:

> "The Special Advocates who appeared in SIAC were alive to the concerns about rendition, and considered evidence bearing on the issues. There were "sometimes vigorous" arguments about disclosure in SIAC. However, there were no submissions by the Special Advocates that the Secretary of State had breached the duty of disclosure. They did not make submissions to the effect that the Secretary of State's case was all along predictably hopeless. They did not make submissions to the effect that the Secretary of State, or any other Defendant to this action, acted in bad faith."

114. Although it would not be appropriate to discuss in this OPEN judgment the detail of the CLOSED proceedings before SIAC and the Administrative Court, as Mr de la Mare QC submitted, it is apparent from that passage of the judgment and from the OPEN SIAC judgment that the Special Advocates did not argue in CLOSED that the United Kingdom Security Services had colluded in unlawful rendition or mistreatment, nor did they argue the point which is now at the heart of the appellants' case that such collusion led to the serious risk that the Qadhafi regime would regard the MOU as window dressing so that any assurances they gave as to safety on return were not reliable, from which it is contended that, as the judge put it the decisions to deport and to detain pending deportation were "predictably hopeless". Furthermore, as Mr Phillips QC accepted in argument in answer to Moylan LJ, the OPEN SIAC judgment does not deal with the lawfulness of the original decision of the Secretary of State to make deportation orders against the appellants and to detain them pending such deportation, from which it is apparent that the CLOSED judgment did not deal with that issue either.

115. The judge does not deal in the judgment with why the Special Advocates did not run these points in the earlier CLOSED proceedings. I agree with Mr de la Mare QC that this may potentially have been for a number of reasons, in so far as it is possible to speculate on the material available in OPEN. They may not have been alive to the points because for example, of the pragmatic approach adopted by the Secretary of State and by the Courts of not relying upon any evidence of detainee reporting. Alternatively, if they were alive to the points, they may have adopted what Mr de la Mare QC described as a "self-denying ordinance" that they could not run in CLOSED a case which was not being run in OPEN or they may have decided, making their own pragmatic decision as to what was in the appellants' best interests, that to raise the points would open a can of worms, whereas the case on which the appeals ultimately won on safety on return provided a clean route to success. In the yet further alternative, Mr de la Mare QC submitted that they may simply have missed the point.

I consider the position further in the CLOSED judgment, but can indicate that I have concluded that there is no basis for criticism of the Special Advocates in the earlier proceedings on my review of the material available in CLOSED.

116. Even if the Special Advocates had been the privies or agents of the appellants, all those reasons for not running the points which the appellants now raise (other than their own negligence) would have been perfectly valid and legitimate reasons for not raising the points in the earlier proceedings. As in *Aldi Stores*, it could not be said that the points were ones which should have been run in the earlier proceedings in SIAC or in the Administrative Court, so that *Henderson v Henderson* abuse of process would not arise. In fact, whatever the reason why the Special Advocates did not run the points which the appellants now raise, they were simply not the privies or agents of the appellants for the reasons I have given earlier in the judgment. In those circumstances, whatever happened in the CLOSED proceedings before SIAC or the Administrative Court, the continued pursuit of these proceedings by the appellants cannot amount to either *Hunter*-type abuse of process or *Henderson v Henderson* abuse of process, for the simple but fundamental reason that at the time of the SIAC and Control Order proceedings in OPEN, the appellants were not aware of the cause of action or the points on which they now rely.

117. So far as the position of the first, third and fourth appellants is concerned, given that their appeals to SIAC were never heard and, as I have found, there is no privity of interest between them and the second and fifth appellants, it is difficult to see how their claims in the current proceedings can be said to be an abuse of process, even if they were launching a collateral attack on the findings of SIAC against the second and fifth appellants in relation to the national security case, which for the reasons I have given, I do not consider that they are.

118. The learned judge has not really addressed the question of privity of interest in his judgment. At [44] he found that there was no difference between the case of the first, third and fourth appellants and that of the second and fifth appellants in the current proceedings. That is true as far as it goes, but does not establish a privity of interest in relation to the earlier SIAC appeals of the second and fifth appellants. The judge goes on to refer to an "identity of interest" demonstrated by the fact that the Secretary of State conceded the appeals of the first, third and fourth appellants after the successful appeals by the second and fifth appellants. He repeats this reference to identity of interest in his "Observations" following [1] of his Order of 10 June 2016 which I referred to at [36] above.

119. If "identity of interest" is intended by the judge to be a reference to privity of interest, then the judge has failed to consider at all the applicable legal test, as laid down by the Court of Appeal in *Resolute Chemicals* and *Standard Chartered*. Had he done so, he could not have concluded that there was any privity of interest. If "identity of interest" is some wider concept than privity, it cannot render the claims of the first, third and fourth appellants abusive, absent privity of interest. As is clear from the authorities (specifically Lord Hobhouse in *In re Norris* at [26]) cases where subsequent proceedings are an abuse of process, notwithstanding that the claimant or his privy was not a party to the earlier proceedings, are entirely exceptional. This case is, as Mr de la Mare QC submits, not remotely like *Ashmore v British Coal Corporation*, which as Lord Hobhouse indicated was a case about marshalling litigation or, in more modern parlance, case management of group litigation. Since the second and fifth

appellants' appeals to SIAC were not test or lead cases, the analysis in that case is inapplicable.

Conclusion

120. For the reasons I have given, I have reached the firm conclusion that the current proceedings are not an abuse of process either pursuant to the principle derived from *Hunter* or pursuant to the principle derived from *Henderson v Henderson*, essentially because I am quite satisfied that the case which the appellants now wish to run is not one of which they were aware at the time of the earlier SIAC or Control Order proceedings. Accordingly, they have not had any opportunity, let alone a full opportunity to run that case. That conclusion was confirmed and supported by the submissions which we heard in CLOSED, in respect of which we hand down a CLOSED judgment herewith.

121. The issues in CLOSED were in a narrow compass and the CLOSED judgment is concerned primarily with consideration of whether the CLOSED judgment of Irwin J (which in turn considers the CLOSED judgments of SIAC and of Mitting J in the Control Order proceedings) has any impact upon the conclusions reached in this OPEN judgment. I do not consider that any of the CLOSED material does affect the conclusions in this OPEN judgment. If anything, consideration of the CLOSED material simply reinforces the conclusions which I have reached in this OPEN judgment.

122. Given the conclusion that the current proceedings are not an abuse of process for the reasons I have given, it has not been necessary to deal with all the detailed and interesting arguments raised by both the appellants and the respondents, although I have considered them carefully. As I said at the outset of the judgment, there is a considerable overlap between the various Grounds of Appeal. In the circumstances, I would give the appellants permission to appeal on the Grounds (D to G) on which the judge did not give permission and allow the appeal.

Lord Justice Moylan

123. I agree.

Sir Stephen Richards

124. I also agree.