NATIONAL SECURITY, RISK, AND ACCOUNTABILITY: THE CLOSED MATERAL PROCEDURE

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TRINITY TERM 2015

ABSTRACT

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DOCTOR OF PHILOSOPHY IN LAW, TRINITY TERM 2015

This thesis explores issues of procedural fairness across the major statutory counterterrorism powers which require the Closed Material Procedure (CMP) in judicial review. It also considers the Justice and Security Act 2013 which applies to civil proceedings of any nature engaging national security concerns on a discretionary basis. The analysis construes procedural fairness broadly by considering its application both in the curial context and inside the relevant administrative organisations. It argues that procedural fairness in the CMP should be understood as part of the routine risk-management responsibilities of administration and administrative law, as opposed to an initiative which is 'exceptional' by virtue of its national security subject matter. Procedural fairness in the CMP could be invigorated by taking seriously the presence of risk and risk assessment in the application of the statutory powers by the executive and in the operation of the CMP itself. This thesis also argues that the extension of the CMP to damages actions under the Justice and Security Act 2013 raises greater normative problems than actions in the existing province of the CMP. This is because such claims, whilst not the sole province of the Act, concern executive accountability for tortious actions, as opposed to judicial review of executive risk-management of terrorism. The analysis concludes with two critical recommendations for improving procedural fairness in law and administration in the relevant subject matters; but ultimately recognises that these are but a first step in a broader project which requires the development of an interdisciplinary substantive theory of necessary secrecy.

ACKNOWLEDGMENTS

When I arrived in Oxford one autumn afternoon a Fellow of Balliol, entrusted with my academic welfare, imparted two pieces of advice. The first was that I should carefully read the works of Joseph Raz. The second piece of advice was that if it transpired that I was unsuited to academic life but wished to remain in the city I should seek employment erecting scaffolding on one of the many historic university buildings. To date I have felt the need to do neither. However, it cannot be said that avoidance of these tasks was an endeavour solely of my own making. In the course of my doctoral thesis I have incurred a great many debts. First and foremost, I thank my supervisor Professor Paul P. Craig without whom I would never have completed my thesis, and whose intellectual guidance and generosity of time I will never forget. I also gratefully acknowledge the financial support of the Carnegie Trust for the Universities of Scotland. Balliol College provided a home, a community, and financial support over three years.

My examiners at initial transfer and confirmation of status Alison L. Young and Aileen Kavanagh provided robust checks on the content and direction of the thesis at crucial stages. Tom Hickman (barrister at Blackstone Chambers) was kind enough to inform me of relevant hearings involving the closed material procedure which provided me with insights I would not otherwise have been able to gain.

Sir Drummond Bone, Lady Bone, and Agathe Bone cheered me up no end on many occasions and provided a home for me in the crucial final stages before submission. I can never repay your generosity, and I cherish your friendship.

A good friend and colleague Professor Aileen McHarg provided friendship and advice regarding publications throughout the duration of my D.Phil. A number of other good friends provided support and a great deal of fun: Jonathan Greenacre, Se-Shauna Wheatle, Dawn Hollis and Kelsey Jackson Williams, Yvonne Bramma, and Jennifer Morrison. Thanks all.

I also extend my heartfelt thanks to my final examiners Professors Elizabeth Fisher and Richard Rawlings. They made my viva voce examination lively, challenging, and collegial in nature. Thanks to both of you.

The greatest thank-you, of course, is to my parents William and Lorna Ann Hooper. This thesis is for both of you.

HAYLEY J. HOOPER

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ATCSA/ATCSA 2001	Anti-Terrorism, Crime and Security Act 2001
CCA 2004	Civil Contingencies Act 2004
CFI	European Union Court of First Instance (General Court)
CJEU	Court of Justice of the European Union
CMP	Closed Material Procedure
COP	Court of Protection
CORG	Control Orders Review Group
CPR	Civil Procedure Rules
CRA/CRA 2005	Constitutional Reform Act 2005
CTA 2008	Counter-Terrorism Act 2008
DDO/DDO 2001	Human Rights Act 1998 (Designated Derogation Order) 2001
ECHR/CONVENTION	European Convention on Human Rights and Fundamental Freedoms 1950
ECJ	European Court of Justice
ECTHR	European Court of Human Rights
ENHANCED TPIMS	Enhanced Terrorism Prevention and Investigation Measures
ERG22+	Extremism Risk Guidance 22+
EU	European Union
FATF	United Nations Financial Action Task Force
FCO	UK Foreign and Commonwealth Office
FMPO	Forced Marriage Protection Order
GCHQ	Government Communications Head Quarters (UK)
GPS	Global Positioning System
HRA/HRA 1998	Human Rights Act 1998
IPP	Imprisonment for Public Protection
IPPR	Institute of Public Policy Research
IPT	Investigatory Powers Tribunal
IRA	Irish Republican Army
ISC	Intelligence and Security Committee
JCHR	Joint Committee on Human Rights
JIC	Joint Intelligence Committee
JSA/JSA 2013	Justice and Security Act 2013
LIFG	Libyan Islamic Fighting Group
MAPP	Multi-Agency Public Protection Panel
MAPPA	Multi-Agency Public Protection Agreement
MI5	Security Service
MI6	Secret Intelligence Service
MOD	Ministry of Defence
NCND	Neither Confirm nor Deny
NOMS	National Offender Management Service
NRP	Negative Resolution Procedure
NSA	National Security Agency (USA)
NSS	National Security Strategy
OASYS	Offender Assessment System
PII	Public Interest Immunity
PISC	Parliamentary Intelligence and Security Committee

PMOI	People's Mojahedin Organisation of Iran
PPO	Prisons and Probation Ombudsman
PRISM	Planning Tool for Resource Integration, Synchronization, and Management
PTA/PTA 2005	Prevention of Terrorism Act 2005
RIPA 2000	Regulation of Investigatory Powers Act 2000
SAA	Specially Appointed Advocate (Special Advocate)
SCPO	Serious Crime Prevention Order
SCR	Supreme Court Rules
SI	Statutory Instrument
SIAC	The Special Immigration Appeals Commission
SIGINT	Signals Intelligence
TAFA/TAFA 2010	Terrorist Asset-Freezing, Etc. Act 2010
TO/TO 2006	Terrorism Order 2006
TPIM	Terrorism Prevention and Investigation Measures
TPIMA 2011/TPIM ACT 2011	Terrorism Prevention and Investigation Measures Act 2011
TRA	Terrorism Related Activity
TRG/TPIM REVIEW GROUP	Terrorism Prevention and Investigation Measures Review Group
UN	United Nations
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
VERA-2	Violent Extremism Risk Assessment (Australia)
WMD	Weapon(s) of Mass Destruction

TABLE OF CASES

UNITED KINGDOM

EUROPEAN UNION

COUNCIL OF EUROPE

OTHER

TABLE OF LEGISLATION AND INTERNATIONAL INSTRUMENTS

UNITED KINGDOM

EUROPEAN UNION

PART I

CHAPTER ONE:
SECURITY, LAW, AND RISK

INTRODUCTION

This thesis explores issues of procedural fairness across the major statutory counterterrorism powers which require the Closed Material Procedure (CMP) in judicial review. It also considers the Justice and Security Act 2013 which applies to civil proceedings of any nature engaging national security concerns on a discretionary basis. The analysis construes procedural fairness broadly by considering its application both in the curial context and inside the relevant administrative organisations. It argues that procedural fairness in the CMP should be understood as part of the routine risk-management responsibilities of administration and administrative law, as opposed to an initiative which is 'exceptional' by virtue of its national security subject matter. Procedural fairness in the CMP could be invigorated by taking seriously the presence of risk and risk assessment in the application of the statutory powers by the executive and in the operation of the CMP itself. This thesis also argues that the extension of the CMP to damages actions under the Justice and Security Act 2013 raises greater normative problems than actions in the existing province of the CMP. This is because such claims, whilst not the sole province of the Act, concern executive accountability for tortious actions, as opposed to judicial review of executive risk-management of terrorism. The analysis concludes with two critical recommendations for improving procedural fairness in law and administration in the relevant subject matters; but ultimately recognises that these are but a first step in a broader project which requires the development of an interdisciplinary substantive theory of necessary secrecy.

Briefly, a CMP divides a hearing into 'open' and 'closed' sessions and empowers a court to issue 'open' and 'closed' judgments. In a 'closed' hearing an applicant is not represented by his own lawyer, but by a Special Advocate: a court appointed lawyer, subject to security vetting by the

government. Neither the applicant nor his legal counsel can access the 'closed' proceedings, evidence or judgments. Only rarely can they communicate with the Special Advocate after he has seen the 'closed' evidence.

This introductory Chapter has several purposes. First, it aims to situate the CMP in the context of historical and contemporary developments in national security and counterterrorism law. Secondly, it introduces and critiques various scholarly approaches to national security and counterterrorism law which have been tangentially applied to the CMP to explain why the risk framework is most suited to analysis of the CMP. Whilst there is no doubt that the spread of the CMP was catalysed by the events of 9/11 and the 7/7 attacks in London this thesis argues that viewing contemporary counterterrorism law though the lens of the 'War on Terror' or the 'State of Exception' paradigm is inappropriate. This is because these approaches permit excessive executive discretion which cannot be subjected to appropriate legal control. The argument also demonstrates that the principle of legality and the judicial practice of balancing rights against policy goals (like security) form insufficient constraints on the executive when deployed solely in their abstract forms. Chapter 2 will build upon this contention by demonstrating that the relevant principles of civil procedure are too malleable to rely on abstract concepts alone to guarantee fairness. This thesis shares Lazarus' approach to delimiting the province of security, insofar as the reason for confining security to 'the narrowest possible set of claims and correlative duties on the state' is tied to the fact that, unlike other concepts which can be framed as both a duty of government and a right of citizens 'security is frequently taken to imply (both legally and rhetorically) a correlative duty on the state or third parties to coerce others, that it is distinctive from many other rights.'[1] In short, a more tangible yardstick is required to evaluate security claims and the language of risk and risk management provides that yardstick.

[1] Liora Lazarus, 'The Right to Security – Securing Rights or Securitising Rights' in Rob Dickinson *et al* (eds) *Examining Critical Perspectives on Human Rights* (CUP 2012), 89.

The CMP and the legislation which makes use of it reflects a general transition towards governance through risk.[2] However, the presence of secrecy means that any risk assessment undertaken in the context of counterterrorism powers (and subsequent judicial review) suffers from an additional layer of complexity. Therefore, this thesis proposes that a more rigorous approach to judicial review of intelligence material under the CMP can be achieved using Pozen's framework of 'deep' and 'shallow' secrets to assist judicial evaluation of claims to necessary secrecy.[3] But before commencing analysis, it is necessary to reflect on the specific meaning(s) of risk(s) as used in this thesis. There is, of course, no fixed definition of risk but the definition proferred by the BSE inquiry is instructive:

> A risk is not the same as a hazard. A hazard is an intrinsic propensity to cause harm. [A] risk is the likelihood that a hazard will result in harm. [Risk] evaluation involves considering both the likelihood that a hazard will cause harm and the severity of the harm that is threatened.[4]

Risk is used in two broad senses in this thesis. These risks will be referred to as 'first order risks' and 'second order risks'. 'First order risk's are the risks that the executive is seeking to manage by exercising counterterrorism powers conferred by legislation across the various subject matters examined in Part II. 'Second order risks' refer to the risks inherent judicial review of these powers, most notably that information damaging to national security may be revealed during a hearing. Finally, although this thesis is primarily about *procedural* fairness in the context of the CMP, there

[2] Jenny Steele, *Risks and Legal Theory* (Hart: Legal Theory Today 2004), 14.

[3] David E. Pozen, 'Deep Secrecy' (2010) 62(2) Stanford Law Review 257.

[4] BSE Inquiry, *The BSE Inquiry - Volume 1 - Findings and Conclusions* (1999-2000, HC 887), Ch 2 [1.62] in Clive Walker and James Broderick, n 88, 4, n 3.

will necessarily be discussions of the substantive decisions reached in case law. The relationship between process and substance is symbiotic: the level of procedural protection – particularly by way of disclosure granted to the non-government party – potentially impacts directly upon the substantive outcome of the case.

HISTORICAL APPROACHES TO NATIONAL SECURITY AND STATE EMERGENCIES

Although the events of 9/11 and 7/7 are within recent memory the intellectual foundations of the rhetoric of the 'War on Terror' and the idea of a 'state of exception' have a long lineage. Whilst Ulrich Beck's 'risk society'[5] and the literature which it inspired[6] is a contemporary development, debate about the appropriate relationship between security and law in a democracy can be traced to ancient Rome.[7] In 51 BC Marcus Tullius Cicero proclaimed that 'the safety of the people is the supreme law'[8] as a justification for martial law in times of war. The absolute nature of need for security also permeated the 17th century works of Thomas Hobbes. According to Gearty, Hobbes' writings in *De Cive* and *Leviathan* are at least partly responsible for 'the contamination of the liberty-security discourse'[9] which has impoverished our contemporary conception of freedom:

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[5] Ulrich Beck, 'The Terrorist Threat: World Risk Society Revisited' (2002) 19 Theory and Culture 39.

[6] Baruch Fischhoff and John Kadvany, *Risk: A Very Short Introduction* (OUP 2011); Richard A. Posner, *Catastrophe: Risk and Response* (OUP 2004); Alan M. Dershowitz, *Preemption: A Knife That Cuts Both Ways* (W.W. Norton 2006); Richard V. Ericson & Kevin D. Haggerty, *Policing the Risk Society* (University of Toronto Press 1997); Kevin Stenson and Robert B. Sullivan, *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Willan Publishing 2001); Adrian Vermeule, *The Constitution of Risk* (CUP 2014).

[7] Andrew Lintott, *The Constitution of the Roman Republic (2nd Edn),* (OUP, Oxford 2009), pp. 109-113. There are various explanations for the origins of Dictatorship, including that it may have been 'a response to the need to have a unified command in war [or] as a means of cowing the plebs., 109-110.

[8] From the latin: '*Salus populi suprema lex*'. Marcus Tullius Cicero, *Treatise on Laws: Book III*, Francis Barham, (ed), *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws,* vol 2 (Edmund Spettigue 1841-42).

[9] Conor Gearty, *Liberty and Security,* (Polity Press 2013), 13.

> …if *Leviathan* rarely intrudes on you…then the fragility inherent in your liberty is not in the foreground of your thinking. It is the freedom you experience, not the ease with which it is taken away. The latter may be something that others suffer – alleged revolutionaries; suspected "terrorists"…but because they are not you or like you, and of course you never meet them, their vulnerability does not register.[10]

Even Hobbes' chief antagonist John Locke argued that the executive must retain the 'Power of doing publick good without a Rule'.[11] In his *Commentaries on the Laws of England*, published in 1766, William Blackstone described the right to personal security as being among the *absolute* rights guaranteed by law. Personal security, in Blackstone's view, amounted to 'a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.' This was 'a natural inherent right [that] cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.'[12] In the 21st century Walker and Loader observed that: 'Security has become *the* political vernacular of our times.'[13] In October 2010 the Conservative-Liberal Democrat coalition *National Security Strategy* asserted that 'The security of our nation is the first duty of government.[14]

[10] ibid, 22.

[11] John Locke and Peter Laslett (ed), *Two Treatises of Government (1689),* (CUP 1988), Second Treatise [166].

[12] William Blackstone and George Sharswood (ed), *Commentaries on the Laws of England in Four Books, Two Volumes, (1753)* (J.B. Lippincott Company 1893), 129-130.

[13] Ian Loader and Neil Walker, *Civilising Security,* (CUP 2007), 9.

[14] HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (Cm 7953, 2010) introduction.

The British statute books display a long history of wartime and peacetime legislation containing sweeping emergency powers.[15] In his celebration of the capacity of republics to turn to commissarial dictatorship as a means of survival in times of crisis Rossiter 'propose[d] to demonstrate how the institutions and methods of dictatorship have been used by the free men of the modern democracies during periods of severe national emergency.'[16] In doing so, he devoted four chapters to 'Crisis Government in Great Britain', ranging from the era before 1914 to the end of World War II. In respect of World War I Rossiter wrote that:

> Of all the nations, then, Great Britain was forced to experience the most radical alterations in governmental organization…The transition from Britain at peace to Britain at war was almost a revolution…For the duration of the war the ancient British liberties – consecrated in such documents as Magna Charta [sic], The Petition of Right, and the Bill of Rights – were at the mercy of government.[17]

The British tradition of legal control of national security, before its contemporary turn in *Belmarsh*, takes a little from all of the traditions described above.[18] For example, the Defence

[15] For a comprehensive account of such powers up until World War II see Cornelius P. Cotter, 'Constitutionalizing Emergency Powers: The British Experience' (1953) 5(3) Stanford Law Review 382-417. For the post-war picture see Joan Mahoney, 'Constitutionalism, the Rule of Law, and the Cold War', Keith D. Ewing, 'The Cold War, Civil Liberties, and the House of Lords', and Aileen McColgan, 'Lessons from the Past? Northern Ireland, Terrorism Now and Then, and the Human Rights Act' in Tom Campbell, Keith D. Ewing, and Adam Tomkins, *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

[16] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, (Princeton University Press1948), xix.

[17] ibid, 151-165.

[18] For an appraisal of civil liberties between 1979-1990, see Keith D. Ewing and Conor A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (OUP 1990), Ch 5-7.

(General) Regulations 1939 at issue in *Liversidge v Anderson*[19] bestowed an order-making power on the Home Secretary which allowed him to imprison 'persons whose detention appears…to be expedient in the interests of the public safety or the defence of the realm.' In 1953 Cotter, detached by the distance of the Atlantic Ocean, concluded that 20th century British governments were 'completely unrestrained by written constitutional limitations and free to invoke the vague and undefined prerogative powers in time of emergency.'[20] Dyzenhaus accurately describes the historical role of the British courts as in emergency situations as 'at worst dismal, at best ambiguous.'[21] This sentiment is reflected throuhgout a series of decisions beginning with *R v Halliday* where Lord Atkinson held that:

> [h]owever precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement.[22]

Before Lord Atkin's dissent in *Liversidge v Anderson* national security was viewed as 'par excellence a non-justiciable question'[23], and this theme was to continue effectively uninterrupted throughout the Second World War until the end of the twentieth century.[24]

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[19] *Liversidge, v Anderson* [1941] UKHL 1 and the Defence (General) Regulations 1939, Regulation 18B.

[20] Cornelius P. Cotter, n 15, 382.

[21] David Dyzenhaus, *The Constitution of Law: Legality a Time of Emergency*, (CUP 2006), 17.

[22] *R v Halliday, ex parte Zadig* [1917] AC 260, p. 271.

[23] *GCHQ* [1985] A.C. 374 HL, 412 (Lord Diplock).

[24] *Liversidge v Anderson* [1941] UKHL 1*, Chandler v DPP* [1962] UKHL 2,*R v Home Secretary, ex parte Hosenball* [1977] 1 WLR 766*, Council of Civil Service Unions v Minister for the Civil Service (GCHQ)* [1985] A.C. 374 HL, *R v Home Secretary, ex parte Cheblak* [1991] 2 All ER 319*, R v Home Secretary, ex parte Chahal* [1994] Immigration Appeal Reports 107*, R (Louis Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] 3 WLR 481; *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153 (HL).

Similarly draconian practices could be found in legislation. The Emergency Powers Act 1920 allowed for the declaration of a 'state of emergency' simply by Royal Proclamation, where a letter from the Queen – at the request of government – was read aloud in parliament. Such a state of emergency could be in force for up to one month, and the penalty for breach of regulations made thereunder was: 'imprisonment with or without hard labour for a term of three months, or a fine of one hundred pounds, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed.'[25] Lloyd George was said to have frankly admitted that the purpose of these powers was to equip the government with an effective means of countering widespread industrial action.[26] So, it appears Gearty was correct that much of twentieth-century national security policy (whether legislative or judicial) was influenced by Hobbesian, and latterly Schmittian thinking insofar as considerations of security were driven by the advent of exceptional situations (war, emergencies, terrorism), and the targets of decision-making were our 'enemies' as opposed to our 'friends'.[27]

CONTEMPORARY APPROACHES TO NATIONAL SECURITY AND COUNTERTERRORISM

Many legal scholars point to the *Belmarsh* case as a turning point in the British courts' approach to legal control of national security powers.[28] In *Belmarsh* the House of Lords held by an 8-1 majority that the indefinite detention of foreign terrorist suspects without trial infringed the right to liberty in Article 5 ECHR and the non-discrimination principle in Article 14 ECHR. David Feldman called the decision 'the most powerful judicial defence of liberty since *Leach* v. *Money* (1765) 3 Burr.

[25] Emergency Powers Act 1920, s 2(3)

[26] Cornelius P. Cotter, n 15, 396.

[27] Carl Schmitt & George Schwab (trs), *The Concept of the Political,* (University of Chicago Press 2007), 26.

[28] *A v Home Secretary (No. 1)* 'Belmarsh' [2004] UKHL 56.

1692 and *Somersett* v. *Stewart* (1772) 20 St. Tr. 1'.[29] But the picture post-*Belmarsh* regarding the intensity of judicial review of national security claims may well be termed 'schizophrenic'.[30] This is because '[even] after *Belmarsh, Rehman* remains the leading House of Lords authority on this issue, *stricto sensu*.'[31] This thesis maintains that the deferential stance adopted in *Rehman*[32], which included a postscript by Lord Hoffmann reflecting upon the (then) recent atrocities of 9/11, accurately reflects the judicial approach to many questions of substantive national security review:

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security.[33]

Lord Hoffmann's appears to indicate that assessing the interests of national security remains primarily an executive issue. Zedner rightly points out that: 'seeking security from terrorism has the quality of a trump card.'[34] However, the contemporary picture with respect to lower courts is more complex. Administrative Court judges do not take executive claims regarding

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[29] David Feldman, 'Proportionality and Discrimination in Anti-Terrorism Legislation' (2005) 64(2) Cambridge Law Journal 271, 273.

[30] Thomas Poole, 'Courts and Conditions of Uncertainty in "Times of Crisis"' [2008] Public Law 234, 239.

[31] Adam Tomkins, 'National Security and the Role of the Court: A Changed Landscape?' (2010) 126 Law Quarterly Review 543-567, 565.

[32] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

[33] *Rehman*, n 24, Lord Hoffmann [62].

[34] Lucia Zedner, 'Terrorism and counterterrorism: What is at risk?' in Layla Skinns, Michael Scott & Tony Cox (eds), *Risk* (CUP 2011), 109.

national security for granted. Tomkins argues that in the post-*Rehman* era the lower courts, fuelled by Article 6 ECHR jurisprudence, have insisted that 'because there is otherwise liable to be a violation of art.6…government decisions should be robustly reviewed even where they concern national security.'[35]

In the aftermath of the July 7, 2005 attacks in London Tony Blair made a remark that, for many, became the sound-bite of the British approach to combating Al Qaeda:

> Let no one be in any doubt that the rules of the game are changing.[36]

Although the New Labour government had provided for indefinite detention without trial of foreign terrorist suspects in the wake of 9/11[37] Blair promised the British public even tougher policies on terrorism. In the course of that particular address he suggested that the Human Rights Act 1998 could be amended to make the deportation of terrorist suspects easier. In March of 2005 the Prevention of Terrorism Act had been passed to provide for the control orders regime, discussed in Chapter 5, but a later enquiry concluded that 'much of [the relevant information] was not known to the police and the Security Service before 7/7, and *could not* have been known to them.'[38] However, unlike the Belmarsh Detainees, all of the 7/7 bombers were later revealed to be British citizens.

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[35] Adam Tomkins, n 31, 567.

[36] Tony Blair, 'Full Text: The prime minister's statement on anti-terror measures' *The Guardian* (London, 5 August 2005) <http://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism1> accessed 01 July 2014.

[37] Anti-Terrorism Crime and Security Act 2001, s 21 and Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644.

[38] Lady Justice Hallett, Lady, 'Report of the Official Account of the Bombings in London 7th July 2005, HC 1087 (The Stationary Office 2006), [15], emphasis original.

The importance of the British response to 7/7 is that it did not signal a transition towards 'War on Terror' thinking. Beyond the absolutely immediate aftermath of the attacks of September 11, 2001 the influence of 'war on terror' rhetoric in as part of *domestic* counterterrorism policy has been conspicuous by its absence.[39] It also seems that the idea of a 'state of emergency' was overplayed. After all, the British situation was hardly comparable to events in Roman history.[40] In fact, such is the scepticism towards the 'war on terror' paradigm in the United Kingdom that the House of Lords refusal in *Belmarsh* to re-examine the evidence relating to the presence of a state of 'war or other public emergency threatening the life of the nation,' followed by the ratification of the presence of such a state, has been criticised as 'completely unnecessary'. Tomkins points out that this part of the ruling which 'some of the Law Lords confessed to being uneasy about, rested on no evidence at all, beyond the assertions made by the government's counsel.'[41] He further argues that the same outcome would have been achieved in the case even if the court had not sullied itself by engaging half-heartedly and reticently with the issue of whether a state of emergency existed.[42]

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[39] British Prime Minister Tony Blair stated this was 'not a battle between the United States of America and Terrorism, but between the free democratic world and terrorism.' Laura K. Donoghue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (CUP 2008), 7. In his review of Bruce Ackerman's *Before the Next Attack: Preserving Civil Liberties in An Age of Terrorism* (Yale University Press, New Haven 2007) Gearty explains that: 'It is wrong . . . for legal traditionalists to treat the 'war on terror' as if it were merely a symptom of collective paranoia, which Americans will come to regret as they recover their sobriety' (Ackerman, 44). Gearty claims that: 'By opposing the 'war on terror' without critically deconstructing the supposed basis of it, [Ackerman] risks doing more damage to democratic freedom and the rule of law…than anything that the 'war on terror' has so far managed'. Conor Gearty, 'The Superpatriotic Fervour of the Moment' (2008) 28 (1) Oxford Journal of Legal Studies 183, 184-198.

[40] Menachem Hofnung, *Democracy, Law, and National Security in Israel*, (Dartmouth Publishing Company 1996), 32.

The English Civil War may have been more comparable to the fall of Rome. Captain John Hodgson concluded that: 'that the safety of the people is the supreme law of both nature and nations, and that there was a people before there were rulers and governors chosen and set over them; and when these turned the government, laid down by law, into an armed force, then did the people betake themselves to thoughts of reformation.' Tristram Hunt, *The English Civil War at First Hand* (Penguin 2011), 87.

[41] Adam Tomkins, 'The Role of Courts in the Political Constitution', (2010) 60 (1) University of Toronto Law Journal 1, 15.

[42] Adam Tomkins, ibid, 15. See also Tom Hickman, *Public Law After the Human Rights Act,* (Hart 2010), Ch 11. Hickman's argues that: 'Lord Bingham's approach essentially absolves the Government from show[ing] that a public emergency … exists', 338-339.

Instead, the British response has been fraught with its own idiosyncrasies, the most notable of which is the distancing of terrorism policy from the criminal process. The recommendations in favour of retaining a strong link between terrorism prevention and the criminal process recommended by Lord Lloyd's seminal 1996 report *Inquiry into Legislation Against Terrorism* have been steadily undermined.[43] Anderson points out that the report was not written in a year which represented 'some pre-lapsarian age of terroristic innocence – but rather at a time when both international terrorism and Northern Ireland-related terrorism, as they are now referred to, were very much a fact of life on this island.'[44] Yet, Lord Lloyd's report rejected both the paradigms of exceptionalism and war, arguing that ordinary criminal law had a central role to play because 'if key sections of the criminal law become outdated or are seriously defective, this will enormously hamper anti-terrorism efforts.'[45] His Lordship went onto acknowledge that:

> It is a dangerous illusion to believe that one can "protect" liberal democracy by suspending liberal rights and forms of government.[46]

The legislation which followed the report was the Terrorism Act 2000. Space precludes a detailed analysis of this Act, which runs to three hundred pages in length and provides for a plethora of measures to combat terrorism. However, this Act provides predominantly for *criminal law* measures, not the *administrative law* measures discussed in this thesis. This undoubtedly reflects Lord Lloyd's conclusion that '[the] government, the judiciary and the law enforcement

[43] Rt.Hon. Lord LLoyd of Berwick, 'Inquiry into Legislation against Terrorism' (Cm 3420, 1996).

[44] David Anderson QC, 'The Meaning of Terrorism', (Clifford Chance/University of Essex Lecture, 13 February 2013) <https://terrorismlegislationreviewer.independent.gov.uk/clifford-chance-university-of-essex-lecture-the-meaning-of-terrorism-13-february-2013/> accessed 01 July 2014, [7].

[45] Rt. Hon. Lord Lloyd of Berwick, n 43, 57.

[46] ibid, 58.

agencies…should do all in their power to ensure that the normal legal processes are maintained'.[47] Zedner points out that the post-*Belmarsh* legal approach to counterterrorism could be seen as part of a framework of government through security.[48] This can reasonably be seen as part of the 'changing rules of the game' that Blair described. Such 'securitisation' is part of a 'worrisome trend' of privileging emergency powers over and above other public policy concerns.[49] In respect of specific policies such as control orders Zedner is of the view that they are part of a system of 'preventative justice'.[50] The rationale for such preventative measures is that conventional criminal justice, of the type privileged in Lord Lloyd's report, *occurs after the fact*, i.e. it punishes wrongs after the damage has been done. In other words, criminal justice can neither assess the risk of serious harm from terrorism, nor do anything to prevent its occurrence. Therefore, the criminal justice model favoured by Lord Lloyd is a 'victim of its own success' because its 'structures and principles…are so rigorous as to lead authorities to pursue proceedings elsewhere in less procedurally rigorous environments.'[51]

Whilst the initial post 9/11 British legal response was initially targeted at non-nationals, typifying the 'friend' or 'enemy' distinction at the core of Schmitt's work,[52] neither the 'war on terror' nor exceptionalism constitute a significantly strong presence in the contemporary approach to British national security law and policy. For example, it cannot be legitimately argued that successive British governments have subscribed to the 'war on terror' approach, namely, by designating suspected terrorists as enemy combatants or instituting a separate sphere of military

[47] ibid, 79.

[48] Lucia Zedner, *Security,* (Routledge: Key Ideas in Criminology 2009), 45.

[49] ibid, 45.

[50] Lucia Zedner, 'Preventative Justice or Pre-Punishment: The Case of Control Orders' (2007) 60 Current Legal Problems 174, 174.

[51] ibid, 201.

[52] Carl Schmitt and George Schwab (trs), n 27, 26.

justice in the same vein as the United States at Guantanamo Bay.[53] And although the British government declared a 'state of emergency threatening the life of the nation' in November 2001, considerable doubt was expressed by parliamentarians at the necessity of such a step during a debate in the House of Commons.[54] Several months later, in March 2002, Home Office Minister Bob Ainsworth was asked how long the derogation from the ECHR would last. He answered: 'For as long as the United Kingdom faces a public emergency threatening the life of the nation.'[55] Several *years* later again in 2009, the New Labour government sought to justify this nature of the emergency as perpetual.[56] However, this approach to the state of emergency (eschewing the use of prerogative power, and giving uncertain answers before parliamentary committees) cannot readily be paralleled in intensity with accepted states of emergencies in other constitutional democracies such as Israel.[57]

Posner and Vermeule claim that 'civil libertarians are obsessed by the shadow of Weimar, in which constitutional failure culminated in executive dictatorship.'[58] This may be true of some scholars, but it is a misnomer in terms of constitutional reality in the United Kingdom. In fact, states of emergency, in the Schmittian sense[59] are unusual in the United Kingdom. Moreover, the

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[53] Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) International and Comparative Law Quarterly 1.

[54] HC Deb 21 November 2001, vol 375, cols 124-47.

[55] HC Deb 8 March 2002, vol 381, col WA597.

[56] Ministers have attempted to justify as the emergency as 'on-going' before the JCHR. Chairman: 'The inference is….that we are in a permanent state of public emergency threatening the life of the nation. Is it not?' David Hanson MP: 'I am afraid, Chairman, that, at the moment, I think that probably is the case…' Joint Committee on Human Rights, *Counter-Terrorism and Human Rights Policy: Uncorrected Oral Evidence given by David Hanson MP*, (2009-2010 HC III-i), Question 58).

[57] Menachem Hofnung, *Democracy, Law, and National Security in Israel*, (Dartmouth Publishing Company 1996). There has been a 'state of emergency' legally in force in Israel since 1948. This far exceeds the perceived period of emergency associated with the War on Terror, 25.

[58] Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts,* (OUP 2007), 53.

[59] John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, (CUP 1999), Ch. 3. Schmitt is of the view that: 'The exception, which is not codified in the existing legal order, can at best be characterised as a case of extreme peril, a danger to the existence of the state, or the like…The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case', 134.

response of government to 9/11 was not to declare a true state of emergency in the same vein as the historical responses to mass industrial action.[60] Instead, the derogation from the European Convention was a 'soft' emergency response.[61] Unlike the First or Second World War no War Cabinet or coalition government was formed as a response to the attacks of 9/11, 7/7 or their aftermath. Ewing also points out that even at the height of Cold War tensions the Communist Party was not a proscribed organisation in Britain, typifying the generally more restrained British response to times of crisis.[62] Whilst the British record on subjecting national security policy to appropriate legal control may be rightly described as chequered or even lacking, at no time in history did we face the prospect of 'executive dictatorship.' Instead, the post-*Belmarsh* legal approach to counterterrorism is best characterised as 'a shift to a system of quasi-criminal law with some of the appearances of freedom but precious little of its substance.'[63] It is this pre-occupation with controlling future events (i.e. the prevention of future attacks by restricting suspects) that makes the statutory frameworks and the CMP suitable for analysis within the framework of risk.

THE RELATIONSHIP BETWEEN RISK, LEGALITY, AND BALANCING

While the New Labour government of 1997-2010 were undoubtedly responsible for the shift away from criminal process towards administrative pre-emption, it was the 2010 Conservative-Liberal Democrat Coalition which relocated national security policy firmly within the risk paradigm. The

Carl Schmitt and Michael Hoelzl (trs), *Dictatorship,* (Polity Press 2013).

[60] Gillian S. Morris, *Strikes in Essential Services,* (Mansell Publishing Ltd 1986), 50-72.

[61] Clive Walker and Alexander Horne, 'The Terrorism Prevention and Investigations Measures Act 2011: one thing but not much the other?' (2012) 6 Criminal Law Review 421, 427.

[62] Keith D. Ewing, 'The Cold War, Civil Liberties, and the House of Lords' in Tom Campbell, Keith D. Ewing, and Adam Tomkins, n 15, 148.

[63] Conor Gearty, n 9, 46.

2010 *National Security Strategy* (NSS)[64] owed its genesis to a 2009 document produced by the Cabinet Office entitled 'the National Security Risk Assessment'.[65] The NSS classifies security threats explicitly as 'risks' according to their gravity. Terrorism is considered to be amongst the highest level of threats on 'Tier one', alongside cyber threats, natural hazards and disasters and the outbreak of an international military crisis. Richards explains that the impetus behind the shift towards the risk paradigm was driven by the desire to depoliticise national security policy and to infuse it with intellectual rigour and expert judgment. This was driven by a desire not to repeat such intelligence failures as those which led to the 2003 Iraq War when many key decisions were made by informal groups of Ministers, or the Prime Minister alone. David Cameron pledged to place such decisions 'on an accountable administrative footing'.[66] As the discussion deepens in Chapter 3 we will see that this 'macro' policy has not necessarily carried over into the minutiae of either specific counterterrorism sanctions or the conduct of the CMP itself.

In the context of the CMP, alternative intellectual approaches continue to prevail, despite the 'global' shift towards risk present in the NSS. The over-arching argument this thesis is devoted to explicating is that improving procedural fairness in pre-emptive counterterrorism sanctions requires an understanding of the presence of the risk paradigm in the relevant legal and administrative processes. The alternative intellectual approaches which continue to hold sway in this area are, broadly, control of power via judicial balancing, or control of power via the concept of legality. It should be noted that this thesis does not seek to argue that these approaches are antithetical to the risk framework, rather they may complement each other. However, this thesis aims to illustrate that to date, the concepts of legality and balancing alone have provided an insufficiently rigorous check upon executive exercise of counterterrorism powers.

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[64] HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (Cm 7953, 2010).

[65] Cabinet Office, 'Fact Sheet 2: National Security Risk Assessment' < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62484/Factsheet2-National-Security-Risk-Assessment.pdf>, accessed 20 May 2015.

[66] Julian Richards, *A Guide to National Security: Threats Responses and Strategy* (OUP 2012), 20-25.

In advancing support for the concept of legality, Dyzenhaus describes the contemporary constitutional response to counterterrorism described above as creating 'black holes' and 'grey holes'. But in the context of this thesis legal black-holes, such as detention outside of the protection of the Geneva Conventions in Guantanamo Bay - where no effective law applies[67] are not the primary area of concern. Instead, given the British historical and contemporary turn, Dyzenhaus' metaphor of 'grey holes' is more apt:

> A grey hole is a legal space in which there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit government to do as it pleases.[68]

Dyzenhaus' taxonomy has been applied to the CMP by Murphy, who argues that '…one of the unacknowledged problems of the "war on terror" is the role that human rights law plays in the creation of legal grey holes. The UK Government created a legal grey hole by responding to *Chahal* with a system that may, strictly speaking, comply with the judgment while still protecting state power.' Moreover, 'Control orders were designed to fit in the space carved out by several European Court of Human Rights decisions on preventive detention in Italy. These examples demonstrate the potential complicity of human rights law in the erosion of the culture of legality.'[69]

Dyzenhaus wishes to use the concept of legality to facilitate a cross-institutional commitment to a substantive conception of the rule of law during emergencies. But there are a commanding set of intellectual criticisms to be levelled at such an approach. Some justify the

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[67] R *(on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [64].

[68] David Dyzenhaus, n 21, 42.

[69] Cian Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 King's Law Journal 19, 33-34.

dominance of executive power in times of emergency as a matter of realism.[70] Posner and Vermeule argue that Dyzenhaus' type of liberal legalism[71] - which emphasises a legal constitution based upon a strong doctrine of the separation of powers – necessarily takes a backseat to executive power in times of crisis because 'legality and legitimacy diverge in times of crisis, and legitimacy prevails.'[72] According to Oren Gross 'there may be circumstances where the appropriate method of tackling grave dangers and threats entails going outside the constitutional order, at times even violating otherwise accepted constitutional principles, rules, and norms.' Such an approach '…may strengthen rather than weaken, and result in more rather than less, long-term constitutional fidelity and commitment to the rule of law.'[73] Similarly, Ignatieff takes the view that terrorist emergencies call into question 'the status of the moral standards encapsulated in the idea of human rights.'[74] In view of this: 'A lesser evil position holds that in a terrorist emergency, neither rights nor necessity should trump…What works is not always right. What is right doesn't always work…At the same time, a constitution is not a suicide pact.'[75] In the United States such thinking has been used to justify a fundamental schism in the justice system, and the trial of terrorist suspects detained at Guantanamo Bay by military commissions.[76]

Although it laudably seeks to preserve the integrity of the rule of law Dyzenhaus' conception of legality is too abstract to combat the above criticisms alone. In arguing for a

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[70] Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic,* (OUP 2011).

[71] David Dyzenhaus, n 21.

[72] Eric A. Posner and Adrian Vermeule, n 70, 5.

[73] Oren Gross, 'Chaos and Rules: Should responses to violent crises always be constitutional?' (2003) 112 Yale Law Journal 1011, 1022-1023.

[74] Michael Ignatieff, *The Lesser Evil: Political Ethics in An Age of Terror,* (Princeton University Press 2004), 33.

[75] ibid, 8-9.

[76] Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror,* (OUP 2009), Ch 7. Sulmasy argues for a 'special terrorism court' and a system of preventative detention, 171. For a summary of the key 'War on Terror' case law see Jenny S. Martinez, 'Process and Substance in the "War on Terror"' (2008) 108 (5) Columbia Law Review 1013.

substantive conception of the rule of law, Dyzenhaus admits that he 'will not at any point go into much detail about…the content of the rule of law.'[77] This thesis will demonstrate that developments in law and practice in relation to CMPs are too complex to rely upon abstract legality alone. Dyzenhaus' analysis fails to convince the reader that the 'rule of law project' is the panacea to principled control of national security. In short, it leaves public lawyers with a problem: national security remains within the framework of the exceptional.

A further set of conceptual possibilities arises from considering the metaphor of 'rebalancing' liberty and security. This is true at the level both of political rhetoric, and at the level of judicial engagement with balancing. In the wake of 9/11 and 7/7 talk of 'rebalancing' was ubiquitous. In 2006 then Prime Minister Tony Blair declared that:

> Each law on terrorism has been attacked, in one case as posing more threat to the country's safety than the terrorism itself. [This] is not an argument about whether we respect civil liberties or not; but whose take priority…I am saying it is time to rebalance the decision in favour of the decent, law-abiding majority who play by the rules and think others should too.[78]

The metaphor was also seized upon by the incoming 2010 Coalition government who took the contrary view to the outgoing New Labour government, stating that 'the British state has become too authoritarian, and over the past decade it has abused and eroded fundamental human freedoms and historic civil liberties.'[79] The argument made here is not that the politicians and civil

[77] David Dyzenhaus, n 21, 12.

[78] Tony Blair, 'Our Nation's Future – Criminal Justice System' (National Archives, 23 June 2006) <http://webarchive.nationalarchives.gov.uk/20070506094157/http://pm.gov.uk/output/Page9737.asp> accessed 01 July 2014.

[79] HM Government, *The Coalition: Our Programme for Government* (Cabinet Office 2010), 11.

society do not rely upon the image of balance, nor is it that the image is misused. In fact, striking a necessary balance between competing values is doubtless how government views its role. Instead, like the abstract form of legality balancing *alone* is an insufficient tool to cope with the demands of doing justice under the CMP. But the presence of the image of balance is not solely a feature of political rhetoric. In fact, balancing is a live judicial technique in the context of public law in general, in counterterrorism law, and in the operation of the CMP. Therefore, this thesis does not claim that *judges* do not undertake 'balancing' in some form or another in the context of counterterrorism adjudication, or adjudication more generally. This is of course the case in the context of human rights which have a proportionality clause, and when mediating between competing values in many other contexts. Justice Barak of the Israeli Supreme Court explained the role of balancing in adjudication as follows:

> The problem of balancing between security and liberty is…a general problem in the law…found deep in the general principles of law, including reasonableness and good faith.[80]

Balancing 'tends to disarm opponents because it has no tenable antithesis: nobody…would stand up and argue for imbalance'.[81] In view of this, legitimate concerns have emerged that the image of balance in the context of liberty and security obscures the fact that even liberal democracies consider security a condition precedent of liberty: 'Far from being in opposition, the project of liberty supposedly announced with the onset of modern liberalism has been inextricably bound up — one might even say wrapped up — in the project of security.'[82] This is problematic because in

[80] *Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces in the West Bank of the IDF Forces in the West Bank* [2004] HCJ 2056/04, President Barak [36].

[81] Andrew Ashworth, 'Security, Terrorism, and the Value of Human Rights' in B.J. Goold & L. Lazrus, *Security and Human Rights* (Hart 2007), 208.

[82] Mark Neocleous, 'Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics' (2007) 6 *Contemporary Political Theory* 131, 139.

trading-off our liberties in anticipation of enhanced security 'there is no reason to suppose that the introduction of a heightened threat from terrorism makes it *less* likely than it was (say on September 10) that the state will act oppressively.'[83]

Specifically, this thesis argues that the judicial rhetoric of balancing endangers procedural fairness by threatening the unnecessary dilution of concepts such as open justice and equality of arms.[84] This is because it lacks sufficient precision. The effect of such lack of precision is explored in the latter part of chapter 2 with respect to requests to implement CMPs outside of their established statutory frameworks. Although the English common law has a long tradition of acknowledging that the 'standards of fairness are not immutable'[85] Hoyano observes that the English courts and even Strasbourg itself have been willing to infer the image of balance into Article 6 ECHR, which makes no textual accommodation for such an activity: 'British courts have long considered that "balancing" permeates art.6…After *Al-Khawaja v United Kingdom* [it] can no longer be said that there is a "minimum irreducible core of fairness" to art.6. According to the Grand Chamber, even the explicit "minimum rights" must be balanced against other competing interests to ascertain whether the fair trial guarantee had been violated.'[86] In fact, the practice of 'gisting' or summarising classified information with which so much of this thesis is concerned reflects the covert dilution of fair trial protections in the name of 'balancing'.[87]

THE RELEVANCE OF THE 'RISK SOCIETY' TO ANALYSIS OF THE CONTEMPORARY COUNTERTERRORISM DEBATE

[83] Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *Journal of Political Philosophy* 191, 208.

[84] For further of how the image of balancing erodes rights protection see Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) Journal of Law and Society 507.

[85] *R v Home Secretary, ex Parte Doody* [1993] 1 AC 531, 560.

[86] Laura Hoyano, 'What is balanced on the scales of justice? In search of the essence of the right to a fair trial' (2014) 1 *Criminal Law Review* 4, 6.

[87] ibid, 12.

The intellectual framework of risk supplies two important insights regarding the operation of the CMP and its related legislation. The first is that risk has become a mode of governance that affects all areas of life. Secondly, the effect of government according to risk acutely highlights some of the problems caused for traditional legal interpretation by pre-emptive sanctions. The term 'World Risk Society' was first coined by German social theorist Ulrich Beck in the 1990s. Beck's 'risk society' encapsulates the idea that human progress has reached a point where 'traditional certainty ends' insofar as 'the focus of our anxiety has switched away from what nature can do towards us towards what we can do to nature.'[88] For governments this shift in focus towards future uncertainty presents regulatory problems. Beck argues that developments in technology have taken society into a position whereby the likelihood of catastrophic events was so great that they could not be insured against.[89] Initially, his theory of risk society centred on developments in science and technology increasing the risk of environmental harm. Furedi highlights that a UK Cabinet Office report considered Avian Flu 'as among the greatest threats facing the country and as much of a danger to Britain as terrorism.'[90] Former Prime Minister Tony Blair, in a keynote speech to the Institute of Public Policy Research (IPPR), also recognised that: 'We cannot eliminate risk. We have to live with it, manage it.'[91] The influence of the risk society upon the New Labour government – which was responsible for the transition in counter-terrorism policy that is the subject of this thesis – is marked by that administration's engagement with the work of Anthony Giddens. Writing on the concept of the Risk Society in the context of British politics, Giddens

[88] Clive Walker and James Broderick, *The Civil Contingencies Act: Risk, Resilience, and the Law in the United Kingdom*, (OUP 2006), 6.

[89] Ulrich Beck, *World at Risk* (Polity 1999), 14

[90] 'Bird Flu Pandemic "As grave a threat as terrorism"' *Independent*, 25 January 2005 in Frank Furedi, n 100, Ch 3 n 17.

[91] Tony Blair 'Common Sense Culture not Compensation Culture', *Guardian*, (London, 26 May 2005) http://www.guardian.co.uk/politics/2005/may/26/speeches.media accessed 01 July 2014.

remarked that: 'In risk society there is a new moral climate of politics, one marked by a push-and-pull between accusations of scaremongering on the one hand and of cover-ups on the other.'[92]

In an essay written in the aftermath of the terrorist attacks on the Twin Towers Beck argued that the events of 9/11 also fitted within his taxonomy of world risk society:

> What do events as different as Chernobyl, global warming, mad cow disease, the debate about the human genome, the Asian financial crisis and the September 11th terrorist attacks have in common? They signify different dimensions and dynamics of world risk society… As soon as we speak in terms of 'risk', we are talking about calculating the incalculable, colonizing the future….[93]

The nature of Al Qaeda and other Islamist terrorist organisations (the primary threat which litigation under the CMP addresses) fits within the rubric of risk society. These organisations are a-structural and typically do not have a definitive or identifiable hierarchy. The original conception of Al Qaeda and the Taliban was of a well-funded (possibly even state-sponsored), far reaching, and hierarchically organised pyramid of terrorist cells with its central authority in Afghanistan.[94] The report of the United States 9/11 Commission estimated that the attacks on New York and the Pentagon cost somewhere between $400,000-500,000 USD to execute. The annual Al Qaeda budget at this time, according to the Commission, was c. $30,000.[95] However, this orthodox view of Islamist terrorism as a highly organised, well-funded network headed by an 'evil mastermind'

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[92] Anthony Giddens, 'Risk Society: The Context of British Politics' in Jane Franklin (ed), *The Politics of Risk Society*, (Polity Press 1998), 29, and Anthony Giddens, 'Risk and Responsibility' (1999) 62 Modern Law Review 1.

[93] Ulrich Beck, Ch 1, n 5, 39-41.

[94] Jason Burke, *Al Qaeda: The True Story of Radical Islam* (Penguin Books 2007), Ch 1.

[95] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, www.9-11commission.gov/report/911Report_Exec.htm, accessed 01 July 2014.

collapsed along with the Twin Towers. Al Qaeda in fact loosely translates as 'the fundamentals' or 'the base-line'. Islamist terrorism is built upon a common ideology, as opposed to a quasi-military structure (like the Irish Republican Army).[96] Loose networks exist through online communication, but terrorist cells often form by simply declaring allegiance to radical Islam.[97] The consequences of this form of 'self-radicalisation' were seen in respect of the Boston Marathon bombings in April 2013[98] and in the murder of British soldier Lee Rigby in Woolwich in South East London on 22 May 2013.[99]

In policy terms, Beck is not the only scholar to draw the connection between risk society and post-9/11 terrorism, and risk management issues in national security. Furedi argues that: 'Appeals to the authority of risk assessment still play an important role in policy making…As an important study of Blair's policy on terrorism notes, he combines an appeal to risk assessment with worst-case thinking…In his response to the threat of terrorism "[Blair] relied on expert risk assessment and his own intuitions".'[100] Spence argues that 'supplanting the logic and language of national security and inviolability with discourses oriented around risk and interdependence

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[96] Katerina Dalacoura, *Islamist Terrorism and Democracy in the Middle East* (CUP 2011), 42-48.

[97] An informed and first-hand discussion of radicalisation can be found in E. Husain, *The Islamist: Why I joined radical Islam in Britain, what I saw inside and why I left* (Penguin 2007). Al Qaeda terrorism disc can be traced to a variant of Islam known as Wahhabism (235-238): 'The problem we call "al-Qaeda" is a bastard child of modernist Islam and reactionary Wahhabism.' See further Michael Chandler and Rohan Gunaratna, *Countering Terrorism: Can we meet the Threat of Global Violence?* (Reaktion Books Ltd 2007), Ch 1.

[98] Obama described the changing nature of the Al Qaeda threat: '…I've said for quite some time…one of the dangers that we now face are self-radicalized individuals who are already here in the United States…And those are in some ways more difficult to prevent.' Barak Obama, 'White House Press Conference April 30, 2013 (Transcript)', *Time Magazine* (New York, 30 April 2013) <http://swampland.time.com/2013/04/30/barack-obamas-white-house-press-conference-april-30-2013-transcript/#ixzz2TwCQ6Ion> accessed 01 July 2014.

[99] Nick Hopkins, and Sandra Laville, 'Woolwich attack: lone wolf and jihadist theories will occupy security forces', *Guardian* (London, 22 May 2013) <www.guardian.co.uk/uk/2013/may/22/woolwich-attack-lone-wolf-jihadist> accessed 01 July 2014. The article notes that the attacks in Woolwich represented 'random, lone-wolf, unsophisticated attacks, conducted by people who are not on the radar of the police or MI5.'

RUSI Report, 'Counter-Terrorism in an Olympic Year: It Will Get Better before It Gets Worse' (2012) 1 (February) UK Terrorism Analysis 1-12, 1 <http://www.rusi.org/downloads/assets/UKTA1.pdf> accessed 01 July 2014> accessed 01 July 2014.

[100] Frank Furedi, *Invitation to Terror: The Expanding Empire of the Unknown,* (Continuum 2007), 68.

promises…an alternative.'[101] The alternative offered by framing analysis of counterterrorism in the language of risk is the recognition that '…world risk society supports an understanding of war against terror and its contexts that is simultaneously critical and constructive, challenging the calcified assumptions of national security with alternative vocabularies and norms of mutual risk, vulnerability, dependence and responsibility.'[102]

The advent of 9/11 saw an explosion of risk discourse in the field of counterterrorism studies and political and legal practice. For example, Dershowitz noted the adoption of the 'precautionary principle' from the field of environmental law as a justification for pre-emptive security measures against individuals (discussed in more depth in Chapter 7).[103] Vermeule broadens out this inquiry to demonstrate that the 'precautionary principle' is now an ingrained principle of liberal democratic constitutionalism.[104] In fact, he envisions the constitutional and regulatory domains as encompassing a 'continuum of precautionary principles, varying both in their stringency and in the timing of their application.'[105] Subsuming the analysis of the CMP within an overarching discourse of risk common to other areas of governance presents an opportunity to divorce analysis of post-9/11 counterterrorism from the rhetoric of exceptionalism and the 'War on Terror'. This is important because these concepts allow for the dilution of legal rights and the pervasiveness of security claims in a way that cannot be sufficiently counter-acted by either legality or balancing viewed as abstract concepts on their own.

The connection between risk and counterterrorism is recognised in law as well as politics. Fisher also notes that there has been a general move towards developing general principles of risk

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[101] Keith Spence, 'World Risk Society and War Against Terror' (2005) 53 Political Studies 284, 285.

[102] ibid, 299.

[103] Alan M. Dershowitz, n 6, 5. See also Jacqueline Peel, *Science and Risk Regulation in International Law,* (CUP 2010), Ch 4.

[104] Adrian Vermeule, n 6, 27.

[105] ibid, 29.

management for criminal justice as a whole.[106] Risk is now a 'new buzzword of administrative governance in the United Kingdom and one of the central tasks of the UK executive state is now perceived to be the "handling of risk".'[107] Specifically: 'The concept of risk is also important in the associated areas of immigration control and terrorism.'[108] For administrative lawyers this means that the subject of risk should be considered more than a mere curiosity[109], instead understanding the impact of risk upon governance should lead to scholars and practitioners 'reconsidering what it is that administrative lawyers do.'[110]

The second facet of risk-analysis – the one which speaks directly to problems caused by the presence of risk for legal regulation – is of acute interest in relation to judicial review under the CMP. Richard Posner highlights the problem that the risk-paradigm creates for the traditional notions of cause-and-effect upon which so much of common law principle is based:

> In the old days, the only ascertainable cause-and-effect relations tended to be one of the "*A* hit *B*"…variety: one cause that was of interest to the law and one readily identifiable effect, following closely upon the cause.[111]

Posner's voice is one among many: there is growing concern that reliance upon predictive risk-assessments undermines the relationship with causation inherent in much of the law, in favour of

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[106] Elizabeth Fisher, 'The rise of the risk commonwealth and the challenge for administrative law' (2003) Public Law (Autumn) 455, 458.

[107] ibid, 455.

[108] ibid, 459.

[109] ibid, 463.

[110] ibid, 478.

[111] Richard A. Posner, n 6, 9.

the principle of correlation.[112] The use of metadata via the PRISM computer programme (which is used to by GCHQ and the NSA in the identification of terrorism suspects based upon correlations drawn from surveillance) exemplifies this problem.[113] Instead of identifying suspects on the basis of causation metadata gathered through surveillance of telecommunications allows for identification of suspects on the basis of *correlation* – a much looser, inference-based form of analysis. Perhaps the worst example of the law's abandonment of causation in favour of correlation in the national security context was the US policy of internment of Japanese-Americans during World War II, which was upheld by the Supreme Court in *Korematsu*.[114] The motivation for the policy was that: 'If the Japs are released, no one will be able to tell a saboteur from any other Jap.'[115] Both the policy, and the decision of the Supreme Court have come to be amongst the most maligned in US legal history.[116]

However, the controversy over metadata and correlation based inferences may be nothing more than the natural evolution of the 'risk communication' model which Erikson and Haggarty identified in their extensive ethnography of police communications in the context of risk-based crime control: 'Collective fear and foreboding underpin the value system of an unsafe society, perpetuate insecurity, and feed incessant demands for more knowledge of risk. Fear ends up proving itself, as new risk communication and management systems proliferate.'[117] In the criminal justice sphere the turn towards risk has also manifested itself in a 'blur[ing] [of] the distinction

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[112] Victor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work and Think* (John Murray Publishers 2013), 157-163.

[113] *Klayman et al. v Obama* [2013] (United States, District of Columbia), 16 December 2013; and *ACLU v Clapper* [2013] (United States, New York Southern District Court), 27 December 2013.

[114] *Korematsu v United States* (1944) 323 US 214.

[115] Earl Warren (1943) in Louis H. Pollak, 'The Legacy of Earl Warren' (1974) 88(1) Harvard Law Review 8, 8.

[116] Susan K. Serrano and D. Minami, '*Korematsu v United States*: A "Constant Caution" in a Time of Crisis' (2003) 10(27) Asian Law Journal 37-50, 37: 'no military necessity existed to justify the incarceration, and that government decision makers knew this at the time, and later lied about it to the Supreme Court.'

[117] Richard V. Ericson and Kevin D. Haggerty, n 6, 6.

between offender and suspect'[118] represented by a focus on risk and risk-assessment as a prominent theme, as illustrated by the introduction of *inter alia* indeterminate life sentences and many of the sanctions discussed herein.

However, the framework of risk is not without its critics. Fisher points out that 'risk is a contested concept [and] the conflicts are not simply over matters of detail.'[119] Walker and Broderick also acknowledge that the framework of risk is vulnerable to criticisms on several fronts. Of interest here are the claims that there is no such thing as an 'objective' classification of risk, meaning that any given conception of risk is vulnerable to alteration depending upon the 'cultural or psychological approaches and value-systems that determine how the concept is constructed and understood.'[120] The second criticism is that 'risk analysis and management is not a "politics-free zone".'[121] After all '[h]ow much preventive justice is really about the scientific assessment of risk of serious harm and how much about the political costs of that harm eventuating is a question probably without answer.'[122] Obviously the antidote to risk in the situation of terrorism is to indefinitely detain persons even where there is even the faintest suspicion of terrorism related activity or terrorist sympathies. This would all but obviate risk, barring the presence of Rumsfeld's 'unknown-unknowns.'[123] But in the context of decisions reviewed under the CMP, the Minister must make his initial decision on advice from security experts which in turn may or may not be subconsciously affected by his party-political persuasion, or any number of extraneous considerations. Thereafter, government lawyers, special advocates, and ultimately judges are left

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[118] Barbara Hudson, 'Punishment, rights and difference: defending justice in the risk society' in Kevin Stenson and Robert B. Sullivan, *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Willan Publishing 2001), 150-154.

[119] Elizabeth Fisher, n 103, 470.

[120] Clive Walker and James Broderick, n 88, 4-5.

[121] ibid.

[122] Lucia Zedner, 'Preventative Justice or Pre-Punishment: The Case of Control Orders' (2007) 60 Current Legal Problems 174, 190.

[123] Frank Furedi, n 100, 55.

to grapple with questions of risk relating to the balance between securing the state, and securing a fair trial for the individual subject to the statutory restriction or prospect of deportation. Decisions by all parties involved – who aim to arrive at a correct interpretation of the relevant legal rules – will inevitably be influenced by perception, culture, politics, expediency and a range of other factors. So, rather than eschewing risk as our paradigm because of its inherent dangers, these examples should illustrate the pressing need for the courts to take claims relating to risk *seriously* and to find ways to subject them to meaningful scrutiny.

In fact, the presence of conflicts over the extent of risks is *precisely why* scholars interested in procedural fairness in the context of counterterrorism should take the risk paradigm seriously. Undoubtedly, there are problems of *substantive* public law involving decision-making in conditions of risk or uncertainty. Counterterrorism is one such area in which these problems are prevalent.[124] Keynes remarked that: '[W]e have, as a rule, only the vaguest idea of any but the most direct consequences of our acts…Nevertheless, the necessity for action and for decision compels us as practical men to do our best to overlook this awkward fact and to behave exactly as we should if we had behind us a good…calculation of a series of prospective advantages and disadvantages, each multiplied by its appropriate probability, waiting to be summed…'[125] This sums up the core problem underpinning any judicial review of an executive decision based on a calculus of risk. Part II of this thesis will explore the connections between substantive decision-making based upon risks or uncertainty and short-comings in legal process. The argument being that the more robust legal procedures are in terms of how they facilitate the participation of legal parties and rational enquiry (whilst weighting other imperatives such as secrecy), the better (or more justifiable) substantive outcomes are likely to be. Therefore, this thesis does not argue that there can be one generic 'risk-template' that could be designed and applied to all forms of judicial review where risk-

[124] On the problems associated with decision-making in conditions of risk or uncertainty: John Maynard Keynes, 'The Theory of Employment' (1937) 51(2) The Quarterly Journal of Economics 209-223, 213-216.

[125] ibid, 213-214.

management appears to be a factor. Such a framework may not even be possible *within* the subject matter of counterterrorism, let alone across the widespread subject matters which engage risk. Instead, the argument is that the study of counterterrorism has become lost in constitutional abstraction, and re-orienting the CMP within judicial review of administrative action will provide better insight into its operation, and greater potential for discovery of improvements. If anything the epistemologically relativistic and politicized nature of the risk society perfectly captures much of the enterprise the courts and the executive are engaged in during judicial review involving closed material proceedings.

THE POSSIBILITY OF EFFECTIVE JUDICIAL REVIEW OF COUNTER-TERRORISM MEASURES

Before proceeding with the enquiry we must consider an objection to judicial review that is pervasive in debates about public law. That is the question about the suitability of subjecting decisions involving complex questions of policy to judicial review at all. In his seminal lecture on the political constitution Griffith argued that framing rights in legal language, so as to make them justiciable 'sound[ed] like a statement of a political conflict pretending to be a resolution of it.'[126] The late Professor Griffith would doubtless be unsurprised that some argue that this proposition holds true of the governmental approach to counterterrorism judicial review to date.[127] But to abandon legal control of counterterrorism simply because of latent fears of the politicisation of law would have catastrophic consequences for both procedural and substantive fairness. Despite the status of the *Rehman* decision, the English legal system no longer fully accepts that questions

[126] J.A.G. Griffith, 'The Political Constitution' (1979) 42 Modern Law Review 1, 14.

[127] Keith D. Ewing, *Bonfire of the Liberties*: *New Labour, Human Rights and the Rule of Law* (OUP 2010) Ch 6-7, KD Ewing, 'The Futility of the Human Rights Act' [2004] Public Law 829-, and Keith D. Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] Public Law 668: [The] control order cases strongly suggest…that the HRA cannot adequately protect human rights…Intoxicated by the heady brew of rights talk, some have argued that this shows we need even more rights…', 692-693 is representative of the argument advanced in all three texts and attempts to prove the fundamental arguments inherent in Griffith's work.

of security are non-justiciable. After all, Lord Atkin's controversial dissent in *Liversidge v Anderson* is now a celebrated defence of liberty under the law:

> In this country amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace.[128]

Despite this there remains an over-arching fear that: 'If we make the wrong choice, the danger is that we will get hit again, that we'll be hit in a way that is devastating.'[129] But as we will see in Chapter 2, counterterrorism is not the only sphere in which the principles of civil procedure are adapted.[130] Hence, if we look at similar areas, such as the classification and parole of prisoners, or the detention conditions of mental health patients we can see that these types of decisions often involve broadly equivalent assessments of risk, yet are considered justiciable. After all, each of these situations 'involve the need to take into account the need for some decisions to be taken urgently in the interests of protecting people from the risk of harm.'[131] Moreover, all are situations in which the ordinary rules of procedural fairness require modification to some degree in order to 'protect persons from the risk of harm or some other substantial reason for departing from these requirements.'[132] So, just as risk is a pervasive feature of modern life, the statutory powers used to

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[128] *Liversidge v Anderson,* n 19.

[129] Dick Cheney (former United States Vice-President) quoted in David L. Altheide, 'Terrorism and the Politics of Fear' (2006) 6(4) Culture Studies, Critical Methodologies (November) 415-439, 415.

[130] *Roberts v Parole Board* [2005] 2 AC 738,[3]: 'The ground upon which the sensitive material has been withheld is that the safety of the source…would be at risk if the material were to be disclosed. It has not been suggested that there is in this case any threat to national security.'

[131] *R (L) v West London Mental Health NHS Trust and Partnerships in Care and The Secretary of State for Health* [2012] EWHC 3200 (Admin). This case involved an Article 6 ECHR and common law challenge to the decision to move a detained mental patient (L) from a medium secure facility to a high security facility. There was no established or agreed procedure. In respect of the Article 6(1) claim – that transfer to a hospital with a stricter security regime engaged L's civil rights – several national security litigations concerning procedural fairness are discussed [686]-[700].

[132] ibid [558].

subject counterterrorism decisions to legal control needn't depart radically from similar, parallel areas of regulation.

Aside from the politicisation of law, the outstanding criticism of judicial review is its inability to properly evaluate complex areas of policy (of which security is clearly one). Myerson argues that the function of a court when tasked with reviewing control orders and similar anti-terrorism powers removes judges from 'the paradigm case of judicial power involv[ing] the authoritative determination of disputes about existing legal rights according to determinate legal standards on the basis of past events or conduct.'[133] In doing this 'the rights and obligations created by control orders depend on the prediction of future circumstances, and involve, in particular, interfering with liberty on the basis of an assessment of future risk'[134] and so task judges with making an assessment which is 'polycentric' in its nature. The nature of a polycentric issue, Meyerson argues, means it cannot be adequately resolved in a judicial forum, and due to this review of the exercise of counterterrorism powers creates: 'Indeterminacy [which] gives rise to the danger of legally uncontrolled and unpredictable judgments on the part of judges, which is a threat to the rule of law.'[135] However, this analysis misinterprets the accepted public law role of judges. Although it is under-discussed King notes that judges often adjudicated in tax cases 'without second-guessing their competency to do so.'[136] Tax law is polycentric because the 'goals underlying tax legislation are manifold, highly complex and interdependent with other social goals.'[137]Clearly, then, judges can cope with so-called polycentric issues which are shone through the narrow lens of legal

[133] Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomson v Mowbray*' (2008) 36 Federal Law Review 209, 212.

[134] ibid, 216.

[135] ibid, 227. Regarding the negative effect of 'polycentric' issues on judicial review see: J. A. G. Griffith, 'Judicial Decision-Making in Public Law' [1985] Public Law 564, and Carol Harlow, 'Public Law and Popular Justice' (2002) 65 Modern Law Review 1.

[136] Jeff A. King, 'The Pervasiveness of Polycentricity' [2008] Public Law 101, 111.

[137] ibid 113.

interpretation. Therefore, the notion of polycentricity in the context of terrorism provides no firm basis for an objection to judicial intervention.

There is another possible objection to judicial management of security cases. Posner and Vermeule echo this concern from a slightly different perspective, arguing that 'Judges are generalists, and the political insulation that protects them from current politics also deprives them of information…about novel security threats and necessary response'.[138] However, it is this *generalist* capacity of judges which assists them in respect of risk and regulation. The ability of the judicial function to adapt to the ever expanding reach of the law, is encapsulated by King, who comments that 'the role of courts in applying open-textured standards such as reasonableness, good faith and fairness has greatly expanded' is actually a credit to judicial malleability.[139] In addition to this generalism, judges now also possess specialist counterterrorism expertise. Tomkins' observes that judicial control of national security powers has improved because 'many of the cases discussed here are decided by a fairly small number of judges…These judges have built up a very considerable body of both experience and expertise.'[140] Moreover, reasoning from abstract principles such as 'liberty' and 'security' rarely feature in judicial decision-making in respect of counterterrorism. Instead, courts of higher principle defer to the findings of their first-instance counterparts: '[The Administrative Court] have developed…"special expertise and experience, not generally shared by members of the Appellate Courts" and "are also much better placed to develop consistent practice for dealing with orders of this kind, and to provide continuing supervision of their making, variation, and implementation".'[141]

Finally, Allison's point that: "Because of its limited competence, the court cannot confidently assess the risk of administrative disruption when it quashes administrative decisions

[138] Eric Posner and Adrian Vermeule, n 58, 31.

[139] Jeff A. King, n 136, 111.

[140] Adam Tomkins, n 12, 566.

[141] *Home Secretary v AP* [2010] UKSC 24, Lord Brown [19].

and requires their reconsideration. Of necessity, it can decide only on a narrow legal ground, such as a recognised case of procedural impropriety, which does not involve a judicial determination of repercussions' must be taken seriously.[142] To do so, an important distinction needs to be drawn regarding the *types* of Executive national security and counter-terrorism decisions this thesis argues should be subject to intensive risk-based review. Overall 'high policy' or 'first order' decisions such as whether there was a 'threat to the life of the nation' which justified a prima facie derogation under Article 15 ECHR are of the type that can legitimately be lablelled the stuff of 'principled'[143] judicial deference. Instead, this thesis is concerned with considering the procedural fairness limitations caused by the CMP in relation to 'second order' decisions. In the *Belmarsh* decision Lord Rodger explained that: 'On a broader view, too, scrutiny by the courts is appropriate. There is always a danger that, by its very nature, a concern for national security may bring forth measures that are not objectively justified…There is no question of that in this case: it is accepted that the measures were adopted in good faith. But good faith does not eliminate the risk that, because of an understandable concern for national security, a measure may be taken which, on examination, can be seen to go too far.'[144] So, whilst Allison's concerns about the invalidation of an over-arching policy (such as a decision to declare war) having potentially inappropriate unforeseen ramifications may be valid, such decisions are not the province of this thesis. Instead, this thesis is concerned with *individuated* decisions (such as the decision to declare an individual a terrorist suspect, or to subject him to a relocation measure).

It should be clear by now that the purpose of this thesis is not to naively prescribe a 'one size fits all' rubric of risk-assessment and risk-management for counterterrorism. The argument proceeds in full awareness that this is a complex area of administrative practice and that the state

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[142] John Allison, 'The Procedural Reason for Judicial Restraint' [1994] Public Law 452, 459.

[143] Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act,* (CUP 2009), 183.

[144] *A v Home Secretary (No. 1) 'Belmarsh'*, n 6, Lord Rodger [177].

uses a variety of tools[145] to assess and manage risk in a variety of contexts.[146] Therefore, it does not seek to prescribe a particular model for pre-emptive counterterrorism sanctions – to do so would be both unscholarly and presumptive. Instead, it seeks to raise awareness of transparency and best practice in parallel areas. Moreover, the thesis does not contend that any mechanisms and models of risk assessment are faultless – this is precisely the need for a range of inputs, including judicial control.

ROADMAP OF THE THESIS

This thesis proceeds in two parts; the first part is conceptual, and the second part is concerned with the application of those concepts. The remaining chapters in Part I (Chapters 2 and 3) contextualise the CMP within a normative framework. Chapter 2 argues that whilst the CMP does depart from the English law traditions of open just and equality of arms, these principles have a much less solid foundation than is assumed by many critics of the CMP. Moreover, a proper understanding of the CMPs operation can only be achieved when it is contextualised against other institutions which compromise principles for the protection of secrecy and privacy. In light of the findings of Chapter 2, Chapter 3 recognises that a deep understanding procedural fairness requires us to look *inside* administrative processes in addition to considering the curial dimension of counterterrorism risk-management. The tailoring of decisions via the risk-paradigm through internal administrative processes becomes all the more important because of the uncertain status of the legal principles discussed in the preceeding Chapter. This Chapter also develops the risk-management and necessary secrecy dimension of the argument further by illustrating that the CMP

[145] Nick Hopkins and Sandra Laville, 'Woolwich attack: lone wolf and jihadist theories will occupy security forces', *Guardian* (London, 22 May 2013) <www.guardian.co.uk/uk/2013/may/22/woolwich-attack-lone-wolf-jihadist> accessed 01 July 2014.

[146] See Paul Slovic and John Monahan, 'Probability, danger, and coercion: A study of risk perception and decision making in mental health law' (1995) 19(1) *Law and Human Behaviour* 49-65; Clayton P. Gillette and James E. Krier, 'Risks, Courts and Agencies' (1990) 138(4) University of Pennsylvania Law Review 1027.

is unnecessarily divorced from other areas of administrative law which concern risk, security, and the need to manage disclosure. It also argues that the need for necessary secrecy which the CMP is designed to accommodate could be best understood and rationalised within Pozen's taxonomy of 'deep' and 'shallow' secrets.[147]

Part II considers procedural fairness in the context of individual statutory powers which use the CMP. Chapter 4 considers the work of the Special Immigration Appeals Commission and argues *inter alia* that the powers which subject appellants to the greatest risks attract the least procedural protection under the CMP. Chapter 5 considers control orders, in which the arguably the greatest innovations in terms of securing procedural justice under the CMP have been made. However, it is notable that these innovations were resisted by the executive and judicial deference remained strong even in the wake of enhanced disclosure. Chapter 6 considers the alleged 'rebalancing' of security and fundamental rights which took place in the transition from control orders to Terrorism Prevention and Investigation Measures, concluding that many of the serious disadvantages appellants experienced during the control orders regime continue to persist. Chapter 7 considers the relationship between UK law and the international dimensions of the United Nations and European Union terrorist asset-freezing regimes. Whilst there has been welcome attempts at judicial control of a regime which was effectively intended to be 'court proof', the international aspects of the regimes make many aspects of review by domestic courts difficult if not impossible. Finally, Chapter 8 argues that the Justice and Security Act 2013, which extends the capacity of the CMP, is at its most problematic in the context of civil damages actions aimed at security executive accountability for alleged abuses of individuals. The conclusion makes some critical recommendations aimed at improving procedural fairness in the context of risk-management in light of the understanding gained by the investigation in the previous chapters.

[147] David Pozen, 'Deep Secrecy' (2010) 62(2) Stanford Law Review 257.

Most of all it highlights how the foregoing analysis makes it clear that national security and counterterrorism law requires a substantive theory of secrecy.

CHAPTER TWO:

THE NATURE AND CONTEXT OF THE CLOSED MATERIAL PROCEDURE

INTRODUCTION

If 'publicity is the very soul of justice'[1], then equality of arms might well be the body of justice. That is the ideal, at least. However, it is important not to over-state the extent to which any given principle is solidified in civil justice or civil procedure.[2] According to Jacobs 'the more essential a principle is expressed to be, the more easily it can be abandoned…the common law knows no fundamentals.'[3] After all, even the criminal process is no stranger to the dilution of principle in the context of counterterrorism. In the 1970s 'Diplock Courts'[4] – courts without juries - were created to alleviate concerns about biased jurors and to assist securing convictions against terrorist suspects. These controversial courts also permitted anonymous witnesses, and lowered the admissibility threshold for confessions.[5]

CMPs are routinely criticised by academics, legal professionals, and civil society organisations as representing an inherent '…unfairness…and…a serious incursion into common law principles of open justice (public hearings) and natural justice (i.e. knowing the case put against you).'[6] But such criticisms overstate the extent to which CMPs depart from norms of procedural

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[1] Jeremy Bentham, 'Draught of a New Plan for the Organization of the Judicial Establishment in France' in Bowring, J. (ed) *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring*, 11 vols, (Tait 1843), 316.

[2] Jack I.H. Jacob, *The Fabric of English Civil Justice* (Stevens & Sons 1987).

[3] Joseph M. Jacob, *Civil Justice in the Age of Human Rights* (Ashgate 2013), 1.

[4] Lord Diplock, *Report of the commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (Cmnd 5185, 1972).

[5] John D. Jackson and Sean Doran, 'Conventional trials in unconventional times: The Diplock Court experience' (1993) 4(3) Criminal Law Forum 503.

[6] Angus McCulloch QC and Martin Chamberlain QC, 'Justice and Security Bill: Briefing Note to Peers from Special Advocates' (22 March 2013) <http://adam1cor.files.wordpress.com/2013/03/js-bill-briefing-note.pdf> accessed 01 July 2014, [2.i].

fairness in general. Although this thesis echoes such concerns it does not intend to do so uncritically. This chapter argues that the English legal system frequently compromises open justice and equality of arms to protect secrecy or privacy. To do so it explains the operation of the common features of the CMP and situates its existence against the broader context of procedural fairness in English law. The context in which the CMP operates comprises the relative status of the principles of open justice and equality of arms at both common law and in the jurisprudence of the European Convention on Human Rights. This chapter aims to reflect critically upon the extent to which the CMP, described by Sir David Keene as an 'elaborate and unusual procedural structure',[7] is actually out of step with other areas of the English legal system. The analysis demonstrates that the apparently hallowed principles of civil procedure which the CMP is derided for departing from are not as sacrosanct as its critics appear to assume. To achieve this aim, proceedings which compromise open justice and equality of arms in two other contexts are considered: the Investigatory Powers Tribunal and the Court of Protection.[8] Finally, applications for CMPs themselves will be considered in a wider context. This will be done by examining the case law in which CMPs have been requested by one, both, or some of the parties, but that request has been denied. This section serves to further illustrate the extent to which the balancing of interests in the counterterrorism context so abstract as to prove uninstructive on its own terms.[9]

THE ORIGINS OF THE CLOSED MATERIAL PROCEDURE IN ENGLISH LAW

[7] *W (Algeria) v Home Secretary* [2010] EWCA Civ 898, Sir David Keene [15].

[8] Court of Protection <http://www.justice.gov.uk/courts/rcj-rolls-building/court-of-protection> accessed 30 May 2014).

I. THE CREATION OF THE CLOSED MATERIAL PROCEDURE AS AN ALTERNATIVE TO PUBLIC INTEREST IMMUNITY

The CMP was initially created by the Special Immigration Appeals Commission Act 1997 (the subject of Chapter 4) as a statutory alternative to the existing law of judicially developed law of Public Interest Immunity (PII) which was designed to protect confidential information. The CMP is a mechanism for dividing court proceedings into 'open' and 'closed' hearings, and to permit the rendering of 'open' and 'closed' judgments.[10] During closed hearings only the presiding judge, government counsel, and Special Advocates (lawyers appointed by the court to test the strength of the government's closed evidence) may participate. In order to be appointed to the Attorney General's Special Advocates Panel lawyers must obtain a 'Developed Vetting' security clearance. This is the highest available level of security clearance.[11] Curiously, judges who participate in the CMP are not required to be security cleared in the same manner as Special Advocates. They are subject only to an advisory presentation from a Security Services' representative in respect of taking necessary precautions to protect classified documents in their possession. By contrast Judges' assistants are required to undergo Developed Vetting if they wish to see the same material.

The Special Immigration Appeals Commission (SIAC) is a creature of statute[12], but its creation is widely regarded[13] as a legislative response to the decision of the European Court of

[10] CPR 76.25(1)-(2) provides the general formulation in respect of control orders: 'The special advocate may communicate with the relevant party or his legal representative at any time before the Secretary of State serves closed material on him…After the Secretary of State serves closed material …the special advocate must not communicate with any person about any matter connected with the proceedings…'. See similar in SIAC Rules 2003, Rule 36, CPR 79.20 (asset-freezing), and CPR 80.21 (TPIMs). In respect of acknowledging receipt of communications see: SIAC 2003 Rules, Rule 36(6)(b), CPR 76.25 (control orders), CPR 80.21 (TPIMs), and CPR 79.20 (asset-freezing).

[11] For details of the 'Developed Vetting' process, see Cabinet Office, *HMG Personnel Security Controls: Version 2.0* (Cabinet Office, London, 2014), Annex B.

[12] See: Adam Tomkins, National security and the role of the court: a changed landscape? (2010) LQR 126(Oct), 543, Fiona De Londras and Fergal F. Davis, 'Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms' (2010) OJLS 30(1), 19-47, and John Ip, 'The Rise and Spread of the Special Advocate' [2008] Public Law 717.

[13] *RB (Algeria) v Home Secretary* [2009] UKHL 10 [77] Lord Phillips of Worth Matravers.

Human Rights (ECtHR) in *Chahal v United Kingdom*.[14] Before *Chahal* national security immigration appeals involved a non-statutory process, in which the Secretary of State consulted with an advisory panel of security experts, who met in secret and did not publish records of their meetings. This procedure was sometimes mockingly referred to as the 'council of three wise men'.[15] The Secretary of State was free to accept or to reject their counsel. The ECtHR held that this process lacked the 'substantial measure of procedural justice'[16] which the Convention required. The response of the British government was to introduce the CMP, inspired by Canadian Immigration proceedings. This mechanism was suggested in the *Chahal* case as a viable alternative to PII which would satisfy the fair trial requirements in Article 6(1) ECHR. Crucially, however, the ECtHR did not take account of the consequences of the prohibition on the Special Advocate from communicating with the claimant save with judicial discretion.[17] The Court's summary over-simplified the Canadian position[18], and failed to realise that the endorsement 'unintentionally provoked a "race to the bottom" by the British [government]…marked by an executive led security agenda [and] the lowest legally acceptable threshold of due process'.[19]

The operation of the CMP and PII differ in several key respects. In contrast to CMPs, the doctrine of PII is applicable to both civil and criminal proceedings.[20] If the government deems that

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[14] *Chahal v United Kingdom* [1996] ECHR 54.

[15] House of Commons Constitutional Affairs Committee, *'The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, Vol II Evidence (7th Report), (2004-2005, HC 323-II) [5].

[16] *Chahal v United Kingdom*, n 14, Judge Jambrek [2].

[17] Immigration and Refugee Protection Act 1976, s 85.4(2), see Joseph Chedrawe, 'Blurring the Civil-Criminal Divide for Process Rights: Closed Material Procedures and the Curious Character of Preventive Security Measures' (2013) 24 King's Law Journal 1, 4. Recently in *Harkat v Canada (Citizenship and Immigration)* [2014] SCC 37 the Canadian Supreme Court reaffirmed the constitutionality of the Special Advocate system, holding at 8 (McLachlin C.J.) that: 'The communications restrictions imposed on special advocates do not render the scheme unconstitutional. They are not absolute and can be lifted with judicial authorization, subject to conditions deemed appropriate by the designated judge.'

[18] Rt Hon. Lord Phillips, 'Is Secret Justice no Justice at All? The use of Closed Material' (King's College, London, 30 September 2013).

[19] David Jenkins, 'There and Back: The Strange Journey of Special Advocates and Comparative Law Methodology' (2011) 42 Columbia Human Rights Law Review 279, 281.

[20] Adam Tomkins, 'Public Interest Immunity after Matrix Churchill' [1993] Public Law 650.

disclosure of certain information in open court would be harmful to the public interest (including national security), the relevant departmental Minister can claim PII by issuing a certificate.[21] The word of the Minister, however, is not enough in and of itself. It is ultimately for the Court, upon examination of relevant documents[22] to decide whether disclosure should occur or not.[23] The court must be satisfied the interest in non-disclosure outweighs the general public interest in open justice: a successful claim to PII can only occur where the 'interests of the state' are obviously jeopardised by disclosure.[24] In contrast with a CMP if a PII claim is upheld by the Court, *neither* party may rely upon that particular document as part of their case; it is completely excluded from proceedings. Moreover, PII cannot be claimed for classes of documents; information for which PII is claimed must be considered by the court on an individual basis.[25] Class claims can be made in the context of the CMP, however.[26] One of the perceived problems with PII, which is discussed more fully in Chapter 8, is its potential lack of suitability in judicial review claims. This may occur because PII works to render sensitive information unavailable to both parties in legal proceedings. A CMP may be thought more suitable because: 'The detail of the material available to the decision-maker is essential to an evaluation of the substantive case. An application for PII would exclude it from consideration.'[27] This view appears to have been adopted by the ECtHR in *Tinnelly and Sons v United Kingdom.*[28] Here, a PII certificate was issued in respect of a request by T for further information regarding refusal of a contract on national security grounds. In finding the violation, the ECtHR

[21] *Duncan v Cammell Laird* [1942] UKHL 3.

[22] *Science Research Council v Nassé* [1980] AC 1028.

[23] *Conway v Rimmer* [1968] UKHL 2.

[24] ibid.

[25] ibid.

[26] *Home Secretary v AF (No. 3)* [2009] UKHL 29, Baroness Hale [105].

[27] R *(Ahmad Sarkani and Others) v Foreign Secretary* [2014] EWHC 2359 (Admin) [37].

[28] *Tinnelly and Sons v United Kingdom* [1998] ECHR 56.

held that: 'the issue by the Secretary of State of section 42 certificates constituted a disproportionate restriction on the applicants' right of access to a court or tribunal. It finds that there has been a breach of Article 6 § 1 of the Convention.'[29] The finding of the violation occurred because PII had been granted in respect of so much vital information that the case could not proceed.

However, PII continues to exist as an option for protecting sensitive information in English law, and as we shall see in Chapter 8, it can be potentially used in conjunction with a CMP. Strasbourg has looked upon CMPs more favourably than PII, and has tacitly approved their use. The Grand Chamber has held that a CMP can be rendered compatible with Article 5(4) ECHR (and, according to the House of Lords Article 6(1) ECHR[30]) so long as:

> [The] detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.[31]

Although, as will be demonstrated Part II of this thesis, the above rule is neither universally applicable across all of the powers which require CMPs, nor are its demands clear in practice.

The CMP (as generally understood across all the powers) contains a few further curiosities. As stated above, unlike PII, it *does* permit class claims related to evidence.[32] It is difficult to gauge the impact this has upon fairness in general, but in *Conway v Rimmer* class claims as a category capable of attracting PII on their own were rejected because only the court 'will be in a position of independence and will as a result often be

[29] ibid [79].

[30] *Home Secretary v AF (No. 3)* [2009] UKHL 28.

[31] *A and Others v United Kingdom* [2009] ECHR 301 [220].

[32] *Home Secretary v AF (No. 3)*, n 26.

better placed than a department to assess the weight of competing aspects of the public interest.'[33] The power to examine individual documents forming part of a class claim also provides an important bulwark against executive error or bad faith.[34] In *Al-Sweady* the Administrative Court emphasised the need for rigour and integrity in claims for PII: '[the] complete integrity of PII Certificates and the Schedules attached to them…is absolutely essential in all cases in which they are put forward. The Courts must be able to have complete confidence in the credibility and reliability of such Certificates and Schedules. Nothing less is acceptable.'[35]

CMPs are now applicable to a range of proceedings which engage security concerns, including organisation proscription, employment, the parole board, and security vetting.[36] It has been described as a 'fairer' process than PII because in a CMP '[the] whole …range of exculpatory material is disclosed, though some of it may only be disclosed to the special advocate, whereas in civil and criminal proceedings material protected by public interest immunity is not disclosed at all.'[37] The procedure has been used flexibly to accommodate different subject matter and administrative practices. The CMP also superimposes evidential barriers onto the already complex and uncertain terrain of evidence in judicial review proceedings. But in academia and civil society the nature and extent of CMP's (un)fairness remains contested. A number of civil society organisations have railed against the mechanism, as have academics.[38] The Joint Committee on

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[33] *Conway v Rimmer* [1968] A.C. 910 Lord Morris, 13.

[34] *R (Al-Sweady and Others) v Defence Secretary* [2009] EWHC 1687 (Admin).

[35] ibid [46].

[36] See Treasury Solicitor, *Special Advocates: A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO) (Open Manual)* (Stationary Office 2006) and John Ip, 'The Rise and Spread of the Special Advocate' [2008] Public Law 717, 721-724.

[37] *RB (Algeria) v Home Secretary*, n 13, Lord Phillips [103].

[38] Examples include: Isabella Sanky (Director of Policy, Liberty), 'Secret Courts Plans under fire again' (*Liberty News Blog,* 14 November 2012) www.liberty-human-rights.org.uk/news/2012/secret-courts-plans-under-fire-again.php accessed 01 July 2014, Amnesty International, 'Left in the Dark: The Use of Secret Evidence in the United Kingdom' (Amnesty International Publications 2012), Justice, 'Justice and Security Bill: JUSTICE urges MPs to act now to stop the expansion of Secret Evidence', *Justice News,* (London, 1 March 2013) <www.justice.org.uk/news.php/95/justice-and-security-bill-justice-urges-mps-to-act-now-to-stop-the-expansion-of-secret> accessed 01 July 2014.

Human Rights' most memorable claim was that the CMP was 'Kafkaesque'.[39] Administrative procedures of a Kafkaesque nature are those which 'take away the participants' ability to engage in rational planning about their situation. [The] participant begins to see himself as an object, susceptible to infinite manipulation by "the system".'[40] But an alternative picture was painted by the growing expertise of first-instance judges[41], and the following remarks by Ouseley J (one of those judges) provides a counterpoint:

> the views of the Special Advocates as represented to…the Joint Committee for Human Rights…are [not] a true reflection of the effectiveness they bring. Nor do they properly reflect the ability of an individual to explain what he has been doing and saying, with whom and to whom, even without specific details of allegations against him.[42]

In contrast, the Special Advocates argued that:

> the contexts in which CMPs are already used have not proved that they are "capable of delivering procedural fairness". The use of [Special Advocates] may attenuate the procedural unfairness entailed by CMPs to a limited extent, but even with the

[39] Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights (19th Report): 28 days, intercept and post-charge questioning* (2006-2007, HL 157/HC 790) [210].

[40] Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press 1983), 91.

[41] Adam Tomkins, 'National Security and the Role of the Court: A Changed Landscape?' (2010) 126 (October) Law Quarterly Review 543, 566.

[42] *AHK and Others v Foreign Secretary* [2012] EWHC 1117 (Admin) [78].

> involvement of [Special Advocates], CMPs remain fundamentally unfair.[43]

II. THE OPERATION OF THE CMP

There are several sets of Civil Procedure Rules governing the operation of CMPs in the various different contexts which they apply, but within these there are rules common to all contexts. Disclosure of 'closed' material, whether to Special Advocates or into open proceedings, is often described as 'iterative' which has been considered problematic by practitioners in the field.[44] Generally speaking, disclosure takes place in two broad phases under a statute where the CMP is compulsory (such as control order proceedings under the PTA 2005). The first disclosures relate to the first compulsory hearing, which determine the validity of the core 'national security case' against an individual. Thereafter, there may be more disclosure, related to other aspects of the case, or related to the reasons for the executive's pursuit of specific sanctions against an individual. Where the application of a CMP is discretionary (under s 6 of the Justice and Security Act 2013), the executive need not disclose the whole universe of sensitive information in order to make a discretionary application for a CMP viable.[45]

All the rules carry the same definition of what constitutes 'closed material' and 'open material', with only semantic differences. Closed material is 'any relevant material that the Secretary of State objects to disclosing to a relevant party'[46], and 'open material' is 'any relevant material that

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[43] Angus McCulloch, Angus QC and Martin Chamberlain QC *et al*, 'Justice and Security Green Paper: Response to Consultation from Special Advocates' (16 December 2011) <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wpcontent/uploads/2012/09_Special%20Advocates.pdf> accessed 01 July 2014.

[44] ibid,[33]: '(iv) The Special Advocates have previously set out our concerns about the way in which AF (No.3) has been operated in practice by the Courts on occasion, by means of "iterative disclosure".'

[45] *R (Ahmad Sarkani and Others) v Foreign Secretary* [2014] EWHC 2359 (Admin) [32].

[46] SIAC Rules 2003, Rule 37(1) (SIAC), CPR 76(1)(3)(b) (control orders), CPR 79.1(2)(d) (asset-freezing), CPR 80.1(3)(b) (TPIMs).

the Secretary of State does not object to disclosing to a relevant party'.[47] The Minister is initially permitted to designate material as 'closed' which he considers a threat to the public interest, by applying to the court to do so.[48] There is also an overriding general duty upon the court or commission to avoid disclosing material that is contrary to the public interest[49] and all of the rules make provision for hearings to be held in private.[50] This means that if the court considers it necessary to conduct a hearing in private for public interest reasons, it may to do so.

Once the Secretary of State has applied to have evidence designated as 'closed' evidence, he must serve on the court his reason for designating the evidence as closed.[51] In addition to this, the Minister must also provide the court with details of whether it is possible to provide 'a summary of that material without disclosing information contrary to the public interest, a summary of that material in a form which can be served on the relevant party.'[52] It is then for the *court* to give permission to the Minister to withhold this closed material,[53] and if such permission is granted the court must decide whether or not to direct the Minister to serve a summary of the closed material on the affected person and his lawyer.[54] The only exception is the Special Immigration Appeals

[47] The is no definition of 'open material' in rules relating to asset-freezing, SIAC or CPR 76(1)(3)(f) (control orders) and 80.1(3)(f) (TPIMs).

[48] SIAC Rules 2003 37.3 (SIAC), CPR 76.28(1)(a) (control orders), CPR 80.24(1)(a) (TPIMs), CPR 79.25(1)(a) (asset-freezing).

[49] The Special Immigration Appeals Commission (Procedure) Rules 2003, SI No. 1034/2003, Rule 4 (1) 'the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.' A similar formulation of this rule appears at CPR 76.1(4) (control orders), CPR 79.2(2) (asset-freezing), and CPR 80.1(4) (TPIMs).

[50] SIAC Rules 2003, Rule 42, CPR 76.22 (control orders), CPR 79.17(1)(b) (asset-freezing), CPR 80.18 (TPIMs).

[51] SIAC Rules 2003, Rule 37(3)(b), CPR 80.24(2)(b) (TPIMs), CPR 76.28(2)(b) (control orders), CPR 79.25(2)(b) (asset-freezing).

[52] CPR 80.24(2)(c) (TPIMs), CPR 79.25(2)(c) (asset-freezing), CPR 76.28(2)(c) (control orders). The SIAC rules have a slightly different formulation. SIAC Rules 2003, Rule 37(3)(c) requires the Secretary of State 'to the extent that it is possible to do so without disclosing information contrary to the public interest, [to provide a] a statement of the material in a form which can be served on the appellant.'

[53] SIAC Rules 2003, Rule 38(6), CPR 80.25(6) (TPIMs), CPR 76.29(6) (control orders), CPR 79.26(6) (asset-freezing).

[54] CPR 76.29(6) (control orders), CPR 79.26(6) (asset-freezing), and CPR 80.25(6) (TPIMs).

Commission, where the Minister is not required to serve material on the Commission if he chooses not to reply upon it in proceedings.[55]

The CPR provide for a Special Advocate as the only explicit counter to the imbalance or inequality of arms created by the unequal access to information inherent in the process.[56] Material cannot be designated as 'closed' unless a Special Advocate has been appointed to represent the interests of the affected party.[57] The Special Advocate must make submissions to the court where the relevant party and his lawyer are excluded, adducing evidence and cross-examining witness, and making written submissions to the court.[58] According to Chamberlain Special Advocates rarely seek authorisation to communicate after closed material has been served, and such authorisations are rarely granted.[59] Where authorisation is sought the Minister is entitled to register an objection to this communication with the court, and if this is done a hearing to decide on the issue of communication must be held.[60]

There are also rules relating to the search for exculpatory material within the closed evidence. During proceedings an appellant can seek to rely upon material which may be within the

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[55] The Special Immigration Appeals Commission (Procedure) Rules 2003, SI No. 1034/2003, Rule 38(7).

[56] SIAC Rules 2003, Rule 37.2 (SIAC),CPR 80.24(2) (TPIMs), CPR 76.28(1)(b) (control orders), 79.25(1)(b) (asset-freezing).

[57] SIAC Rules 2003, Rule 37(2), CPR 76.28(1)(b) (control orders), CPR 79.25(1)(b) (asset-freezing), 80.24(1)(b) (TPIMs).

[58] SIAC 2003 Rules, Rule 25, CPR 76.24 (control orders), CPR 79.19 (asset-freezing), CPR 80.20 (TPIMs).

[59] Martin Chamberlain, 'Special advocates and procedural fairness in closed proceedings' (2009) Civil Justice Quarterly 314, 321.

[60] SIAC 2003 Rules, Rule 36(5)(b), CPR 76.25(5)(b) (control orders), CPR 79.20(5)(b) (asset-freezing), CPR 80.21(3)(b) (TPIMs). There are two cases which appear to form exceptions to the general rules on non-communication. In *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) appeared to have a hybrid 'semi-closed' process akin to a confidentiality ring [8]: 'disclosure [was made] to the claimant's [own] legal representatives on the basis of appropriate undertakings, and in part by the appointment of special advocates to deal with material that could not be disclosed to the claimant's legal representatives…The process meant that the court had to split the hearing into three categories: open sessions, semi-closed sessions (in which the public were excluded but the claimant's counsel and counsel for the Secretary of State addressed the court, with the special advocates also present), and closed sessions (in which the public and the claimant's team were excluded but the special advocates and counsel for the Secretary of State addressed the court).' *Home Secretary v AM* [2009] EWHC 425 (Admin) involved the provision of 'closed material' to AM (the subject of a control order) in return for a 'confidentiality' undertaking.

closed evidence provided he files a statement of that evidence with both the Secretary of State and the Special Advocate.[61] Thereafter, the Secretary of State is under a duty to make a 'reasonable search' for the material described.[62] According to the CPR the Minister must produce evidence which 'is relevant and of assistance to the Appellants and to the Commission'.[63] Prior to 2010, no formal procedures were in place for recording and securely archiving evidence served in closed hearings; such a procedure is now in place to prevent the destruction of closed bundles.[64]

Clearly the CMP compromises open justice and equality of arms. Van Harten argues that CMPs render courts dependent 'on executive agencies, including foreign governments, to supply and characterise the confidential information from which secret evidence is drawn.'[65] Moreover, in her oral evidence to the JCHR, Dinah Rose QC remarked that:

> One of the things that has always struck me…is how different an open case may look from a closed case. The case that an appellant thinks they are meeting may not be simply different in extent but wholly different in kind from the case they are actually meeting.

[61] The Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007, SI No. 1285/2007, Rule 10A. The rule reads: 'Where the appellant wishes to rely on evidence in support of his appeal, he must file with the Commission and serve on the Secretary of State and on any special advocate a statement of that evidence.' There is no similar amendment to any of the Civil Procedure Rules in respect of control orders, asset-freezing, or TPIMs.

[62] The Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007l SI No. 1285/2007, Rule 10A(2)(a), CPR 76.27 (control orders), CPR 80.23 (TPIMs), and CPR 79.23(1)(a) (asset-freezing). In respect of the non-SIAC proceedings the 'reasonable search' provision relates not to *exculpatory material* but instead to 'relevant material' or 'material relevant to the matters under consideration in the proceedings'.

[63] *Kamoka and Others v The Security Service and Others* [2015] EWHC 60 (QB) [25] indicates that it is possible (in theory) to launch a private law claim alleging lack of candour in disclosure in the context of actions before SIAC, control orders, TPIMs and terrorist asset-freezing.

[64] *R (Maya Evans) v Secretary of State for Defence and Associated Newspapers* [2013] EWHC 3086 (Admin) [39].

[65] Gus Van Harten, 'Weaknesses of Adjudication in the Face of Secret Evidence' (2009) 12 International Journal of Evidence and Proof 1, 10.

> You just cannot tell; it is a classic iceberg situation, where two-thirds is underwater.[66]

Although the idea of justice behind closed doors conjures up images of democratic regimes edging ever closer to the practices of dictatorships[67] CMPs are not civil procedures' first departure from open justice or equality of arms. English law makes general provision for secrecy, or 'a property of information…withheld from others…intentionally'.[68]

In *Bank Mellat (No. 1)*[69] in which the Supreme Court held a closed hearing on the basis of implied statutory authority, Lord Neuberger adduced seven principles to guide the future use of CMPs, and to enhance the fairness of the procedure in general. These principles can be summarised as follows: (1) Where a judge gives both open and closed judgments, it is highly desirable that, in the open judgment, the judge: (i) identifies every conclusion which has been reached in whole or in part using closed material, and (ii) that the judge says that this is what he or she has done; (2) A judge who has relied on closed material in a closed judgment should say in the open judgment as much as possible about the closed material relied upon; (3) On appeal against an open and closed judgment, an appellate court should only be asked to conduct a closed hearing if it is strictly necessary for fairly determining the appeal; (4) If the appellate court decides to look at closed material, careful consideration should be given by the advocates, and by the court, to whether it would nonetheless be possible to avoid a closed substantive hearing; (5) If the court decides that a CMP is necessary, the parties should try and agree a way of avoiding, or minimising

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[66] Joint Committee on Human Rights, *The Justice and Security Green Paper (24th Report)* (2010-2012, HL Paper 286/HC 1777) Dinah Rose QC, uncorrected transcript of oral evidence (24 January 2012).

[67] Anthony W. Pereira, 'Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, (CUP 2008), 47.

[68] Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law,* (University of Chicago Press 1988), 12-13.

[69] *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38.

the extent of, a closed hearing; (6) If there is a closed hearing, the lawyers representing the party relying on the closed material, as well as that party itself, should ensure in advance of the appeal that: (i) the excluded party is provided with as much information as possible about closed documents (including any closed judgment) relied on, and (ii) the special advocates are given as full information as possible regarding the nature of the passages relied on in closed documents and the arguments which will be advanced in relation thereto; (7) Appellate courts should be robust about acceding to applications to go into closed session or even to look at closed material.[70] These principles have been considered in several cases considered throughout this thesis. What has been surprising, is that to date, their applicability to cases involving the CMP has been held not to apply in circumstances where it seems *prima facie* intuitive that they should.[71]

OPEN JUSTICE, EQUALITY OF ARMS, AND THE EXTENT OF SECRECY

The approach to procedural fairness is perhaps best captured by the judicial aphorism that the 'rules of Natural Justice – or of fairness – are not cut and dried. They vary infinitely'.[72] Moreover, 'What…fairness require[s]… is *essentially an intuitive judgment*.'[73] This is indeed painting with a broad brush, but the principles of open justice and equality of arms are the subject of frequent compromise in order to preserve secrecy of one form or another. Whilst open justice might be a separate principle of the English legal system, equality of arms is merely one specific aspect of the right to a fair trial.

[70] *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38 [68]-[74]. See further Hayley J. Hooper, 'Crossing the Rubicon: Bank Mellat v HM Treasury (No. 1) [2013] UKSC 38' [2014] Public Law 171.

[71] See Chapter 7-8.

[72] *R v Home Secretary, ex parte Santillo* [1981] QB 778, 795.

[73] *R v Home Secretary, ex parte Doody* [1993] UKHL 8, Lord Mustill 14, emphasis added.

On the one hand, English public law sets its face firmly against secrecy: executive decisions may not be carried out according to secret fiat.[74] But it would be naïve and inaccurate to ignore the comfort of the British constitution, both in historical and contemporary terms, with secrecy. Writing in 1990 Ponting opined that:

> Britain has fostered a culture of secrecy which extends far beyond central government in many different and often unsuspected ways…The desire for secrecy is an automatic reflex in the executive…The justification provided for this policy of closed government is that the whole *process* of government must remain secret in order to ensure "good government".[75]

One of the most striking features of this 'culture of secrecy' which is beyond the remit of this thesis, is the ability of the House of Commons to meet in secret.[76] Scheppele also makes clear that: 'Law is, in short, one of the few places in social life where one can see the magic and the devastation

[74] *Walumba Lumba v Secretary of State for the Home Department* [2011] UKSC 12, in which Lord Dyson castigated the Minister for detaining deportees under a secret policy, as opposed to the public policy which included a presumption in favour of release [166].

[75] Clive Ponting, *Secrecy in Britain,* (Historical Association Studies, Basil Blackwell Ltd 1990), 42-43, emphasis original.

[76] According to Erskine May this took place during World War II following the precedents set during World War I. Parliament sat in private during the World Wars whenever 'it seemed that matters of value to the enemy might be revealed in debate in either House'. The last secret sitting of the House was 4 December 2001 (HC Deb 4 December 2001, vol 376, col 314.). To hold a secret session Members must follow the procedure set out in Standing Order No. 163. Criminal Proceedings were brought against a private individual for alleged disclosure of information relating to a secret parliamentary session pursuant to the Defence (General) Regulations 1939, Regulation 3(2). Jack Malcolm *et al* (eds), *Erskine May's Treatise on the Law, Privilege, Proceedings and Usage of Parliament* (24th edn, Butterworths 2011), 321 and 280; W. Ivor Jennings, 'Parlaiment in Wartime' (1940) 11(4) The Political Quarterly 351. According to Wilson: 'The Prime Minister is occasionally questioned on matters arising out of his responsibility [for national security]. His answers may be regarded as uniformly unimformative.' Harold Wilson, *The Governance of Britain,* (Weidenfield & Nicholson and Michael Joseph 1976), 168.

[76] Stephen J. Schulhofer, 'Secrecy and Democracy: Who Controls Information in the National Security State' NYU Public Law and Legal Theory Research Paper Series, Working Paper No. 10-53 (August 2010) and David Omand, *Securing the State* (Hurst and Company 2011).

wrought by secrets.'[77] The Anglo-American common law tradition makes legal provision for the preservation of confidentiality, secrecy, and privacy in many respects, creating an imbalance of power across many areas of law and legal relationships. For example the law endorses the 'isolation of the military and national security communities from both other policy makers and the general public'.[78] Similar secrecy occurs in in commercial relationships (trade secrets, and arbitration processes), the medical sphere (doctor-patient confidentiality), and child protection (protection of vulnerable witnesses, etc.). This list is non-exhaustive, but all of these relationships are capable of generating secrets which require the modification of legal principles. After all, the law recognises that national security, of which counter-terrorism measures are an important subset, is chiefly concerned with the control, interpretation, and strategic use of information.[79] The CMP is superimposed against this backdrop; it is neither the greatest nor the least incursion into the principles of procedural fairness in the English legal system. There are greater or lesser compromises to principle made for the sake of secrecy, and they are driven by different rationales.

I. OPEN JUSTICE

The roots of the principle of open justice in the English legal system are not immediately clear. Its genesis lies in some combination of jury trials, freedom of expression, the rule of law, and the historical influence of the Enlightenment.[80] In *Scott v Scott*[81] Lord Shaw opined that open trials represented 'a sound and very sacred part of the constitution of the country and the administration

[77] Kim Lane Scheppele, n 68, 3.

[78] ibid, 15.

[79] Stephen J. Schulhofer, n 72, and David Omand, *Securing the State* (Hurst and Company 2011).

[80] Joseph M. Jacob, n 3, 47.

[81] *Scott v Scott* [1913] AC 417.

of justice'.[82] This was reiterated in *Al Rawi*, in which the Supreme Court refused to institute a CMP on the basis that it would contradict the fundamental principles of fairness at common law. In this context Lord Dyson went as far as to say that 'open justice is not a mere procedural rule. It is a fundamental common law principle. [A] closed material procedure involves a departure from both the open justice and the natural justice principles.'[83] To institute such a procedure in this context would damage the right to a fair trial, and go beyond the ordinary procedural regulation and variation of court practice.

The relationship between natural justice and open justice might be characterised by the fact that 'candour is a requirement of due process.'[84] Any legal process which inhibits candour may in fact be self-defeating.[85] But Jaconelli observes that 'publicity, in itself, is not an unalloyed benefit in the administration of justice.'[86] Despite being a landmark ruling on the gravity of the principle of open justice *Scott v Scott* was decided a mere two years after the enactment of the Official Secrets Act 1911 which 'set the legal seal on secrecy in central government.'[87] In the contemporary context the Civil Procedure Rules state that hearings shall generally be held in public,[88] but there is an exception if the hearing 'involves matters relating to national security.'[89] The European Convention has also influenced the extent of publicity in judicial proceedings in several ways. Article 6 ECHR, which states that 'in the determination of…civil rights and obligations…everyone is entitled to a fair and public hearing' is, textually at least, an unqualified right. However, the requirements of

[82] ibid, 473 in Joseph Jaconelli, *Open Justice: A Critique of the Public Trial,* (OUP 2002), 6.

[83] *Al Rawi and Others v The Security Service and Others* [2011] UKSC 34, Lord Dyson [11]-[14].

[84] Joseph M. Jacob, n 3, 46.

[85] ibid, 46.

[86] Joseph Jaconelli, n 82, 1.

[87] ibid, 2.

[88] CPR Part 39(1).

[89] CPR Part 39.2(b).

openness (and fairness in general) have been significantly diluted by *inter alia* the CMP.[90] The openness of proceedings, in terms of permitted reporting, has also been influenced by Article 10 ECHR, particularly in the context of the Court of Protection, discussed below. Insofar as disclosure and reason-giving are a facet of open justice, Article 8 ECHR has some procedural requirements in this regard, but they are not as robust as those in Article 6 ECHR. This is discussed more fully in Chapter 4 in the context of national security deportations.[91]

Open justice has several substantive aspects. It requires that judicial proceedings should be public, which includes access by the litigants themselves, as well as the public and the press. Open justice also increasingly requires (in the public law context) that decisions are supported by evidence-based reasons. Although hearsay and intercept evidence is admissible in judicial review of many national security decisions[92] there is an emerging trend towards demands for evidence and witnesses in cases with a human rights dimension, forcing the executive to be more open. Whilst 'judicial review might be said to be a singularly inapt means of examining issues of credibility'[93] because of its generally paper-based nature, case law suggests that a potentially greater degree of justificatory evidence is required where human rights are engaged.[94] Requests for increased disclosure which depart from the general paper-based procedures can be refused if the court perceived that they amount to a mere "fishing expedition" in which a claimant seeks to build a frivolous case.[95] For example, there is authority to suggest that courts are willing to hear from external experts, and to undertake a:

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[90] Laura Hoyano, 'What is balanced on the scales of justice? In search of the essence of the right to a fair trial' (2014) 1 *Criminal Law Review* 4, 6.

[91] *Al-Nashif v Bulgaria* [2002] ECHR 502.

[92] *R v Home Secretary, ex parte Rahman* [1998] QB 136.

[93] *Ali v Birmingham City Council* [2010] UKSC 8, Lord Kerr [78].

[94] *R (Quila) v Home Secretary* [2011] UKSC 45.

[95] *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 [31].

> sociological assessment - an assessment of what are the needs of society. This in part involves a legal examination of the content and legal effect of the relevant provision. [But] equally there will almost always be other evidentially valuable material which can be placed before the court which is relevant, such as reports that have been made, statistics that have been collected, and so on.[96]

In the context of human rights, insufficiently disclosed reasons or evidentiary basis increasingly cause judgments to be rendered against the Executive.[97]

CMPs compromise the first limb of open justice in several respects. The non-state party, members of the public, and press are excluded from closed hearings, and litigants are usually anonymised using alphabetical pseudonyms, e.g. XY. The interest in proceedings being accessible, observed, and reported serves to ensure fairness in the broadest sense and 'provides a disciplinary role for judges and witnesses.'[98] Closed hearings and non-disclosure of closed material falls somewhere on a spectrum of incursions into the open justice principle available in the English legal system. Hearings may be in secret or in private. It was the view of the Court of Appeal that 'the use of modern equivalents such as "private" and "secret" has given rise to some apparent inconsistencies.'[99] The rationales for a process being private, as opposed to secret, may differ considerably. For example, privacy may be required where the court exercises its "'parental and administrative" jurisdiction "to guard the interests of the ward or the lunatic".'[100] By contrast secret

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[96] *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40, Lord Hobhouse [142].

[97] *Francis Paponette and Others v Attorney General of Trinidad and Tobago* [2010] UKPC 32; R *(Quila) v Home Secretary* [2011] UKSC 45.

[98] Joseph M. Jacob, n 3, 52.

[99] *Dept. of Economic Policy (Moscow) and Government of Moscow v Bankers Trust Co. and Another* [2004] EWCA Civ 314 [11].

[100] ibid [13].

hearings are generally considered to be 'inherently abhorrent', and permitted only in exceptional circumstances as a result.[101] However, the distinction is neither principled, nor binary. The procedural operation and reporting restrictions of the Court of Protection exemplify this problem.

The Court of Protection (CoP) and the CMP may appear incomparable at first. However, the CoP is an *in camera* civil tribunal, upon which media reporting is severely restricted. It oversees decisions related to the liberty of mentally incapacitated persons, which often encroach more deeply upon personal liberty than the counterterrorism restrictions reviewed under the CMP.[102]

The Court of Protection was created by Part 2 of the Mental Capacity Act 2005. In contrast with the IPT the rationale for privacy (and perhaps secrecy) surrounding the Court of Protection is that the decision-making processes with which the court is charged with scrutinising are '[c]onfidential [and are not] the business of anyone other than the individual or individuals who are making them.' Moreover, this privacy 'represents an entirely simple…self-evident aspect of personal autonomy.'[103] Within the key procedural rules of the Court is a general presumption that hearings will be heard in private unless there is a 'good reason' to depart from that presumption.[104] This rule has gained the Court a reputation in some sections of the press as 'Britain's most secretive court'[105] and 'one of the most hidden corners of the British justice system'.[106] The subject matter of its caseload includes the deprivation of liberty, the right to die, and the withdrawal of medical

[101] ibid [18]-[20].

[102] For a public lawyer's perspective on the Court of Protection see Nick Armstrong and Alex Rook, 'Court of Protection for Public Lawyers' [2012] Judicial Review 28.

[103] *A v Independent News and Media Ltd* [2010] EWCA Civ 343, Lord Chief Justice [18].

[104] Court of Protection Rules 2007, SI No. 1744/2007, Rule 90: 'The general rule is that a hearing is to be held in private.'

[105] Staff Writer, 'Right to die case: how Britain's most secretive court operates', *The Telegraph* (London, 28 September 2011) www.telegraph.co.uk/news/uknews/law-and-order/8793920/Right-to-die-case-how-Britains-most-secretive-court-operates.html accessed 01 July 2014.

[106] Ameilia Hill, 'The court of protection: defender of the vulnerable or shadowy and unjust?' *Guardian* (London, 6 November 2011) <www.guardian.co.uk/law/2011/nov/06/court-protection-defender-vulnerable-unjust> accessed 01 July 2014.

treatment from those who lack mental capacity. It also has a staggering caseload of on average 23,000 applications per year (of which just fifteen were reported in 2008-2010)[107] which vastly outweighs the combined totals of all the other procedures which form the subject matter of this thesis.[108] Senior Judge Lush commented in 2010 that 'the media have consistently portrayed the Court of Protection as a secret court. It's not and never has been a secret court. It's time this old shibboleth was finally laid to rest.'[109] However, its serious human rights subject-matter and the exclusion of all press and public suggest that the criticisms should not be taken quite so lightly.

The deprivation of liberty provided for under the Mental Capacity Act 2005 is not a light-touch power. Shah and Heginbotham raise concerns that not only are there serious shortcomings in the Deprivation of Liberty Safeguards, and 'a formal application to the CoP to ensure that the rights of the individual are protected…is rarely [made] because the time and expense involved make this unrealistic.'[110] In effect, the CoP oversees decisions which in many cases involve potentially more serious violations of Convention rights than those decisions regulated by the CMP. The presumption against public hearings and reporting of judgments in the Court rules has been criticised as allowing 'public authorities [to] shelter under the privacy umbrella.'[111] It was successfully challenged in *A v Independent News & Media Limited*.[112] The Court of Appeal concluded that:

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[107] Denzil Lush (Senior Judge, Court of Protection), 'Court of Protection: 2009 Report' Judiciary of England and Wales www.judiciary.gov.uk/publications-and-reports/reports/family/court-of-protection/court-of-protection accessed 01 July 2014, 15-18.

[108] Amelia Hill, n 106.

[109] Denzil Lush (Senior Judge, Court of Protection), 'Court of Protection: 2010 Report' Judiciary of England and Wales www.judiciary.gov.uk/Resources/JCO/Documents/Reports/court-of-protection-report-2010.pdf accessed 01 July 2014.

[110] Ajit Shah and Chris Heginbotham, 'Newly introduced deprivation of liberty safeguards: anomalies and concerns' (2010) 34 The Psychiatrist 243, 244.

[111] Jerome Taylor, Mark Neary and Romana Canneti, 'Opening Closed Doors of Justice' (2012) 23 British Journalism Review 42, 49.

[112] *Independent News and Media Ltd & Others v A* [2010] WTLR 55, [2009] EWHC 2858 (Fam), and *A v Independent News and Media Ltd* [2010] EWCA Civ 343.

> The new statutory structure starts with the assumption that, just as the conduct of their lives by adults with the necessary mental capacity is their own affair, so too the conduct of the affairs of those adults who are incapacitated is private business. Hearings before the Court of Protection should therefore be held in private unless there is good reason why they should not. In other words, the new statutory arrangements mirror and rearticulate one longstanding common law exception to the principle that justice must be done in open court.[113]

The decision also represents the first acknowledgment by an English court that Article 10 ECHR also contributes to the principle of open justice, via the protection of the right to report on proceedings. Perhaps the most controversial departure from principle made by the Court was the imprisonment of Wanda Maddock for five months for failing to comply with rulings relating to her father's care.[114] Reports differ as to whether Maddock's committal hearing took place in open session or in private.[115] On the one hand '[s]entencing Ms Maddocks to prison for contempt demonstrates that the court will make robust decisions to safeguard people who cannot protect themselves.'[116] However, secret criminal proceedings are a hallmark of injustice. This was the

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[113] *A v Independent News and Media Ltd* [2010] EWCA Civ 343 [19].

[114] Owen Bowcott, 'No one should be jailed in secret, says top judge', *Guardian* (London, 3 May 2013), <www.guardian.co.uk/law/2013/may/03/no-one-jail-secret-judge?INTCMP=SRCH> accessed 01 July 2014. *SCC v JM (the person to whom the matter relates by his litigation friend, the Official Solicitor) and Others* (Unreported, Judge Cardinal, 31 August 2012).

[115] Lynsey Coleman, 'Secrecy and the Court of Protection' (Solicitors Journal, 5 May 2013) <http://www.solicitorsjournal.com/node/16217> accessed 01 July 2014 suggests the committal hearing was open, but it has been widely reported that the hearing took place in private. See, inter alia, Steven Doughty and Andy Dolan, 'Jailed in secret - for trying to rescue her father from care home where she believed he would die', Daily Mail (London, 23 April 2013) <www.dailymail.co.uk/news/article-2313760/Wanda-Maddocks-Jailed-secret--trying-rescue-father-care-home-believed-die.html#ixzz2UtGPbqvF> accessed 01 July 2014.

[116] Lynsey Coleman, n 115.

sentiment reflected in guidance issued by the Lord Chief Justice in the wake of the ruling. He advised that '[i]t is a fundamental principle of the administration of justice in England and Wales that applications for committal for contempt should be heard and decided in public, that is, in open court. Furthermore a person must "never" be sent to custody without the Judge publicly naming them, outlining the nature of the contempt, and detailing the punishment imposed.'[117] The case must also have a public reasoned judgment explaining the reasons for a private committal hearing.[118] The problem caused by the presumption of privacy in the rules of court is that legitimate privacy intended to protect vulnerable persons had become secrecy which damaged the public interest in ensuring that criminal justice was both done and seen to be done.

There is much evidence to suggest that both the common law and the European Convention jurisprudence venerates the principle of open justice. However, balancing this principle with other considerations in any given context has been shown to be problematic. Although there has been a general shift towards increased judicial demand for evidential justification in human rights cases the legal lines between necessary privacy, confidentiality, and secrecy are subject to frequent blurring. Therefore, in terms of open justice, the CMP rests upon the unstable foundations of the wider legal system.

II. EQUALITY OF ARMS

It is easy to pinpoint ways in which the CMP leaves participants on an unequal footing. In particular, the presence of closed hearings and judgments which only the government can access,

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[117] Sir J. Munby, President of the Family Division and President of the Court of Protection, 'Committal for Contempt of Court: Practice Guidance' (4 June 2013) [2013] EWHC B7 (COP): 'The Guidance recognises that the Court of Protection…is vested with a discretionary power to hear a committal application in private. It emphasises that this discretion should be *exercised only in exceptional cases* where it is *necessary in the interests of justice* and that if the court decides to exercise its discretion to sit in private the judge should…give a judgment in public setting out the reasons for doing so…' [3] emphasis added.

[118] Staff Writer, 'No Secret Jailing' (*Criminal Law and Justice Weekly*, 11 May 2013) www.criminallawandjustice.co.uk/news/No-Secret-Jailing accessed 01 July 2014.

and the limited disclosure of information and evidence into open hearings and judgments, seem immediately problematic. The presence and mandate of the Special Advocate is also an indication of inequality. Nevertheless, equality of arms is not a familiar concept to common lawyers. Historically, it is rooted in the civil law tradition. It encompasses the idea that 'one side to litigation shall have no advantage over the other by way, for example, of being able to provide the tribunal with evidence or comments not available to the other side.'[119] There are aspects of natural justice at common law which overlap with equality of arms but it occupies even less stable terrain than open justice, and has been subject to even more destabilisation via claims to secrecy as a result.

The facets of equality of arms engaged by a CMP are fourfold: the right to choose and consult one's own legal counsel, the right of an individual to full knowledge of the case against him, the related right to be heard, and the right to present an effective defence. The Privy Council recognised equality of arms 'as lying at the heart of the right to a fair trial.'[120] However, the CMP in its present form is not the forum where secrecy has done the most damage. To illustrate this, discussion begins by contextualising the relevant aspects of equality of arms in the English legal system, considering how the CMP deviates from them, and finally examining the procedures of the Investigatory Powers Tribunal (IPT) as a comparator.

The most basic (and intuitive) aspects of equality of arms – the right to a level playing field in terms of disclosure and the right to present a defence at an oral hearing – is not necessarily guaranteed in public law disputes. The sources of facts, and whether to make findings of fact remain a largely discretionary case-by-case decision for the courts.[121] But fairness is essentially a contextual notion. For example, in *Fayed*[122] the House of Lords considered a challenge to immigration legislation, which explicitly stated that the Minister was not required to give reasons,

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[119] Joseph M. Jacob, n 3, 105.

[120] *Procurator Fiscal v Brown (Scotland)* [2000] UKPC D3 (5 December, 2000), Lord Bingham.

[121] Michael Fordham, *Judicial Review Handbook* (6th edn, Hart 2012), 187 (17.3.17).

[122] *R v Home Secretary, ex parte Al Fayed* [1997] 1 All ER 228.

and that the decision was not to be the subject of review or appeal in any court. Fayed appealed against the decision to refuse judicial review. The House of Lords allowed the appeal on the basis that the ouster clause in the British Nationality Act 1981 did not prevent the court from ensuring that the Home Secretary had met his obligation to act fairly. In respect of the duties to give notice and provide a reasoned decision, the House of Lords concluded that the requirement of notice only required the Minister 'to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can.'[123] In respect of the requirement of reason giving, House of Lords held that this case was not one where the giving of reasons was essential. Instead, it was sufficient that the 'applicant has been given sufficient information as to the subject matter of the decision to enable him to make such submissions as he wishes.'[124] As the discussion of what fairness requires in the CMP progresses, particularly with respect to the practice of 'gisting' information or allegations, it will become clear that the requirements of reason giving under the CMP mirror the general requirements of fairness (at least in principle) in the common law more closely than might first be assumed.

Despite this, the requirements of national security can counteract equality of arms both at common law and in the Convention jurisprudence. In *Kennedy v United Kingdom*[125] the ECtHR reiterated that:

> [The] principle of equality of arms, [is] one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.

[123] ibid.

[124] *R v Home Secretary, ex parte Al Fayed* [1997] 1 All ER 228.

[125] *Kennedy v United Kingdom* [2010] ECHR 682.

> [The] Court has held nonetheless that, even in proceedings under Article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security…[126]

The fact that a Special Advocate in a CMP can be authorised by statute (or appointed by a court) in order to examine closed material clearly goes against the principle that one should be able to choose their own lawyer. But this principle does not have a strong foothold in the English legal system, either. Epp and Obrien acknowledge that: 'Throughout the common law world it has been recognised by the courts that, for those who can afford it, the right to choose a legal representative is fundamental; and, even, "an important feature of any free society".'[127] However, their discussion draws not on binding precedent, but upon unreported cases. The position in EU law and under the ECHR is stronger than in English common law.[128] The European Court of Justice held in *Eschig* that individual persons in a class action insurance suit retained the right to choose their own counsel.[129]However, this only applies where EU law is engaged, and is therefore unlikely to impact on the CMP, unless special advocates are adopted in proposed closed hearings before the EU General Court (see Chapter 7).

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[126] ibid, [184]-[187].

[127] John A. Epp and Derek O'Brien, 'Defending the Right to Choose: Legally aided defendants and choice of legal representative' (2011) 4 European Human Rights Law Review 409-420, 409. The cases referred to by the authors are an unreported judgment of Neuberger J in *Maltez v. Lewis,* cited in *R (Legal Aid Board) v Duncan and MacKintosh* [2000] EWHC Admin 294, Brooke LJ [459].

[128] The concept of equality of arms is clearly a constituent part of the right to a fair trial in Article 6(1) ECHR, see *Edwards and Lewis v United Kingdom* [2003] ECHR 381.

[129] Jonathan Goldsmith, 'The Right to Choose Your Own Lawyer – Part 2' *Law Society Gazette* (London, 25 October 2010) <http://www.lawgazette.co.uk/blogs/euro-blog/the-right-choose-your-own-lawyer-part-2> accessed 01 July 2014 and *Eschig (Freedom to Provide Services)* [2010] 1 CMLR 5.

The right to an oral hearing is not guaranteed in judicial review hearings, which are in general paper-based. In *Al Sweady* it was considered that the human rights claims in play justified a departure from the usual paper-based nature of judicial review proceedings.[130] The right has also evolved in the context of Parole hearings. Even where recall to prison is at stake, an oral hearing is not guaranteed, because civil rights and obligations are not being determined.[131] In *Osborn v Parole Board*[132] the Supreme Court held that an oral hearing is required to satisfy common law (and the equivalent Convention standards) whenever fairness to the prisoner requires a hearing in light of the facts of the case and the importance of what is at stake. In the abstract, this test is somewhat open-ended. Obviously, the presence of closed hearings and special advocates considerably complicates the possibility of these principles (such as they are) being given due regard in the context of the CMP.

But in the specific context of the CMP, *Al Rawi* indicates that the protection of fairness in civil claims may not be as robust as in criminal proceedings, even where human rights law is engaged. When discussing *R v Davis*[133] – which held that an anonymous Crown witness infringed the rights of the accused – Their Lordships took differing views *obiter* on the right to know one's accuser. Lord Dyson considered that the fact *Davis* was a criminal case was 'not material'[134], whereas Lord Clarke was of the opinion that:

> I would not accept the argument that there is no significant difference in this context between a criminal case and a civil case.

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130 *R (Al Sweady) v Defence Secretary* [2009] EWHC 2387 (Admin) [18]: 'a different approach was needed because these "hard-edged" questions of fact represented an important exception to the rule precluding the court from substituting its own view in judicial review cases.'

131 *Smith v Parole Board* [2003] EWCA Civ 1269.

132 *Osborn v Parole Board* [2013] UKSC 61.

133 *R v Davis* [2008] UKHL 36.

134 *Al Rawi*, n 83, [35].

> The decision in *R v Davis* is of importance but it was a criminal case, where I well understand that the importance of the defendant being able to confront his accusers may be critical. The same may be much less important in a civil case…[135]

The CMP allows anonymous witnesses to testify in closed session on behalf of the government. These witnesses are usually drawn from the Security Services (MI5) or the Secret Intelligence Service (MI6).[136] The status of equality of arms in the context of the Convention is significantly stronger, even with respect to civil proceedings, but still recognises a variation between the requirements of civil and criminal proceedings:

> [T]he requirement of equality of arms applies in principle to civil cases as well as to criminal cases. [However], *the requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge*.[137]

In the specific context of the CMP, the principle of equality of arms has been considered in the Supreme Court three times. Counsel for *Al Rawi* argued that equality of arms was, like open justice, a basic right inherent in the common law constitution.[138] However, none of the judgments accredit the same constitutional status to this principle, as is given to the principles of open justice

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[135] *Al Rawi*, n 83, Lord Dyson [187].

[136] Cases involving anonymous Security Service witnesses include: *Home Secretary v E* [2007] EWHC 233 (Admin), *A and Others v Home Secretary* [2003] UKSIAC 1/2002, and *LO v Home Secretary* [2010] UKSIAC 73/2009.

[137] *Suoiminen v Finland* [2003] ECHR 330 [33], emphasis added.

[138] *Al Rawi*, n 83, [127].

or fairness. In *Tariq v Home Office*,[139] which concerned the level of disclosure applicable in principle in a CMP conducted in the Employment Tribunal, Lord Hope (part of the majority) stated that:

> [P]arties to litigation need to know what it is that their opponent alleges against them. They need to have the chance to counter those allegations. [One] of the implicit constituent rights of article 6 is that there should be equality of arms between the parties to proceedings….equality of arms is not an absolute right, restrictions may only be placed upon it where it is strictly necessary and proportionate do so. [The] balancing exercise between equality of arms principle and the withholding of evidence on the grounds of national security…must [show] that the limitation on the rights of the party who is denied such access is adequately offset by sufficient counterbalancing measures.[140]

In *Tariq* the Supreme Court concluded that access to an independent tribunal and the appointment of a Special Advocate were a proportionate counterweight to the incursions into the principle of equality of arms required to protect national security evidence. If the status of the principle was in any doubt vis-à-vis the CMP, its importance was contextualised by Lord Brown in *W (Algeria) v Home Secretary*.[141] Lord Brown, the former President of the Security Services Tribunal,[142] allowed an irrevocable anonymity order on behalf of a witness testifying in support of an appellant before

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[139] *Secretary of State for the Home Department (Appellant) v Tariq (Respondent), Secretary of State for the Home Department (Respondent) v Tariq (Appellant)* [2011] UKSC 35.

[140] *Secretary of State for the Home Department (Appellant) v Tariq (Respondent),* n 139, [71]-[117].

[141] *W (Algeria) v Secretary of State for the Home Department*, n 7.

[142] The United Kingdom Supreme Court Biographies of Former Justices<http://www.supremecourt.gov.uk/about/former-justices.html> accessed 30 May 2013.

the Special Immigration Appeals Commission (SIAC). He made clear that the decision to permit such an order binding the Secretary of State against disclosure relating to that witness was not aimed at 'levelling the playing field' or 'providing "equality of arms" between the parties'.[143] For those who agree that the counter-terrorism legislation which makes use of the CMP represents 'a system of quasi-criminal law'[144] the judicial approach to balancing in the context of equality of arms will be of some concern.

Despite the severe compromises to equality of arms made by the CMP it does not stand out as the starkest departure from principle in the name of secrecy and security. This is the preserve of the Investigatory Powers Tribunal (IPT). The IPT was established by section 65 of the Regulation of Investigatory Powers Act 2000 (RIPA 2000).[145] It was established to investigate and regulate complaints against public authorities in relation to the use of covert surveillance techniques. The rationale for a separate tribunal for such complaints (as opposed to making them a jurisdiction of the administrative court) is that the need for surveillance, interception of communications, and secret intelligence 'remains an effective, indeed an essential, weapon in the armoury of those authorities responsible for the maintenance of law and order and the safety of the realm'.[146] Like the Court of Protection, the subject matter within the jurisdiction of the IPT extends to serious allegations of human rights violations, including those under Article 3 ECHR.[147] Of all the judicial bodies examined here, it is the most shrouded in secrecy, and treats litigants most unequally. The IPT often has controversial and newsworthy subject matter, such as the

[143] *W (Algeria) v Secretary of State for the Home Department*, n 7 in Hayley J. Hooper, 'The Lesser of Two Evils' (2012) 128 Law Quarterly Review 511-514, 512.

[144] Conor Gearty, *Liberty and Security,* (Polity Press 2013), 46.

[146] Lord Diplock, comment in report to Prime Minister (March 1981) in Home Office, *Interception of Communications in the United Kingdom: A Consultation Paper* (Cm 4368, 1999), [1.3].

[147] *AJK and Others v Commissioner of Police for the Metropolis and Others* [2013] EWCA Civ 1342.

revelations regarding undercover police officers gaining intelligence via sexual relationships with political activists.[148]

One possible criticism of the furore surrounding control orders etc is that the catchment for such powers is niche in numerical terms. However, this is not true of the IPT. Recent revelations surrounding the US National Security Agency's (NSA) 'PRISM' programme revealed that GCHQ had gained intelligence from large-scale and widespread monitoring of internet traffic in which many large internet companies (including Google and Facebook) were either directly involved or complicit.[149] In a statement to the House of Commons Foreign Secretary William Hague defended the work of British intelligence agencies as being in accordance with law and also stated that: 'concerns can be raised through the management structure. There is also the Investigatory Powers Tribunal, to which members of the intelligence services can take complaints or concerns *without having to do so in public*.'[150] However, the acknowledgment of the need to safeguard the use of covert surveillance and intelligence techniques as a central goal of public policy has not insulated the IPT from stringent criticism. Ian Leigh has called the tribunal 'far from satisfactory' on the grounds that the:

> [V]agueness of the powers granted to the agencies make a finding of illegality by the Tribunal highly unlikely. Secrecy restrictions placed on the process make it impossible for a complainant to the IPT to distinguish between an unsuccessful application based on

[148] ibid.

[149] Nicholas Watt, 'NSA "offers intelligence to British counterparts to skirt UK law"', *Guardian* (London, 10 June 2013) www.guardian.co.uk/politics/2013/jun/10/nsa-offers-intelligence-british-counterparts-blunkett accessed 01 July 2014.

[150] Rt Hon. William Hague MP Foreign Secretary, HC Deb 10 June 2013, vol 564, col 47, emphasis added.

> justifiable use of legal powers and one based on lack of evidence of the services' involvement.[151]

Section 67 of RIPA 2000 explains that in hearing a complaint the IPT 'shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review.'[152] The Tribunal is the *only forum* in England which can examine legal complaints about the conduct of MI5, MI6, and GCHQ, and the police[153] in relation to surveillance and the interception of communications. The tribunal is also tasked with adjudicating upon relevant complaints made pursuant to section 7(1)(a) of the Human Rights Act 1998. Unlike the CMPs examined in this thesis, the IPT was subjected to the criticism in 2001 that '[t]he standard of review also fails to inspire confidence. The Tribunal has never found a breach and, because of the rules about non-disclosure, rarely considers cases in which there has been any interception.'[154]

Unlike criminal proceedings, the IPT may 'receive evidence in any form, and may receive evidence that would not be admissible in a court of law.'[155] As with the CoP all IPT hearings are generally conducted in private.[156] Unlike CMPs, persons making complaints are entitled to a legal representative (solicitor or barrister) of their own choosing for the whole procedure.[157] However, the complainant is not entitled to be present at that hearing. Furthermore, the tribunal is not

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[151] Iain Leigh, 'Rebalancing Rights and National Security: Reforming UK Intelligence Oversight a Decade after 9/11' (2012) 27(5) Intelligence and National Security 722, 728.

[152] Regulation of Investigatory Powers Act 2000, s 67(2).

[153] *R (A) v Director of Establishments of Security Service* [2010] 2 AC 1.

[154] Yaman Akdeniz, 'BigBrother.gov.uk: State surveillance in the age of information and rights' (2001) Criminal Law Review (February) 73, 90. A 1999 government consultation paper noted that: 'It is a published fact (as set out in the Annual reports) that the Tribunal has never found there to have been a contravention of the provisions of the Act. This has led to a measure of suspicion as to the effectiveness of the Tribunal's work. ' Home Office, *Interception of Communications in the United Kingdom: A Consultation Paper* (Cm 4368, 1999), [1.9].

[155] IPT Rules, Rule 11(1).

[156] ibid, Rule 9(6).

[157] ibid, Rule 10.

entitled to disclose the fact that it held a hearing to a complainant. This is in stark contrast to the principle of natural justice at common law which requires notice to be given to an involved party that a hearing is taking place.[158] Nor is the tribunal allowed to disclose any of the information used in the hearing, or the identity of any witnesses.[159] The tribunal has near-absolute 'neither confirm nor deny' (NCND) policy in respect of the conduct of investigations. NCND is a policy favoured by the intelligence services to protect their operations techniques and sources. This means that if an individual makes a complaint to the IPT based on the suspicion that he is being unlawfully investigated the tribunal cannot release any information that confirms or denies the individual's concerns.[160] The NCND policy was confirmed to be compatible with Article 6 ECHR in *Kennedy v United Kingdom.*[161] The Supreme Court adopted a similar view in *A (Appellant) v B (Respondent)*,[162] concluding that the IPT procedure was structured so as to accommodate the:

> self-evident need to safeguard the secrecy and security of sensitive intelligence material, not least with regard to the working of the intelligence services. It is to this end, and to protect the "neither confirm nor deny" policy (equally obviously essential to the effective working of the services), that the Rules are as restrictive as they are regarding the closed nature of the IPT's hearings and

[158] ibid, Rule 6(2)(a), *Fleet Mortgage v Lower Maisonette* [1972] 2 All E.R. 737 in Paul Jackson, *Natural Justice* (Sweet & Maxwell 1973), 10-12.

[159] ibid, Rule 6(2)(b). There are a number of further non-disclosure provisions enumerated in Rules 6(2)(c)-6(2)(e).

[160] *AJK and Others v Police Commissioner and Others* [101]-[102]: 'This is the NCND policy transposed to the IPT. The reason for it is obvious. Those who are planning, or who have committed, serious criminal offences may wish to know if they are the subject of any of the investigatory techniques governed by RIPA. If, by making a complaint to the police, or by bringing proceedings in the IPT, they could obtain a confirmation or denial that they were subject to any investigation, then the purpose of the investigation could well be defeated.'

[161] *Kennedy v United Kingdom* [2010] ECHR 682.

[162] *A (Appellant) v B (Respondent)* [2009] UKSC 12.

> the limited disclosure of information to the complainant (both before and after the IPT's determination).[163]

The rules of procedure for the IPT are set out in the Investigatory Powers Tribunal Rules 2000,[164] and these differ from general CMP rules in several important respects. First of all, the rules governing disclosure before the tribunal are more stringent than those which apply in CMPs. As with courts seized of a CMP, the tribunal is bound by a general duty to carry out its functions in a way which ensures that:

> information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.[165]

The IPT is under no duty to hold oral hearings, although it may do so at its discretion.[166] The first open oral hearing was held in 2014 in *Abdel Hakim Belhadj*.[167] Belhadj complained that communications between himself and his lawyers (legally privileged communications) had been intercepted by the intelligence community. In this case the IPT reaffirmed the need for the NCND

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[163] ibid, [14].

[164] The Investigatory Powers Tribunal Rules 2000, SI No. 2665/2000.

[165] ibid, Rule 6(1).

[166] ibid, Rule 9(2)-9(3). The last open hearing of the IPT took place on 14 February 2014. See *Privacy International v Foreign Secretary and Others* concerning the interception of 'metadata', grounds available at: https://www.privacyinternational.org/sites/privacyinternational.org/files/downloads/press-releases/privacy_international_ipt_grounds.pdf accessed 13 March 2014.

[167] *Abdel Hakim Belhadj and Others v Security Service and Others* [2014] Ref: IPT/13/132-9H (07 February 2014).

policy and held that closed hearings *without* a minimum core of disclosure were within the powers of the tribunal. The IPT also rejected the application of Lord Neuberger's principles of guidance in *Bank Mellat (No. 1)*, favouring the NCND in rule 6 (which prevents the tribunal from disclosing that it is holding a hearing):

> to avoid the risk that the interests of national security, or the prevention or detection of serious crime, or the proper functioning of the intelligence services, might be compromised if a complainant were notified of the need for a closed hearing, and thus was able to infer that he had been, or was currently, the target of intelligence measures.[168]

The IPT concluded that a closed hearing would only be necessary to 'protect sensitive information or to comply with the "neither confirm nor deny" policy.'[169]

Finally, there are some tightly controlled exceptions to the general duty of non-disclosure. The IPT may disclose information only if it can obtain the consent of the person attending the hearing, the author of the document in question, or where relevant, any of the Commissioners defined in Rule 2 (for example, the Intelligence Services Commissioner or the Investigatory Powers Commissioner).[170] So unlike CMPs, where final judgments on disclosure are made by an independent and impartial judge, decisions on disclosure before the IPT are capable of being subject to a veto by the intelligence of security agency that is the subject of the complaint. In other words, there are even greater issues with secrecy and equality of arms before the IPT than are

[168] ibid [23].

[169] ibid, n 168, [32].

[170] IPT Rules, n 164, Rule 6(3).

present in CMPs, generally. In short, equality of arms, whether at common law or in the Convention as applied in English law in various guises, does not have a secure foothold. At most it can be considered an emerging principle, as opposed to a sacrosanct one. The CMP exists against a backdrop of exceptions to principle in favour of secrecy, and despite its controversy, it does not standout as the harshest compromise in the name of national security.

LITIGATION CONCERNING CLOSED MATERIAL PROCEEDINGS IN THE BROADER CONTEXT

Despite the unstable terrain that the CMP traverses in the context of general procedural fairness, the courts have historically prevented the unnecessary creep of the procedure areas across the legal system. Obviously, the Justice and Security Act 2013 (the subject of Chapter 8) now permits the procedure in any civil proceeding where information sensitive to national security is at stake. However, prior to the passage of the 2013 Act several attempts were made to institute CMPs in various types of civil hearings. These cases demonstrate two things: first courts have been generally unwilling to extend the scope of the CMP beyond situations involving national security and counterterrorism, even where the CMP is intended to protect the rights of vulnerable persons. One exception to the general trend described below occurred in *Evans*.[171] Here the Upper Tribunal opted to conduct a CMP in the context of a review of a freedom of information dispute pursuant to its power to prohibit disclosure of sensitive information.[172] This may be explained by a general exception to the rule in *Al Rawi* which the Supreme Court identified *obiter* in the Attorney General's subsequent appeal by Lord Wilson's suggestion in dissent: a CMP may be resorted to via the court's inherent procedural jurisdiction where the objective of the proceedings is to secure disclosure

[171] *Evans v Information Commissioner* [2012] UKUT 313 (AAC).

[172] The Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698 (L.15), Rule 14(5).

which would otherwise be frustrated.[173] Although all of the decisions discussed in this section refuse a CMP in the instant case, they leave the possibility open in future circumstances. Secondly, the rhetoric of balancing fairness against other interests (national security, prison security, witness protection, and so on) to ensure open justice and equality of arms are only compromised in 'exceptional circumstances' is unhelpful in predicting what sorts of circumstances might lead to the use of a CMP.

In *Roberts v Parole Board*[174] the House of Lords considered whether the application of a CMP in relation to a parole board hearing was possible pursuant to both the powers granted to the board by the Criminal Justice Act 1991 and within the procedural requirements of Article 5 ECHR. The Parole Board wished to withhold evidence from R and his lawyers on the grounds that it was 'sensitive material'. Their Lordships ruled that 'the source of the information or evidence would be at risk if the material were to be disclosed. *It has not been suggested that there is in this case any threat to national security.*'[175] The request for a CMP was refused, but the House of Lords recognised that because fairness is a 'constantly evolving concept'[176] and, unlike a criminal defendant, a potential parolee had already been found guilty of an offence[177] that the board had the inherent power to 'direct non-disclosure if the Board is satisfied, in an *exceptional situation*, that there is *no alternative*, if the public interest is to be protected.'[178] In respect of the duties of a Special Advocate Lord Woolf acknowledged that: 'The protection provided by the [Special Advocate] may be limited but, in some situations, it may make the critical difference.'[179] The balance required to be struck in *Roberts*

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[173] *R (On the Application of) Evans and Another v Attorney General* [2015] UKSC 21, Lord Wilson [180].

[174] *Roberts v Parole Board* [2005] UKHL 45.

[175] ibid, [3], emphasis added.

[176] *R v H* [2004] 2 AC 134, Lord Bingham [11].

[177] *Roberts v Parole Board*, n 174, Lord Woolf [42].

[178] ibid, Lord Woolf [56], emphasis added.

[179] ibid [59].

was between "'balancing the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public" (if this is the case) "against the need to protect the public".'[180] Lord Woolf, also in the majority, rejected a submission to the effect that 'situations involving national security come in a separate category.'[181] This decision suggests that information sensitive to national security is not the only subject matter capable of tipping the balance in favour of secrecy. However, it does not bring us closer to unpacking what other sorts of information or evidence would require a CMP.

There even appears to be a remote possibility of instituting a CMP in public inquiry proceedings, despite the intuitive response that this would frustrate the object of proceedings. In *R (Home Secretary) v Assistant Deputy Coroner for Inner West London*[182] the Administrative Court confirmed that a CMP could not be applied to public inquiry proceedings concerned with questions relating to the perceived failure of the intelligence services. Sitting as Coroner Hallet LJ had acknowledged that amongst the interested parties of the inquiry (the relatives of the bombing victims) some parties supported the Home Secretary's request for the use of a CMP, whereas others did not.[183] In respect of the CMP, Hallett LJ acknowledged that the Court of Appeal decision in *Al Rawi*[184] had a narrow *ratio* which did not altogether exclude the possibility of instituting a CMP.[185] But the Coroner concluded that she did 'not have the power to conduct closed hearings from which the interested persons as well as the broader public are excluded absent a waiver of their rights by all interested persons.'[186] Despite this, the requirement of a Special

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[180] ibid, Lord Woolf [46] quoting from *R v Parole Board, Ex parte Watson* [1996] 1 WLR 906, 916-917, Sir Thomas Bingham MR.

[181] ibid, Lord Woolf [73].

[182] *R (Home Secretary) v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin).

[183] Ruling of Dame Heather Hallett in the Inner West London (Westminster) Coroner's Court Coroner's Inquests into the London Bombings of 7 July 2005 (3 November 2010), lines [7]-[14].

[184] *Al Rawi v Security Services*, n 839.

[185] *R (Home Secretary) v Assistant Deputy Coroner for Inner West London*, n 183, lines [17]-[20].

[186] n 183 lines [18]-[22].

Advocate could still theoretically be justified. This decision therefore begs similar questions about striking the balance to the *Roberts* decision.

A further application for a CMP was rejected in the context of protecting a witness in a domestic violence case. In *Chief Constable and AA v YK and Others* the police sought a CMP to protect a witness in the context of a Forced Marriage Protection Order (FMPO) pursuant to the Forced Marriage (Civil Protection) Act 2007. Sir Nicholas Wall, President of the Family Division, rejected the application, and opined that 'the use of special advocates in forced marriage cases will be rare in the extreme, and in my judgment they are not called for in this case.'[187] Despite this, Sir Nicholas Wall acknowledged that force marriage was not only a form of domestic violence, but could also amount to a serious abuse of human rights.[188] The balance to be struck in this case was between the right to a fair hearing, and the possibility that disclosure of a witness' identity would place him or her at risk of harm. An FMPO can be made to restrict the activities of a person (a respondent in the terms of the Act) whom the court believes is attempting to force another into marriage, and to restrict the activities of the individual at risk of being married. There is no defined standard of proof required before action is taken[189], and there is no exhaustive list of measures which may be imposed. In short, FMPOs are in theory wider in scope than control orders. However, this was not a case where Special Advocates were provided for by statute, and moreover, the subject matter was 'determinedly civil in content'.[190] In determining the appropriate course of action the court adopted the approach in *R (Malik)* which held that 'there is power in the court to request the appointment of a special advocate of its own motion. But that power should be exercised *only in an exceptional case and as a last resort*.'[191] The first reason for refusal was that the

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[187] *Chief Constable and AA v YK and Others* [2010] EWHC 2438 (Fam) [109].

[188] ibid, n 187 [9].

[189] 'There is, moreover, nothing *in the Act* to stop the court acting on hearsay evidence, or information provided to it by the police which has not been disclosed to the respondents.' ibid[18], emphasis original.

[190] ibid [51].

[191] *R (on the application of Malik) v. Manchester Crown Court and another* [2008] EWHC 1362 (Admin), emphasis added [99].

nature of an FMPO was protective of *an* individual.[192] Secondly, there was nothing the Special Advocate could do that could not be done by the judge, and finally, a Special Advocate was not required to assist with the determination of fact.[193] The judgment recognised that there was a real risk of honour violence if certain information was to be disclosed. This suggests that risk of violence towards an individual, as opposed to violence against the state (the usual subject of terrorism) is insufficient to trigger exceptions to open justice and equality of arms. This is concerning because the risk of domestic violence far outstrips the risk posed by terrorism (if the number of perpetrators is considered). Police figures in 2014 estimated that as many as 10,000 people were at 'high risk of death or serious injury' from domestic violence.[194]

The possibility of a CMP in the context of family law arose again before the Supreme Court. The speech by Lady Hale, for the majority in *Re A (A Child)*,[195] contains perhaps the tightest definition of a public interest reason for excluding the introduction of a CMP. The mother of A wished to rely upon testimony of X, who alleged she had been sexually abused by A's father, in her application for custody of A. Counsel for X resisted disclosure on the basis that it would result in degrading treatment of X, contrary to Article 3 ECHR. The father, the Children's guardian, and A's mother all sought disclosure of X's identity. The relevant local authority claimed PII in respect of their records relating to X's identity. In stark contrast with national security proceedings the Supreme Court acknowledged that in the field of family law and child welfare 'the presumption in favour of disclosure is strong indeed'.[196] Moreover, the dispute about the identity of X went to the core of the question concerning whether or not her testimony was indicative of risk posed to A by

[192] ibid [90]-[91].

[193] ibid [92]-[97].

[194] Sandra Laville, "Domestic Violence Puts 10,000 at high risk of death or serious injury' *Guardian* (London, 26 February 2014), www.theguardian.com/society/2014/feb/26/domestic-violence-risk-death-injury-police accessed 01 July 2014.

[195] *Re A (A Child)* [2012] UKSC 60.

[196] ibid, per Lord Mustill in *In re B (A Minor) (Disclosure of Evidence)* [1993] Fam 142, 614.

her father. The court ruled in favour of disclosure, acknowledging that the suggestion of a CMP faced 'two formidable difficulties'.[197] These were of course the ruling in *Al Rawi* which was directly applicable as the present cases fell within the meaning of 'ordinary civil proceedings', and secondly that although child welfare was 'paramount' and could justify departure from the ordinary principles of the right to a fair trial Lady Hale acknowledged that:

> We have arrived at a much better understanding of those difficulties in the course of the control order cases. [The] essential requirement of any fair procedure is that the person who stands to lose his rights has an opportunity effectively to challenge the essence of the case against him. There may be cases in which this can be done by offering him a "gist" of the allegations and appointing a special advocate [In] a case such as this, however, it is not possible effectively to challenge the allegations without knowing where, when and how the abuse is alleged to have taken place. From this information it is inevitable that X's identity will be revealed. [A] closed material procedure…would not meet the minimum requirements of a fair hearing in this case.[198]

In short, the protection of the rights to privacy and insulation of a vulnerable witness from degrading treatment in the context of child welfare was an insufficient basis to institute a CMP.[199] Both of these cases present an interesting contrast to the CoP, whereby the dignity of a vulnerable

[197] ibid [34].

[198] ibid [34].

[199] ibid [1].

person is considered to justify the utmost privacy (although it entails no compromise to equality of arms). In situations where recourse to a CMP is not found in statute there exists a vague formulation that a CMP would only be permissible in a category of 'exceptional circumstances'. Such circumstances are as yet uncrystallised, but we can reasonably infer that individual vulnerability, even when serious, does not tip the scales in the same manner as *raisons d'état*. Although section 6 of the Justice and Security Act 2013 applies to material sensitive to national security in the context of any civil proceeding, this terrain is still uncharted. In view of this, the rhetoric of balancing and exceptionalism has proved vague and unhelpful on their own terms. Perhaps the most forceful illustration of this is to be found in the context of the Supreme Court judgment in *Bank Mellat (No. 1)*,[200] discussed in-depth in Chapter 7.

CONCLUSION

So, just as those who continue to see national security in exceptional terms may well be misguided, Bentham may too have been misguided when he made his remarks about publicity being the soul of justice. If justice has a soul, that soul is acutely concerned with trade-offs in unpredictable circumstances. This chapter explained the genesis and operation of CMPs, with particular respect to how it emerged as an alternative to the doctrine of PII. Thereafter, it placed such procedures within the wider context of open justice, secrecy, privacy and equality of arms to demonstrate that whilst CMPs are indeed worthy of criticism for being procedurally unfair, the 'core values' which they depart from are very much in doubt themselves. The examples of the IPT and Court of Protection serve to illustrate that justice can be closed off and disclosure of information can be restricted not only in ways which are *more draconian* than CMPs but also for reasons other than state security, such as the protection of dignity, privacy, or of vulnerable persons. The consideration of

[200] *Bank Mellat v HM Treasury (No. 1)* [2013] UKSC 38.

the case law on the applications for a CMP beyond the context of counterterrorism statutes considered in this Chapter demonstrated that courts have attempted to constrain the spread of the procedure via the balancing of interests. However, when scrutinised, the balances struck were often contestable and their prescise rationale was difficult to pinpoint. Notions of balancing and fairness are often intuitive, but given the often serious nature of what is at stake in the context of the CMP it is desirable that they are more grounded, scientific, and predictable. It is with this issue in mind that we move to the discussion in Chapter 3 to consider alternative frameworks for conceptualising how risk is managed and secrecy accommodated in both the CMP itself and the administration which surrounds it.

CHAPTER THREE:

RISK-MANAGEMENT AND DISCLOSURE

INTRODUCTION

In Chapter One we saw that much has been made of the ills of the Closed Material Procedure, including that it 'detract[s] from a culture of legality'[1], or that it risks 'normalising the exceptional'.[2] In Chapter Two we also discovered that the CMP has been superimposed upon the norms of civil procedure, which provide a much less stable foundation than its critics perhaps presuppose. However, the standards of public law are ambiguous not only in the procedural dimension: the ambiguity persists into matters of substance.

Whilst recent history has seen a transition from legal accountability for the state's actions in the field of national security as being unthinkable (unless you were Lord Atkin)[3] towards some measure of control, the present arrangements remain fraught with difficulties. We must be cognisant that the rules of natural justice and open justice might support different intensities of *substantive* review at different times. In the most general sense, the approach to judicial review where national security is at stake is imprecise. In the context of *Re (Arthurs)* – a challenge to a Ministerial national security certificate authorising a Diplock trial – the court described the substantive approach as:

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[1] Cian Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 King's Law Journal 19.

[2] John Ip 'The Rise and Spread of the Special Advocate' [2008] Public Law 717.

[3] Lord Atkin's relationship with his judicial colleagues suffered as a result of his dissenting views in *Liversidge v Anderson* [1942] AC 206; see Master T Shuttleworth, 'Reputations: Then and Now, No. 4 Lord Atkin' (*Graya News*) <http://www.graysinn.info/phocadownload/Article_3_-_Summer_Graya_News.pdf> accessed 01 July 2014, see also: Tom Bingham, 'Mr Perlzweig, Mr Liversidge, and Lord Atkin' in *The Business of Judging: Selected Essays and Speeches* (OUP 2000), 216.

> "a sliding scale of review"…the degree of intensity of judicial scrutiny depends on the context of the issues before the court.[4]

This problem is mirrored across the spectrum of public law and Hickman cautions against adopting 'a monistic approach to legal justification.'[5] With respect to the initial case upon which the need for imposing an order is built (described in Chapter 2 as the 'national security case'), the Administrative Court described the case as amounting to: 'a value judgment [requiring a] degree of deference.'[6] However, individual measures (i.e. specific measures imposed as part of the order) are generally subject to more intensive review. The review typically 'involves the customary test of proportionality.'[7] By contrast substantive review conducted by the SIAC is limited to 'anxious scrutiny'. This standard originated in *Bugdaycay*[8] and was later criticised as being 'descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an "axiomatic" part of any judicial process, whether or not involving asylum or human rights.'[9]

This inability of legality alone to control the executive in the national security context is undoubtedly influenced by the relatively modest purpose of administrative law, which is 'to keep officials from straying beyond some large and loose requirements of clear statutory language'.[10] Administrative law does this by employing equally loose concepts of control such as 'legality', 'rationality', 'proportionality', and 'fairness'. Within those loosely-defined boundaries 'there lies a gigantic policy space, invisible to the legal order.'[11] Throughout Part II of this thesis there are

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[4] *Arthurs, Re Judicial Review* [2010] NIQB 75 [26].

[5] Tom Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68(4) Modern Law Review 655, 665.

[6] *Home Secretary v MB* [2007] QB 415; [2006] EWCA Civ 1140, [57]-[65].

[7] ibid [63].

[8] *Bugdaycay v Home Secretary* [1987] A.C. 514.

[9] *R (YH) v Home Secretary* [2010] EWCA Civ 116 [24].

[10] Jerry L. Mashaw, *Bureacratic Justice: Managing Social Security Disability Claims* (Yale University Press 1983), 9.

[11] ibid, 9.

numerous examples of symbolic legality wearing thin[12], i.e., examples of these public law concepts failing to enchroach upon the boundaries of the policy space to secure fairness to litigants. Therefore, this Chapter argues that the 'thinness' of legality compels us to 'look inside the bureau, while retaining a normative perspective.'[13] To understand procedural fairness as a matter of law, we must also understand procedural fairness as a matter of *administration*. That is to say we should expand our notions of enquiry beyond the courtroom to examine the fairness of the management processes undertaken by the executive.[14]

This Chapter considers procedural fairness 'inside the bureau' and in the courtroom by considering how both executive and judicial proceedings relate to 'parallel areas' of law and administration, and by addressing the influence of secrecy upon fairness in the context of counterterrorism. The purpose of drawing parallels is to facilitate the critical discussion of recommendations undertaken in the conclusion by highlighting that the subject matter of this thesis is not exceptional, but much like other areas of law and administration in the demands it places upon the executive and courts.

Discussion proceeds in three phases. First it considers procedural fairness in the administrative sense, by considering alternative mechanisms to control 'first order risks'. Thereafter it considers procedural fairness in the judicial sense, by considering how disclosure of information is managed via the concept of 'gisting' sensitive information. The third and final phase of this Chapter seeks to explain how different approaches to the classification of intelligence material may impact upon both the administrative and judicial dimensions of procedural fairness.

THE ROLE OF "FIRST ORDER" AND "SECOND ORDER RISKS"

[12] ibid, 11.

[13] ibid, 15.

[14] Jerry L. Mashaw, 'The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timliness in the Adjudication of Social Welfare Claims' (1974) 59 Cornell Law Review 722, 775.

In the post-9/11 context Laws LJ noted that 'our law is no stranger to the prevention of risk. Its processes are not limited to the allocation of legal consequences on proof of facts.'[15] Whilst the risks associated with terrorism and counterterrorism appear in many guises[16] the use of risk throughout this thesis refers to two specific senses. We will call these "first order risks" and "second order risks", or risks related to administrative procedures and risks related to court procedures, respectively.

A "first order risk" refers to the decisions taken by the relevant parts of the *executive* during the exercise of statutory powers (e.g. the formation of an opinion on the national security case, and the need for deportation/asset-freezing/control orders, and specific measures thereunder). The first order risk is the risk that the exercise of statutory power is trying to mitigate: i.e. the risk that a suspect will cause harm to the public.

The sphere of "second order risks" concerns the risk that sensitive and legitimately secret information will be released during judicial review proceedings to the genuine detriment of national security. These "second order risks" engage the attempt made by this thesis to infuse both legality and balancing with empirical rationality. As explained in the previous chapter, the information that is made available in "open" and "closed" proceedings is ultimately a matter for judicial discretion.

"First Order Risks": The Approach to Risk-Assessments and Fairness in Parallel Areas of Administration

The purpose of any such comparision between administrative practices in the context of procedural fairness is part of the drive to achieve 'bureaucratic rationality' or 'domination through

[15] *A and Others v Secretary of State for the Home Department* [2004] EWCA Civ 1123 [159].

[16] Lucia Zedner, 'Terrorism and Counterterrorism: What is at risk?' in Layla Skinns, Michael Scott, & Tony Cox (eds), *Risk* (CUP 2011), 115-123.

knowledge' in Weber's words.[17] A rational bureaucracy is typified by a system focussed upon factual correctness and technocratic decision-making which is designed to minimise decisions based upon 'nonreviewable judgment or intuition'.[18] Such intuition-based reasoning, or politicized as opposed to 'rational' judgement are often revealed to be key drivers of intelligence failure in the national security context.[19] The resulting effect on the legal process of striving for 'bureaucratic rationality' would be to create administrative processes which are more easily intelligible to courts and, in turn, more amenable to judicial control.

This section considers the operation of Multi-Agency Public Protection Agreements (MAPPA) in order to illustrate that executive risk management in the criminal justice sphere is broadly analogous to that undertaken by the executive under the statutes considered herein. The purpose of this is not to uncritically recommend the adoption of MAPPA procedures, but instead to pave the way for a critical discussion about recommendations for improving administrative procedural fairness in the Conclusion.

A brief comparison clarifies the extent of the shortcomings of transparency in the context of pre-emptive counterterrorism sanctions. Although Zedner notes that 'assessing terrorist risk is largely based on the subjective professional judgments of psychiatrists, intelligence experts and policy analysts'[20] the only information available regarding the executive processes for imposing sanctions or deportation can be found in the reports of the Independent Reviewer of Terrorism Legislation.[21] By contrast, the Multi-Agency Public Protection Panels (MAPPs) and the Parole

[17] Max Weber, *From Max Weber: Essays in Sociology* (Routledge 2009), VII: Bureaucracy, Max Weber, *Economy and Society: Volume I* (University of California Press 1978), Ch XI 'Bureacracy', 973-976.

[18] Jerry L. Mashaw, n 11, 26.

[19] Peter Gill & Mark Phythian, *Intelligence in an Insecure World* (2nd edn, Polity 2012), 143-158.

[20] Lucia Zedner, n 16, 111.

[21] Examples include: David Anderson QC, 'Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005' (The Stationary Office 2012) and David Anderson QC, 'First Report on the Operation of the Terrorist Asset-Freezing, etc. Act 2010' (The Stationary Office, December 2011).

Board have available public documentation regarding their procedures.[22] Therefore, the comparison drawn here is necessarily a speculative insight. What is true of, say, the MAPPA process may also be true of the Control Orders Review Group (CORG), or equally it may not. Different departmental cultures clearly have an impact, despite the presence of substantial overlap in the subject matter (i.e. pre-criminal sanctions, and release on licence of extremist offenders).

Decision-making regarding the imposition of a control order and specific measures thereunder were taken by a review group, and a similar group exists for Terrorism Prevention and Investigation Measures.[23] The Independent Reviewer of Terrorism Legislation (David Anderson QC) took the view that discussions at these groups were commendably 'structured and unhurried' and that each TPIM order was discussed related to a criteria labelled (a) through (l). These considerations included *inter alia* the standard of proof, necessity, the national security case, the prospect of criminal prosecution, case management issues, the health of the restricted person, and an exit strategy for when the sanctions expired. The Independent Reviewer concluded that these discussions were 'about as fair-minded as could be expected, given the fact that all participants in those discussions are representatives of the authorities.'[24] But by contrast the (recently amended) procedure for terrorist asset-freezing pursuant to the Terrorist Asset-Freezing, etc. Act 2010 was initially criticised by the Independent Reviewer for lacking transparency.[25] The process for designating persons under the 2010 Act (or the Counter-Terrorism Act 2008) requires both 'reasonable belief' that an individual is connected with terrorism and that an asset-freezing measure is 'necessary' on the part of the Treasury. However, the Independent Reviewer expressed concerns

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[22] Ministry of Justice, *MAPPA Guidance 2012: Version 4* <www.justice.gov.uk/downloads/offenders/mappa/mappa-guidance-2012-part1.pdf> accessed 21 October 2013.

[23] David Anderson QC, 'Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011' (The Stationary Office 2013).

[24] ibid, [8.11].

[25] David Anderson QC, 'First Report on the Operation of the Terrorist Asset-Freezing, etc. Act 2010' (The Stationary Office 2011), [6.8].

about the fact that 'unusually for executive orders of this kind – there are no formal meetings for the purposes of review [and] Asset-freezing is reviewed somewhat less formally than the other executive orders in the counter-terrorism field.'[26] He also explained that the benefit of the model used with regards to control orders and TPIMs is that it allows 'assumptions to be tested by "devil's advocate" type questions, regarding for example whether the objective of an executive order might not be achieved by other means.'[27]

Although there are some favourable aspects to the present executive arrangements the procedures in respect of TPIMs and asset-freezing can be contrasted with the ostensibly much more transparent approach found in decision-making regarding Multi-Agency Public Protection Agreements (MAPPA). MAPPA is a non-statutory body whose operations are governed by the Criminal Justice Act 2003, section 325. MAPPA's duties relate to the administration of release and licence conditions for violent offenders (including terrorists and domestic extremists) and sexual offenders from prison post-conviction. MAPPA does not have a fixed membership, rather it refers to necessary personnel constituted on a case-by-case basis to assess individual offenders. It does not set licence conditions, rather it makes representations to the relevant Minister.

The Secretary of State for Justice is responsible for issuing the MAPPA guidance. There are some starkly apparent differences in the level of transparency regarding the MAPPA process and the counterterrorism sanctions which may, or may not translate into real differences. The comparison is apt because many of the licencing conditions imposed mirror those available under the counterterrorism sanctions. Futhermore, the monitoring of individuals subject to MAPPA agreements is undertaken by the same private company responsible for monitoring terrorist suspects.[28] Conditions for extremist offenders include prohibitions on contact, upon association,

[26] ibid [6.6].

[27] ibid [6.7].

[28] Ministry of Justice, n 22, [24.9].

and restrictions upon place of worship or preaching, and notification and supervision requirements.[29] Any additional (i.e. non-standard licence requirement) imposed on a terrorist offender must be necessary and proportionate *in and of itself*. It also must have a 'causal link to the index offence'.[30] As the discussion in Part II develops it will be shown that causal links for specific executive measures are not always readily identifiable or appropriately tested in the context of the CMP (see Chapter 5 in particular).

But it is the differences in the respective Executive processes pursuant to MAPPA and counterterrorism sanctions which are striking. MAPPA has publically accessible rules governing the structure of meetings; and it uses named rubrics (in the form of clinical actuarial tools) for the assessing risk posed by individuals.[31] By contrast, it is unclear if levels of risk among controlees, TPIMs, or potential SIAC deportees or the like is graded on any form of scale. However, it can be inferred from judicial decisions that there is some use of risk grading when choosing a counterterrorism sanction. For example, BM was originally the subject of a terrorist asset freeze, prior to being subject to a control order and subsequently a TPIM. According to Collins J BM was the subject of an asset-freeze in 2007 because: 'That was at the time believed to provide sufficient control over him and a control order was not considered necessary.'[32]

But it does not automatically follow that there is a 'one size fits all' executive process for managing risks presented by terrorist suspects or released offenders. One possible objection to increased transparency regarding the Executive processes for imposing counter-terrorism sanctions is that it might render the overall process of protecting the public less safe, or less effective. But transparency is not untempered by security concerns. The absence of a right to make

[29] Ministry of Justice, 'Licence Conditions: PI 07/2011' (21 April 2011) <www.justice.gov.uk/.../psi.../pi_07-2011_licence_conditions_final.doc>, accessed 01 July 2014, Annex B.

[30] ibid.

[31] Ministry of Justice, n 31: On MAPPA Meeting Rules see Ch 13, on the use of Risk-Management Rubrics, see Ch 11.

[32] *Home Secretary v BM* [2012] EWHC 714 (Admin) [9].

representations at a MAPPA meeting by a licensee was the subject of an Article 8 ECHR procedural fairness challenge in *R (Hassan Tabak) v Justice Secretary and Others*.[33] Tabak, who was convicted of preparing a terrorist act contrary to section 5(1) of the Terrorism Act 2006, challenged the compatibility of the MAPPA guidelines with the procedural requirements in Article 8 ECHR on the basis that he and his lawyer were excluded from having his views taken into account at the 'material stage of the decision-making process, namely the MAPPA meetings at which the additional licence conditions came to be selected.'[34] They were, however, permitted to make prior written representations. Tabak also made a general common law challenge to the legality of the MAPPA guidance.

Tabak's MAPPA conditions mirrored those of control orders, TPIMs, and SIAC bail. These included living at an address specified by the probation service, a twelve hour curfew, daily reporting requirements at a police station, and electronic tagging. The decision to subject him to these restrictions had been made on the basis of an OASys (Offender Assessment System) Risk Assessment and the outcome of that assessment had been disclosed to him. The OASys system is described as a 'structured clinical tool used to assess and manage over 250,000 offenders each year in England and Wales'.[35] Tabak was assessed at a MAPPA meeting to be a 'level 3' offender (the highest category of risk). In line with guidance the members of the MAPPA meeting assessed the licence conditions as necessary and proportionate to manage the risk that he presented. The MAPPA guidance had stated that 'the human rights of offenders could never take priority over public protection.'[36] In Tabak's case, the Court concluded that because the standards of procedural fairness were 'not immutable' and Article 8 ECHR did not require prior notification of restrictions

[33] *R (Hassan Tabak) v Justice Secretary and Others* [2013] EWHC 2492 (Admin).

[34] ibid, [63].

[35] Philip Howard, 'Recent Thinking and Results from OASys' National Offender Management Service (England and Wales), <www.cepprobation.org/uploaded_files/Presentation-Recent-thinking-results-from-OASys(1).pdf> accessed 01 July 2014.

[36] *R (Hassan Tabak) v Justice Secretary and Others* [2013] EWHC 2492 (Admin) [35].

in every case, even where (as in the present case) the interference on private and family life was likely to be severe. The Court also acknowledged that 'the offender's procedural rights must give way in certain circumstances such as urgency.'[37] The challenge to the policy also failed, even although the court acknowledged that there was some risk it may lead to an interference with rights in certain circumstances. Therefore, it appears that MAPPA guidance can be interpreted by courts in a manner that is still cognisant of the need to manage risk and secrecy without compromise to public safety.

One further objection to the analogy might be that MAPPA risk-management operates on a different temporal plane to counterterrorism sanctions. The subjects are already detained and the guidance mandates that planning must begin six-months prior to their release. It may well be the case that civil counterterrorism sanctions may have to occasionally be imposed in a much more rapid or ad hoc fashion. But it would be a mistake to view the process of imposing and reviewing counter-terrorism sanctions *as a whole* to be conditioned by urgency. The initial imposition of a counterterrorism sanction may well be urgent, but the over-all process of review is protracted. For example, in control orders and TPIMs the initial review threshold that an order must meet to be valid is that it is not 'obviously flawed'.[38] This is the initial judicial review of the 'national security case'. This type of hearing takes place ex parte, after the Minister makes an order. No orders have been invalidated at this stage.[39] As we will see in Chapters 5 and 6 full review is conducted at a more leisured pace. Litigation of administrative counterterrorism sanctions is often protracted and multi-faceted, during which there would be ample time for assessment and reassessment of suspects in the manner conducted in MAPPA assessments.

[37] ibid [64].

[38] Prevention of Terrorism Act 2005, s. 3(2)(a) and Terrorism Prevention and Investigation Measures Act 2011, s.6(7).

[39] Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37 Melbourne University Law Review 143, 162.

So, initial urgency does not necessarily justify a lack of structure or disclosure in the course of on-going review. Executive management of civil counterterrorism sanctions appears *prima facie* to be both less structured, and to place less emphasis upon individual tailoring of measures to risks than the MAPPA system. This may contribute to secrecy being over-emphasised. The absence of a clear relationship of cause-and-effect between measures taken (particularly with respect to control orders and deportation measures) demonstrates a departure from the rationality that appears to be present in the MAPPA system. If anything, the key difference between MAPPA licence conditions and control orders (the subject of Chapter 4) in particular is the emphasis upon the necessity of maintaining a 'rational connection' between the risk posed by the offender the and conditions imposed upon him or her.[40] This problem is undoubtedly exacerbated by constraints on disclosure both under individual statutory regimes, and by the fact that the level of procedural protection varies from one regime to another.

"SECOND ORDER RISKS": MANAGING DISCLOSURE OF SECURITY SENSITIVE INFORMATION VIA THE CMP

As stated above, "second order risks" are engaged by judicial decision-making. For example, any decision to designate information or evidence as "open" or "closed" in the context of the CMP engages the risk that legitimately secret information will be released during judicial review proceedings to the genuine detriment of national security. Arguably, the presence of such risks has fuelled a culture of unprincipled and excessive deference. For example, when declining to disclose a redacted version of a previously closed judgment regarding detainee mistreatment in Afghanistan, opting instead to 'gist' its contents Mitting J concluded that:

[40] R *(On the Application of David Gunn) v Secretary of State for Justice and the Nottinghamshire Multi Agency Public Protection Arrangements Board* [2009] EWHC 1812 (Admin) [42].

> Whilst there is a public interest in knowing the scale of the redactions, I do not think that it is sufficient to outweigh the risk of harm to the public interest created by disclosure otherwise than in digest form, *even though that risk is of a general nature and is inherently unquantifiable.*'[41]

It is this type of deference to 'inherently unquantifiable' risk that this thesis takes issue with.[42] This section considers the development of the practice of 'gisting' sensitive information from its origins in cases involving prisoners and its extension to counterterrorism cases involving the CMP. It will be shown that the practice was unpredictable and controversial long before it was applied to the CMP.

THE DEVELOPMENT OF 'GISTING' SENSITIVE INFORMATION

The following is the full extent of disclosure granted to AE and his lawyers. Further disclosure to ensure compatibility with Article 6(1) ECHR was resisted in favour of revoking his control order:

(a) '[AE] has expressed extreme views'.

(b) '[AE] is a well-known figure in the Iraqi Kurd community. He is regarded as a spiritual adviser. He is considered to be knowledgeable about spiritual matters. That he has been and may still be regarded as a spiritual counsellor is concerning given his extremist views'

[41] *R (Maya Evans) v Secretary of State for Defence and Associated Newspapers* [2013] EWHC 3086 Admin [36], emphasis added.

[42] T.R.S. Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65(3) Cambridge Law Journal 671.

(c) '[AE] has been in contact with AI associated Iraqi Kurds in the United Kingdom'.

(d) '[AE] has delivered lectures at a mosque in Peterborough. The Security Service assesses that these lectures were of an extremist nature';

(e) 'Prior to the imposition of the control order [AE] was involved in document and identity fraud on behalf of his extremist contacts. He acted as a middle man, obtaining document on behalf of his associates. He has also been involved in fraud for his own personal advantage, which includes the claim of double benefits'

(f) '[AE]'s home address was searched in August 2005. The interrogation of the hard drive of the computer recovered from the search showed that the user of the computer had visited websites selling toy remote-controlled helicopters and cars. The search also recovered a large remote-controlled car. The computer interrogation has also showed that the user had examined the possibility of purchasing low light pinhole cameras. A variety of paperwork in his name was found in the search.'

(g) 'the Security Service assesses that [AE] was a member of the Islamic Movement of Kurdistan';

(h) 'AE is assessed by the Security Service to have 'both extremist and criminal associates in Peterborough and he has been involved in radicalising Muslims in Peterborough and he may remain in contact with those associates'

(i) 'the assessment of the Security Service is that AE 'is a leading figure in Islamist extremist circles in the Peterborough area'; and

(j) 'the Secretary of State does not accept that Taha Muhammed is AE's genuine identity and assesses that "this is no more than an alias".'[43]

Not all disclosures are reproduced to this effect in open judgments, so it is difficult to assess how representative this particular disclosure is of the pre-gisting era in control orders, or whether 'post-gisting' disclosures significantly different. However, what is clear is that the disclosure amounts to allegations, as opposed to evidence, the sources of the allegations are not stated, and the language is vague, often referring to the security service 'assessments' of particular issues. The recurring concern which must complicate 'open' judicial review proceedings of such information is the lack of access to clear standards against which the assessments were made. There is no way for lawyers in open proceedings to discern whether such judgments were informed by knowledge, expertise, intuition, or some indecipherable combination of all three elements. We will return to the AE example during the discussion of alternative approaches to intelligence information, below.

In *Home Secretary v AF (No. 3)*[44] (discussed in depth in Chapter 5) the House of Lords suggested that the requirements of Article 6(1) ECHR could be met in respect of control orders (and in turn, any proceedings involving a CMP in which Article 6(1) ECHR is engaged) by importing the practice of 'gisting' into those proceedings. The decisive paragraph of the decision of the ECtHR in *A v United Kingdom*[45], reversed the position in *MB*[46] (which held the requirements of disclosure were circumstantial and not absolute) effectively meant that in every case where Article 6(1) ECHR was engaged the claimant was entitled to the 'gist' of the case against him. As

[43] *Home Secretary v AE* [2008] EWHC 585 (Admin), Appendix 1 'The December Disclosure'.

[44] *Home Secretary v AF (No. 3)* [2009] UKHL 28.

[45] *A and Others v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29 [220].

[46] *Home Secretary v MB* [2007] UKHL 46.

the discussion proceeds (particularly in Chapters 4 and 5), it will become clear that in the context of the CMP, the objective and content of 'gists' are often contested.

The practice of 'gisting' was first accepted in administrative law in *R v Home Secretary, ex parte Doody*.[47] Several prisoners challenged the Secretary of State's decision to impose discretionary life sentences on the basis of their risk to the public. The Home Secretary made this decision without communicating the reasons for, or the basis upon which the decision was made, to the prisoners. The House of Lords unanimously held that: 'Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'[48] In a subsequent series of cases involving prisoners the practice of 'gisting' or disclosing summaries of information was endorsed because it struck a balance between providing information to the prisoners, and preserving the confidentiality of information which could pose a risk to individuals or threaten the internal security of prisons.[49]

It might be objected that there are limited parallels between the secrecy required in decisions involving prisoners and the secrecy required in counterterrorism cases. However, control of information in the context of decisions affecting prisoner release or classification often involves issues relating to witness protection, intelligence gathering techniques, confidentiality of expert reports, and the general need to maintain order within the prison context.[50] Moreover it has been judicially accepted that the procedures used to designate controlees and those subject to Imprisonment for Public Protection (IPP) share the common theme of risk assessment.[51] In *RB*

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[47] *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, Lord Mustill, 560 G.

[48] ibid, Lord Mustill, 560 G.

[49] Following *Doody* the practice of 'gisting' was endorsed in *R v Secretary of State for the Home Department ex parte Duggan* [1994] 3 All ER 277 and *R v Secretary of State for the Home Department ex parte McAvoy* [1998] 1 WLR 790.

[50] *R (Alan Lord) v Home Secretary* [2003] EWHC 2073 (Admin) [37]-[39].

[51] *Home Secretary v BF* [2011] EWHC 1878 (Admin) [46].

(Algeria) there was further acceptance of the idea that the analogous position between prisoners seeking release on licence and persons subject to a control order generated similar requirements in terms of procedural fairness in general, and disclosure of information in particular.[52] The parallel between forensic clinical risks and intelligence risks explored above was realised by the Court of Appeal in the context of the extrapolation of the practice of 'gisting' confidential reports to prisoners detained on mental health grounds in the context of an appeal against transfer to more secure conditions.[53] The NHS Trust and the Secretary of State sought to dissuade the court from 'judicialising' of what was essentially: 'a clinical risk-based evaluative judgment undertaken by expert clinicians from a range of disciplines'.[54] This argument is not dis-similar to the long history of arguments made against the 'judicialisation' of national security simply because it is a sensitive, multi-faceted policy area. However, the Court of Appeal recognised that although the various clinical factors and the need to balance the prisoner's individual well-being with the safety of the institution as a whole meant that the 'situation therefore ha[d] an element of polycentricity about it'[55] and 'considerations of urgency or confidentiality will limit what fairness requires in a particular case'.[56] Despite this, gists of the reasons for transfer in this context were required by the 'overarching principles of the concept of procedural fairness'.[57]

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[52] *RB (Algeria) v Home Secretary* [2009] UKHL 10 [94]-[97]: 'The consequence of not disclosing this information may be that the suspect has no idea of the case that is made against him. Insofar as he is the person to whom the information relates, he it is who is likely to be best placed to rebut it if it is untrue. His ability to defend himself will be seriously impaired, if not totally destroyed, if he is not told the case against him. [The] same is true of another situation in which the propriety of the use of closed material has been an issue - where consideration is being given to the release of a prisoner on licence…Once again, however, the facts that will be critical to that risk will be facts personal to the prisoner himself. If he is not aware of factual allegations about himself that bear on the risk that he poses he will not be in a position to rebut them.'

[53] *R (L) v West London Mental Health NHS Trust and Secretary of State* [2014] EWCA Civ 47.

[54] ibid [61].

[55] ibid [79].

[56] ibid [82].

[57] ibid [82].

It is of relatively little surprise, then, that the practice of 'gisting' was viewed by the English courts as the working solution to the Strasbourg decision in *A v United Kingdom*.[58] The operative paragraph of the Strasbourg judgment, paragraph 220, makes clear that the question of sufficient disclosure: 'must be decided on a case-by-case basis.'[59] There is also an example of a 'sufficiently specific allegation' in the same paragraph, but no explicit guidance is given beyond this as to how to satisfy procedural obligations.

Several difficulties persist with the system of gisting, some of which were apparent before it applied to counterterrorism cases, and some that are specific to counterterrorism itself. In the counterterrorism context Kavanagh expressed the view that: 'What is clear is that, even after AF, doubts still remain about the extent to which the Special Advocate system delivers a substantial measure of justice.'[60] In his speech in *AF (No. 3)* Lord Hope stated that 'the principle is easy to state, but its application in practice is likely to be much more difficult'.[61] In *Home Secretary v AS*[62], one of the control orders in which the ruling in *AF (No. 3)* was applied, Collins J made clear how difficult it was to maintain the distinction between disclosure of allegations and hard evidence. Following the reasoning of Lord Philips, Collins J pointed out that:

> In reality, that distinction may in given cases not be easy to apply since, as must be obvious, what amounts to an allegation and what amounts to evidence to support an allegation may depend on the width of the allegation…[63]

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[58] *A and Others v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29.

[59] ibid [220].

[60] Aileen Kavanagh, 'Special Advocates, Control Orders, and the Right to a Fair Trial' (2010) 73(5) Modern Law Review 824, 856.

[61] *AF (No. 3)*, n 51, Lord Hope [85].

[62] *Home Secretary v AS* [2009] EWHC 2564 (Admin).

[63] ibid, Collins J [8]-[9].

This distinction between allegations and evidence is artificial and problematic. But the lack of specificity in disclosures is not counterterrorism specific. It had been revealed as a serious issue with the administrative practice of gisting in its original context of prisoner licencing. In *R (Alan Lord) v Home Secretary*[64] significant criticism was made of the practice of 'gisting' confidential reports and witness statements regarding prisoners. This had come to the attention of the Prisons and Probation Ombudsman (PPO). In a report of 9 June 2003 the PPO heavily criticised the existing practice of 'gisting' in the context of cases concerning prisoners. The report was in respect of a specific prisoner, and was highly critical of the gist because it:

> [C]ontain[ed] numerous phrases common to many gists on other category A complainants that I have read elsewhere. I have some sympathy for his solicitors' complaint that the document has become standardised. Mr [S's] gist should have provided him with clear and unambiguous information on which to base his representations…*If a gist renders itself so anodyne that it could equally apply to any number of prisoners then its effectiveness in providing a prisoner with credible material to understand the reasons behind their categorisation is open to question.*[65]

Similar complaints have been made regarding the language of disclosure used during counterterrorism reviews. It is often standardised and obfuscatory, giving little indication as to the true connection between the 'open' and 'closed' cases that are being challenged by the claimant's

[64] *R (Alan Lord) v Home Secretary* [2003] EWHC 2073 (Admin).

[65] ibid, [33], emphasis added.

own lawyers and the Special Advocate respectively.[66] Moreover, following *ex parte Duggan* gisting in the context of prison reporting is subject to three additional rules which are possibly more stringent in practice and can, exceptionally, warrant *full disclosure*[67] where they are not sufficiently followed. These rules are that any gist (as a minimum should): state whether the anonymous views are unanimous or otherwise; where such views are divided the numbers of positive and negative viewpoints regarding the prisoner should be made clear; and finally, the gist should summarise *each individual* reported view.[68] Whilst it seems that most counterterrorism cases involve one, unanimous, view presented by the Minister on behalf of the Security Services there are clearly practical problems with this inherited, or adapted, system.

An additional and significant problem with the gisting regime is that it is not applicable across the full range of counterterrorism powers which deploy CMPs in litigation. It only applies where Articles 5(4) or Article 6(1) ECHR are engaged by the statutory or common law right being reviewed. So, despite trenchant criticism by Special Advocates, it does not apply to SIAC deportation or deprivation of citizenship proceedings (the subject of Chapter 4). The Constitutional Affairs Select Committee acknowledged that: 'The disclosure process under the SIAC system represents a considerable weakening of the judicial protection available under the common law Public Interest Immunity rules.'[69] However, the government responded that:

> the current system is not ideal but this is the best system which can be devised to strike a fair balance between the interests of justice

[66] Joint Committee on Human Rights, *The Justice and Security Green Paper (24th Report)* (2010-2012, HL Paper 286/HC 1777) Dinah Rose QC, uncorrected transcript of oral evidence (24 January 2012).

[67] *Matthew Williams v Home Secretary* [2002] EWCA Civ 498. Williams, whose only reason for continued detention was his perceived risk to public safety, had his case considered in 'open' and 'closed' hearings during which contradictory views were expressed regarding his level of risk. In such exceptional circumstances the Court ordered full disclosure on the basis that the two appeal bodies concerned may have been working with substantially *different* material.

[68] R *(Alan Lord)*, n 72, [60].

[69] HM Government, *Government Response to the Constitutional Affairs Select Committee's Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates'* (Cm 6596, 2005), 5.

> and the interests of national security, bearing in mind the risk posed to national security by the appellant and the risk to national security which would undoubtedly arise…if the closed material were revealed to the appellant.[70]

But this is not, in itself, an argument for relying upon strict legalism to deny the application of the rule in *AF (No. 3)* to non-Article 6(1) ECHR proceedings.

The application of the *AF (No. 3)* rule to a non-Article 6(1) ECHR context (employment) was given judicial consideration in *Home Office v Tariq*.[71] Tariq sought redress for the withdrawal of his security clearance, which left him unable to work. In the proceedings, Tariq complained that his security clearance was withdrawn on a discriminatory basis. Specifically, he claimed the removal of his clearance occurred in circumstances involving direct or indirect discrimination on grounds of race and/or religion, contrary to the Race Relations Act 1976 and the Employment Equality (Religion or Belief) Regulations 2003.[72] The Home Office contended that there was no such discrimination, and that the decisions taken in relation to Mr Tariq were taken for the purposes of safeguarding national security. The tribunal conducted its proceedings using a CMP.

Eight of their Lordships held that the CMP as applied to the employment tribunal was compatible with Article 6 ECHR rights. Furthermore, the in the context of security vetting (and potentially in similar contexts) Article 6 ECHR did not require the same level of disclosure as *Home Secretary v AF (No. 3)*[73] (described by Lord Brown as 'A-type disclosure').[74] Lord Kerr dissented, arguing that Article 6 ECHR would *always* require the presence of '*A*-type disclosure'.

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[70] ibid, 5-6.

[71] *Home Office (Appellant) v Tariq (Respondent), Home Office (Respondent) v Tariq (Appellant)* [2011] UKSC 35.

[72] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660.

[73] *Home Secretary v AF (No. 3)*, n 51.

[74] *Tariq*, n 79, Lord Brown [86].

The leading speech in *Tariq* was delivered by Lord Mance. The four substantive speeches share two core premises which are very closely related, but merit standalone consideration due to their potential wider implications. The first of these principles is that there is a hierarchy among human rights norms, and indeed, the substantive legal protection of human rights; and this in turn affects procedural protection secured by way of disclosure. The majority appears to be content with the presence of a pyramid of rights, with liberty in narrowly defined terms at the peak in terms of its importance. The second and third rights considered, namely equality and property, were accorded a lesser status than liberty, but are of uncertain status in relation to each other. It is not entirely clear whether this hierarchy affects disclosure in the context of the CMP as it currently stands.

Lord Dyson opined that '[On] any view, discrimination is a less grave invasion of a person's rights than the deprivation of the right to liberty.'[75] In the majority view only the infringement of the physical liberty of the subject, for example by the imposition of a control order or actual detention will attract the protection of the ratio in *Home Secretary v AF (No. 3)*.[76] Lord Kerr's partial dissent illuminates the problems in the majority's creation of a relative hierarchy of rights to restrict the availability of '*A*-type disclosure'. When commenting on the majority's restricted application of the ECtHR decision in *A v United Kingdom* to certain categories of violation, Lord Kerr stated that:

> [the] eligibility criteria for inclusion in this privileged group are not clear. Certainly, the class is not confined to those whose liberty is at stake, as the speeches in *AF (No. 3)* make clear. [If] *A*-type disclosure is required in challenges to freezing orders, does it

[75] ibid, Lord Dyson [160].

[76] *Home Secretary v AF (No. 3)*, n 51.

> extend to property rights more generally? If it does, why should property rights be distinguished from loss of employment cases? After all, loss of livelihood may be just as devastating as having one's assets frozen.[77]

Lord Kerr makes clear that human rights cannot be arranged in order of importance in order to regulate (or restrict) litigants' access to procedural protection. Moreover, the damage done by this hierarchy is immediate. Its creation actually fuels the structural weakening of the protection provided by Article 6 ECHR. The application of the *Kennedy*[78] case to *Tariq* goes to the core of this weakening. In *Kennedy*, the applicant became suspicious that he was under surveillance by the British Security Service (MI5). He alleged before the Investigatory Powers Tribunal (IPT) (discussed in Chapter 2) that the Security Services were intercepting his telecommunications and that this constituted a violation of his Article 8 ECHR rights. Kennedy argued that the proceedings of the IPT should be conducted in a certain way in order to protect, in particular, his Article 6 ECHR rights. His requests included that proceedings must be public and include oral hearings, and that there must be full mutual disclosure between all parties. Ultimately, the ECtHR concluded that whilst Mr Kennedy's complaint did engage Article 6, the nature of the security exercise complained about (covert surveillance) meant that closed hearings and non-disclosure of evidence were in fact permissible practices within the meaning of Article 6 ECHR.

Lord Dyson interpreted the ratio in *Kennedy* to conclude that there is 'a clear line of authority to support the proposition that, *in surveillance and security vetting cases*, an individual is not entitled to full Article 6 ECHR rights if to accord him such rights would jeopardise the efficacy of the surveillance or security vetting regime'.[79] However, Lord Kerr's dissent, which preserves the

[77] *Tariq,* n 79, Lord Kerr [133].

[78] *Kennedy v United Kingdom* [2010] ECHR 682.

[79] *Tariq*, n 79, Lord Dyson [158].

structural integrity of Article 6 ECHR, interprets *Kennedy* in an altogether different manner, casting it as an 'anomaly'[80] in Strasbourg jurisprudence:

> The decision in *Kennedy* ought to have been made on the basis that article 6 was not engaged because the issues that the case raised were simply not justiciable.[81]

The claim that certain areas of national security activity, such as surveillance, are non-justiciable is Janus-faced: whilst Lord Kerr's approach preserves the structural integrity of Article 6 ECHR it suggests that these are problems which ordinary courts simply cannot solve. To return to our analytical framework: despite the inroads made in relation to disclosure, without reform, some vital information may remain unnecessarily inaccessible to claimants. What is clear from the above discussion is that the concept of gisting is a maladapted practice in the context of counterterrorism CMPs. Part of the reason for this is that the approach to gisting in its existing sphere of operation was already fraught with difficulties, and its sphere of operation in the context of the CMP is further limited by unprincipled distinctions. However, it is likely to remain the modus-operandi for disclosure of sensitive information for some time to come. In view of this, it is appropriate to consider means for enhancing its effectiveness, by considering how best to approach disclosure and review of intelligence material.

APPROACHES TO THE CLASSIFICATION AND MANAGEMENT OF INTELLIGENCE INFORMATION

I. ON THE NATURE OF INTELLIGENCE INFORMATION

[80] ibid, Lord Kerr [126].

[81] ibid [128].

Fisher points out that 'one of the central tasks of the UK executive state is now perceived to be the "handling of risk".'[82] This fits particularly well with pre-emptive national security powers and the CMP because intelligence estimates are offered as guides to future attitudes and behaviours.[83] In respect of this, administrative lawyers and judges must recognise the challenges of 'judicially reviewing highly technical decision-making made in circumstances of scientific uncertainty and socio-political conflict'.[84] Nowhere is this truer than in the fields of intelligence and criminal justice, or the quasi-criminal procedures which this thesis is concerned with. Murphy notes that in the post-9/11 era the distinction between intelligence and criminal evidence 'has all but collapsed.'[85] Secret Intelligence is defined by relevant practitioners as:

> Mainly secret activities – targeting, collection, analysis, dissemination and action – intended to enhance security and/or maintain power relative to competitors by forewarning threats and opportunities.[86]

The term 'intelligence' can refer to either the activities of intelligence and security agencies or their final 'product', i.e. the information itself.[87] In the field of counterterrorism decision-makers will

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[82] Elizabeth Fisher, 'The Rise of the Risk Commonwealth and the Challenge for Administrative Law' [2003] Public Law (Autumn) 455, 455 and note 1, Strategy Unit of the Cabinet Office, *Risk: Improving Government's Capability to Handle Risk and Uncertainty, Full Report: A Source Document* (The Stationary Office 2002), 4.

[83] Lawrence Freedman, 'The Politics of Warning: Terrorism and Risk Communication' (2005) 20(3) Intelligence and National Security 379, 384.

[84] Elizabeth Fisher, n 82, 466.

[85] Cian Murphy, n 1, 19.

[86] Peter Gill, 'Intelligence, Threat, Risk and the Challenge of Oversight' (2012) 27 Intelligence and National Security 206, 207.

[87] ibid, 207.

face both technical and informational uncertainty combined with political and public pressure to make effective and accurate decisions which take account of competing considerations. Although these problems are difficult they are not *sui generis*. Epistemological uncertainty permeates many areas of administration and regulation. For example, administrators and judges struggle with similar epistemological uncertainties in counterterrorism cases, and those from the scientific, medical, and environmental world.[88]

Using the language of risk in counterterrorism and national security is not unproblematic, however. Both Phythian and Gill note that in the context of the 'new terrorism' the politicisation of analytical claims to risk is more likely, as evidenced by the (mis)use of intelligence in the lead up to the Iraq War in 2003.[89] Such politicisation may occur in counterterrorism decisions in spite of attempts to 'depoliticise' risk in the sphere of national security.[90] However, it is generally believed that British intelligence estimates are generally given by experts independently of government pressure.[91] Phythian notes that risk arguments can be overplayed by intelligence agencies because 'intelligence is not simply an objective "eye" seeing and describing reality but one which, for a range of reasons, may introduce distortions with the consequence that intelligence, "participates in the creation and reproduction of…political reality".'[92] This is precisely why strengthening the parallels between the activities of intelligence agencies and other experts working with incomplete information in the context of the public good would help counterbalance the risk of inevitable

[88] Walter Laquer, 'The Question of Judgment: Intelligence and Medicine' (1983) 18 The Journal of Contemporary History 533 and Stephen Marrin and Jonathan D. Clemente, 'Improving Intelligence Analysis by Looking to the Medical Profession' (2005) 18(4) Journal of Intelligence and Counter-Intelligence 707, 708.

[89] Peter Gill, n 86, 208; Mark Phythian, 'Policing Uncertainty: Intelligence, Security and Risk' (2012) 27(2) Intelligence and National Security 187, 190.

[90] Jonas Hagman and Myriam Cavelty, 'National Risk Registers: Security Scientism and the Propagation of Permanent Insecurity' (2012) 43(1) Security Dialogue 79-96.

[91] Lawrence Freedman, n 14, 387 note 16.

[92] Mark Phythian, n 89, 191.

'groupthink' that history has shown to flourish when such agencies are left unchecked.[93] United States' judge Patricia Wald, writing in the context of the reaction to the failure of US intelligence agencies over the presence of Weapons of Mass Destruction in Iraq, cautions that 'even without any overt outside pressure on analysts they can be affected by a climate of conformity and disapproval of superiors if they deviate from accepted views.'[94] These concerns illustrate the importance of finding a method for dealing with secret intelligence which is knowledge based and rational, as opposed to being driven by intuition or political desires.

II. MOSAIC THEORY

The 'mosaic theory' of intelligence is a foundational concept in intelligence gathering which states that '[d]isparate items of information, though individually of limited or no utility, can take on added significance when combined with other items of information.'[95] It is a system of informational analysis for both those involved in intelligence gathering, and for judges in judicial review. When deciding whether to disclose a document it is the 'mosaic, not the document, [which] becomes the appropriate unit of risk assessment.'[96] In other words, executive claims based upon the mosaic theory present a serious threat to any meaningful judicial analysis of cause-and-effect in any given case.

[93] Patricia Wald, 'Analysts and Policymakers: A Confusion of Roles?' (2006) 17 Stanford Law & Policy Review 241, 250.

[94] ibid, 262.

[95] David E. Pozen, 'The Mosaic Theory, National Security, and the Freedom of Information Act' (2005) 115(3) The Yale Law Journal 628, 628.

[96] ibid, 633.

Mosaic theory is judicially recognised as a reason for deference in the context of judicial review before US Courts.[97] In the US context, Pozen argues that mosaic theory poses difficulties for courts hearing national security cases: 'New terrorists and new technologies have increased the risks from mosaic-making in recent years, and the trauma of 9/11 has increased the salience of such risks.'[98] The relevance of mosaic theory in the context of CMPs was acknowledged in *W (Algeria)*, insofar as "closed" national security evidence might form 'part of a jigsaw or mosaic…whereby such risks come to be recognised.'[99] Additionally, Megarry J commented obiter in *AF* that closed evidence was 'comprised of a mosaic of information drawn in various combinations, depending on the particular case, from a variety of sources such as (1) intercept evidence, (2) covert surveillance evidence and (3) agent reporting.'[100] So, the mosaic theory holds that the revelation of one seemingly innocuous piece of information in open court might allow someone to situate that information in a larger piece of a much more sensitive puzzle or 'mosaic', and in turn, to deduce the content of highly sensitive information. In other words, judicial review which affords meaningful transparency and participation to an affected person *is a risk in and of itself*.[101] Arguably, this fact in itself is justification for restricted judicial review of intelligence risk assessments in closed proceedings, let alone disclosure in open proceedings.

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[97] Christina E. Wells, 'CIA v Sims: Mosaic Theory and Government Attitude' (2006) 58(4) Administrative Law Review 845, 845: 'mosaic theory too often is a crude tool that results in excessive secrecy by demanding extreme deference from judges when national security is involved'.

[98] David E. Pozen, n 95, 632.

[99] *W (Algeria) v Home Secretary* [2012] UKSC 8, [2012] 2 All ER 699, Lord Brown [11]. The 'mosaic theory' was also relied upon to successfully resist disclosure relating to the subject matter of an arms contract in *Ms X and the Department of Enterprise, Trade & Employment* [2002] IEIC 17.

[100] *Home Secretary v AF* [2008] EWCA Civ 1148 [24].

[101] Amnesty international raise concerns that during the CMP the 'government can rely on a range of intelligence material that would not always be accepted in other civil and criminal proceedings in the UK…Special Advocates have stated that the primary source for this type of remote intelligence material is often "unattributed and unidentifiable and invariably unavailable" (113) As a result their ability to challenge the reliability of such information can be limited.' Amnesty International, 'Left in the Dark: The Use of Secret Evidence in the United Kingdom' (Amnesty International Publications 2012), 30-31.

In respect of CMPs, there is no clear way of gauging the relevance of the mosaic theory. This is the case for two reasons: first; closed judgments (where attempts to secure further disclosure often take place) may make reference to the mosaic theory, but these proceedings are not publicly reported. Secondly, the present rules on disclosure do not actually mandate the disclosure of actual information (such as witness statements, or intercept evidence). Instead, disclosure of information usually occurs by way of summaries (gists). The refusal of *AF (No. 3)* compliant disclosure in AE's case (our example, above) also suggests the mosaic theory may be relevant to the operation of the CMP. If we apply the theory to the allegations about AE, for example, allegation (a) 'AE has expressed extreme views' we might conclude (applying mosaic theory logic) that revealing the source(s) of that allegation would allow AE to backwards-induct from the source of this information some other piece(s) of information that ultimately damages national security.

However, there are several reasons why applying the mosaic theory to disclosure in the context of judicial review threatens optimal procedural fairness. It might be, as Pozen suggests, that every national security case is to a greater or lesser degree a 'mosaic case'.[102] If that is so, then, restricting information disclosure only to 'gists' or summaries might be seen to provide a reasonable working solution to the management of risk. But asserting the mere presence of a 'mosaic' cannot be a sufficient justification in and of itself for restricting disclosure. In the US context Cole argues that the ' "mosaic" argument essentially claims that…judges should presume danger even where the government offers only "innocuous" information about an individual,…the "mosaic" theory could justify the detention of virtually anyone.'[103] Therefore, claims in closed proceedings that a piece of information or evidence 'X' is part of mosaic 'Y' and cannot be disclosed for this reason may be consistently over-relied upon by the executive, leaving judges with

[102] David E. Pozen, n 95, 671.

[103] David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (The New Press 2003), 21-22.

little means of assessing the value of such a claim. In real terms, there is a conceptual parallel with this issue and the Special Advocates' criticisms in relation to the operation of disclosure of sensitive information. Special Advocates have pointed to the fact that there is an 'endemic' problem with late disclosure which reduces the effectiveness of the Special Advocates to successfully challenge material. Even after the decision in *AF (No. 3)* the Special Advocates took the view that the court almost always upheld government objections to disclosure, and that the Security Service operated "'an extraordinarily precautionary approach to what needs to be kept private in the interests of national security". In one case a Security Service witness apparently agreed that the Service was "institutionally cautious.'"[104] Therefore, the mosaic theory is unlikely to take us further in any given evaluation of procedural fairness. There will always be some need for secrecy in counterterrorism and national security proceedings, but the debate about ensuring fairness cannot be advanced if we endorse a framework that allows the Executive to consistently over-claim the need for secrecy. If disclosure is to become meaningful enough to ensure that a reasonable balance between 'natural justice', 'open justice', and the reasonable management of the risks created by trying to satisfy these ideals, then a more nuanced analytical framework is required for the evaluation of the risks posed by the disclosure of secret information.

III. DEEP AND SHALLOW SECRETS: A FRAMEWORK FOR FAIRER DISCLOSURE

A more helpful framework is put forward by Pozen, who develops Scheppele's[105] distinction between 'deep secrets' and 'shallow secrets' by extending it from the realm of private and commercial law into the realm of state secrecy.[106] If this conceptual framework were to be applied

[104] Oral Evidence of Helen Mountfield QC in Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2010 (16th report),* (2009-2010, HL 64/HC 395) [60]-[65].

[105] Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law,* (University of Chicago Press 1988), Chapter 2, n 20.

[106] David Pozen, 'Deep Secrecy' (2010) 62 Stanford Law Review 257.

by judges and the executive it might help determine what can be disclosed in "open" sessions under the CMP to make the practice of gisting more rigorous. In contrast to mosaic theory, this is not a working theory of intelligence management or a tool of judicial review, but an analytical framework drawn from academic literature. Pozen defines a Secret as Deep when 'a small group of similarly situated officials conceals its existence from the public and from other officials.' So, prior to the revelations by Edward Snowden, the existence and operation of the PRISM meta-data surveillance program would undoubtedly have been a Deep Secret.[107] Pozen's own example of a 'deep secret' is a plot by a small number of Central Intelligence Agency officials to assassinate a head of state in a third country.[108] By contrast, a Shallow Secret exists when 'ordinary citizens understand they are being denied relevant information and have some ability to estimate its content.'[109] So, to return to the AE example, above: the December Disclosure might indicate the presence of Shallow Secrets because AE may be able to estimate their source (such as surveillance, or informers at the mosque where he allegedly preached extremist views).

Scheppele's recognition that legitimate secrecy pervades many areas of any given legal system contributed to the analytical framework in Chapter 2. In fact the post-9/11 phenomenon of 'public secrecy' has been considered (in cultural terms) as part of 'The New Normal'. This is a state of 'managed insecurity.'[110] The value of Scheppele's distinction in this context is that it may develop a workable way to 'reduce the depth of state secrets without spilling their contents to the wider world.'[111] According to both Scheppele and Pozen these Deep Secrets are normatively

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[107] Stephen I. Vladeck, 'Big Data Before and After Snowden' (2014) 7 Journal of National Security Law and Policy 333; James Ball, 'Leaked Memos Reveal GCHQ Efforts to Keep Mass Surveillance Secret' *The Guardian* (London, 25 October 2013) <http://www.theguardian.com/uk-news/2013/oct/25/leaked-memos-gchq-mass-surveillance-secret-snowden> accessed 01 July 2014.

[108] David Pozen, n 106, 268.

[109] ibid, 274.

[110] Jack Bratich, 'Public Secrecy and Imminent Security: A Strategic Analysis' (2006) 4-5 Cultural Studies 493, 507.

[111] David Pozen, n 106, 262.

undesirable because they: 'block out all sunlight from the decisional process beyond the small-circle of secret-keepers…In addition to corruption and abuse, ideological amplification, bias, and groupthink will be more likely to flourish.'[112] But of course it will always be possible that some 'deep secrets' are entirely legitimate, such as the presence of under-cover agents in terrorist cells, for example.

Pozen also rightly acknowledges that the Deep/Shallow distinction is a spectrum: 'any particular secret may be located on a continuum running from maximally opaque to maximally intelligible.'[113] Pozen argues judicial control can only be part of the picture in any given state secrecy framework:

> …judicial review is bound to be a limited tool for addressing secrets that lurk in the shadows and are perceived only hazily, if at all, by the parties who seek them. Depth must be minimised at an earlier stage in the policy process.[114]

There will always be the possibility that 'deep secrets' will remain even after the most searching judicial review. After all, the executive ultimately selects which information to rely upon in CMPs. This is a prior decision (before information is classified as "open" or "closed"). So, there is no doubt that the executive could retain an "upper hand" in litigation by carefully selecting which information is put forward in support of any given decision. This is, in effect why, theorising the *procedural* aspects of the CMP can only take us so far in the search for optimal fairness and correctness in decision-making. We must look inside administration to form a holistic account of what procedural fairness demands.

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[112] David Pozen, n 106, 280.

[113] ibid, 266.

[114] ibid, 325.

Neither should it be assumed that the division between the 'mosaic theory' and Pozen's account of 'deep and shallow secrets' is entirely binary. Returning to the example of AE we can consider a number of hypothetical possibilities into the December Disclosure using the Deep/Shallow model. It may be that all of the information is underpinned by shallow secrets, on the basis that AE may have been able to reasonably infer the source of the allegations. However, the refusal of further disclosure suggests that the Security and Secret Intelligence services, in collaboration with the Home Secretary considered that the cost of further disclosure in compliance with Article 6 ECHR posed a greater risk to national security than releasing AE from his obligations. Whilst it is impossible to know the reason why this is so, there are a number of possibilities that can reasonably be suggested. First, the additional information may have been part of a mosaic of information which would have damaged national security had it been revealed. A second option is that further disclosure would have exposed a legitimately Deep secret, such as the identity of an undercover agent, or a covert surveillance system. A third option is that further disclosure might have engaged with some *combination* of mosaic theory and deep secrecy. So it is a potentially legitimate criticism of Pozen's classification of secrecy that it does not acknowledge the need for deep secrecy, nor does it acknowledge its potential overlap with legitimate mosaic claims.

Nonetheless, an effectively organised executive process for risk-assessment and management, coupled with a functioning CMP with a rational approach to disclosure might be a practical demonstration of a functioning approach to necessary and justifiable shallow secrecy. Pozen also highlights that the depth of secrets can be reduced through *intra-institutional challenge* as an alternative to direct public disclosure.[115] In the context of the CORG, discussed above, intra-institutional challenge (or people playing 'devil's advocate') appears to be flourishing at these group meetings.[116] And based upon the competing 'parallel lines' of executive risk management regarding

[115] David Pozen, n 106, 324.

[116] David Anderson QC, n 24.

suspects and parolees, we can make some inferences about the likelihood of deep secrecy being prevented, and fairness being achieved through a balance of preserving legitimate shallow secrecy and guaranteeing sufficient procedural fairness. Therefore, this thesis does not claim that delineating between deep and shallow secrets is a panacea to all the ills present in the operation of the CMP. Instead, the theory will be used to demonstrate throughout Part II that procedural fairness is greatest where secrecy is shallowest.

CONCLUSION

Throughout this thesis it will be maintained that in any judicial review of a system of risk management the courts must be willing to demand that steps taken by the executive against individuals or entities (whether as over-arching or specific measures) are capable of principled justification. In real terms this means developing a better and more concrete understanding of where decision making about the sanctions stands in relation to parallel areas of administration, and where judicial control stands in relation to the rest of administrative law. The parallels drawn between areas of administration and legal practice outside of the subject matter of this thesis are not intended to be uncritical endorsements. Instead, they are merely intended to demonstrate that national security does not exist as an island set adrift from other areas of law and policy. With the possibility of the parallels clearly demonstrated the way is paved for a critical discussion about recommendations to be undertaken in the overall Conclusion. The concluding recommendations consider the insights from this Chapter in more depth so as to facilitate an informed discussion of possible steps towards a whollistic improvement of procedural fairness in the CMP.

Part II

CHAPTER FOUR:

THE SPECIAL IMMIGRATION APPEALS COMMISSION

INTRODUCTION

As discussed in Chapter 2, the CMP was created in response to the decision in *Chahal v United Kingdom*.[1] In the course of its judgment the ECtHR endorsed a description of the Canadian national security immigration review procedure described in an *amicus curaie* brief submitted by Amnesty International.[2] In *Chahal* the Canadian procedure was described only briefly by the Court:

> Under the Canadian Immigration Act …a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him. [T]he confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.

[1] *Chahal v United Kingdom* [1996] ECHR 54.

[2] ibid [144].

Somewhat ironically, however, the Court did not grasp the full intricacies of the Canadian procedure. The ECtHR did not take account of the prohibition on the Special Advocate from communicating with the claimant (save with judicial discretion), nor its potentially detrimental effects on fairness to litigants.[3]

Unlike the rest of the powers examined herein, SIAC predates 9/11 and the beginning of the 'War on Terror'. From early on in the SIAC's existence there has been fervent criticism of the use of immigration measures to tackle counterterrorism and national security problems.[4] The first appeal against deportation concerned Shafiq Ur Rehman, a Muslim cleric from Oldham.[5] One of SIAC's tasks was to hear appeals relating to executive orders certifying suspects for 'indefinite detention without trial'. Such certifications applied to foreign nationals suspected of terrorism pursuant to section 21 of the Anti-Terrorism Crime and Security Act 2001.[6] That jurisdiction was subsequently altered by the Prevention of Terrorism Act 2005 which replaced indefinite detention with the system of control orders. Currently, SIAC hears appeals against the deportation of foreign nationals, and of British nationals that the Home Secretary wishes to deprive of citizenship. Of all the powers examined herein the subject matter of SIAC is perhaps the most important, simply because the consequences of its rulings for non-government litigants rank among the most severe. Yet, the procedural protections and disclosure requirements are among the weakest considered in this thesis. Although the challenges to SIAC's procedures have generated important decisions which to some extent redress the balance between the executive and the litigant (such as the prohibition against reliance upon evidence solicited via torture[7], and the limited permission of

[3] Immigration and Refugee Protection Act 1976, s 85(4)(ii).

[4] According to Lord Bingham 'the central complaint made by the appellants: that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem…The conclusion that the Order and section 23 are, in Convention terms, disproportionate is in my opinion irresistible.' *A v Home Secretary (No. 1)* "Belmarsh" [2004] UKHL 56 [43].

[5] *Secretary of State for the Home Department v Shafiq Ur Rehman* [2000] EWCA Civ 168.

[6] *A v Home Secretary (No. 1) "Belmarsh"* and *H v Secretary of State for the Home Department* SC/12/2002 (2 July 2004).

[7] *A v Home Secretary (No. 2) "Torture Evidence"* [2005] UKHL 71.

'reversed closed evidence'[8]) such innovations are insufficient to redress the central imbalances in SIAC's procedure. The procedural shortcomings can be explained (but not necessarily justified) by the fact that the exclusion of foreign 'aliens', as opposed to 'citizens' is a recognised prerogative of states.[9]

This chapter explains the jurisdiction of SIAC and the appeal processes it operates. It then considers how the over-arching relationship between risk and review of executive discretion is framed by the SIAC. Analysis then highlights the anomalies in procedural fairness which occur throughout the different subject matters engaged by the European Convention, such as bail hearings, and hearings which engage European Union Law. Discussion then focusses upon procedural fairness in the context of deprivation of citizenship and deportation where there is an issue of safety on return.

JURISDICTION AND SUBJECT MATTER

I. THE NATURE OF THE SIAC

Unlike other first-instance tribunals operating the CMP (i.e. the Administrative Court), SIAC is staffed by intelligence professionals as well as judges. One such intelligence professional, retired diplomat Brian Barder, outlined the role of this third 'lay' member of the tribunal:

> [He] is there to advise his judicial colleagues on how much weight should be given to the various kinds of secret information submitted in evidence: how to allow for the possibility that

[8] *W (Algeria) v Home Secretary* [2012] UKSC 8.

[9] Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 International Journal of Constitutional Law 9, Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (OUP 2012).

> intercepted communications may have been deliberately planted, that informers may have embellished their reports in order to please their paymasters, or that raw intelligence may have been misunderstood and misinterpreted by the agent providing it or by the intelligence and security officers who receive and process it. This is an area of which few serving judges have much, if any, direct knowledge. [My] experience suggests that the lay member's views on legal questions, though diffidently expressed, can also sometimes be helpful. It is fair to ask, however, whether intelligence experts ought to be full members of the commission, rather than act as advisers to a panel of three fully-fledged judges.[10]

Given that there have been (as yet unimplemented) Home Office proposals to provide training to first-instance judges on relevant intelligence analysis techniques, this further suggests that there may be something to be gained from the presence of an individual with such training where a CMP is conducted.[11] The Constitutional Affairs Committee reported that the effectiveness of Special Advocates may also be enhanced if 'intelligence service personnel could be provided in support of Special Advocates in the handling of closed material, and whether Special Advocates could be enabled to appoint and call evidence from appropriately cleared experts.'[12] By 2009 this proposal had been implemented for Special Advocates, however Chamberlain (an experienced Special Advocate) remained of the view that this was not enough to surmount the 'systemic problems—

[10] Brian Barder, 'On SIAC' (2004) 26(6) *London Review of Books* 40-41.

[11] HM Government, *Justice and Security: Green Paper* (Cm 8194, 2011), Appendix F.

[12] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates: Volume I (7th Report)* (2004-2005, HC 323-I) [97].

the inability to call evidence, the lack of effective means to challenge the Government's disclosure objections and the inability to take instructions on the closed case'.[13]

Moreover, the determinations issued by the SIAC are of a different style from those issued by an ordinary court. According to the 1997 Act, the Lord Chancellor was empowered to make procedural rules which would '[enable] proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal'.[14] This manifests itself in a number of different ways. For example, the 'open' judgments issued by the SIAC can be as brief as three or four pages.[15] Moreover, in rulings the standard of reason-giving is extremely variable: decisions can turn upon obfuscatory phrases such as '[a]lthough some of the new material which the Secretary of State relied on for that comment, was dealt with in closed and was not supported before us by the evidence…it is clear that the assessments which underlay the principal and first review judgments remain sound'.[16] However, some judgments do display more detailed considerations and summaries of open and closed evidence reminiscent of the Administrative Court.

II. THE JURISDICTION OF THE SIAC

The SIAC has jurisdiction to hear appeals related to immigration and which would be dealt with in mainstream courts or tribunals, 'but for' the existence of a national security or other public interest element relied upon by the Secretary of State.[17] To move an appeal into the jurisdiction

[13] Martin Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 (3) *Civil Justice Quarterly* 314-326, 323.

[14] Special Immigration Appeals Commission Act 1997, s 5(3)(a).

[15] E.g.: *A v Home Secretary* (Certification Appeal) SC/1/2002 (28 February 2005), *MK and Home Secretary* (Bail) SC/29/2004 (24 May 2005), *M and Home Secretary* (Appeal Allowed) SC/17/2002 (8 March 2004).

[16] *A v Home Secretary* (Certification Appeal), ibid, [7].

[17] Special Immigration Appeals Commission Act 1997, s 2(1)(a).

of SIAC the Home Secretary must issue a certificate stating that his decision is underpinned by national security or public interest concerns. Pursuant to section 15 of the Justice and Security Act 2013 the Secretary of State can sign a certificate which has the effect of transferring judicial review of proceedings to deprive a claimant of citizenship to the jurisdiction of the SIAC.[18] Section 62(4)(a) of the Immigration and Asylum Act 1999 limits the rights of persons to appeal to the Asylum and Immigration Tribunal where 'the Secretary of State has certified that the appellant's departure from the United Kingdom would be conducive to the public good as being in the interests of national security, the relations between the United Kingdom and any other country or for other reasons of a political nature'. Section 70(1)(a) also limits appeals under the 1999 Act to the jurisdiction of SIAC where the Secretary of State has issued a certificated to the effect that 'the appellant not to be given entry to the United Kingdom on the ground that his exclusion is in the interests of national security'.

SIAC also has jurisdiction over appeal proceedings against Certification under section 55 of the Immigration, Asylum and Nationality Act 2006. Pursuant to section 55 the Secretary of State can issue a certificate depriving an appellant of the protection of Article 33(1) of the Refugee Convention on the grounds of national security. If the Secretary of State exercises her power under section 97 of the Nationality, Immigration, and Asylum Act 2002 to deport an individual wholly or partly in 'the interests of national security' or 'in the interests of the relationship between the United Kingdom and another country' then an appeal is available to the SIAC. SIAC also has jurisdiction over certain immigration claims arising under EU law. Appeals against decisions to remove persons 'in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature' made pursuant to the Immigration (European Economic Area) Regulations 2000 section 32(2)(1) can be heard before SIAC if there is a national security or other public interest dimension.[19]

[18] *L1 v Home Secretary* [2013] EWCA Civ 906 [25].

[19] SI 2012/1547.

Section 17(2)(a) of the UK Borders Act 2007 also permits a failed asylum seeker to bring an appeal before SIAC where the Secretary of State has certified the decision to deport was based wholly or partly on national security or other public interest grounds. SIAC also has jurisdiction over bail hearings regarding persons detained under the Immigration Act 1971 where the Secretary of State has certified that an individual's detention is necessary in the interests of national security[20], where an individual is detained following a decision to refuse leave to remain on grounds of national security[21] or where an individual is detained 'following a decision to make a deportation order against him on the ground that his deportation is in the interests of national security.'[22] Following an amendment to the British Nationality Act 1981 section 40(2) made by way of section 4 of the Nationality, Immigration and Asylum Act 2002 SIAC also hears appeals against 'denaturalisation' or deprivation of citizenship. Section 40A(2) of the 2002 Act allows for the issuing of a national security certificate by the Home Secretary to shift appeal proceedings against deprivation of citizenship into the jurisdiction of the SIAC.[23] Following the enactment of the Immigration Act 2014 section 18, there is an appeal from a decision of the SIAC regarding a security certification made under section 97 or 97A of the Nationality, Immigration and Asylum Act 2002. This type of appeal must be determined using 'the principles which would be applied in judicial review proceedings.'[24] The JCHR raised 'serious concerns' about the effect the transfer of such proceedings would have on the right to effective access to a court, because review is a much less intrusive form of scrutiny than appeal.[25]

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[20] Special Immigration Appeals Commission Act 1997, s 3(2)(a).

[21] ibid, s 3(2)(b).

[22] ibid, s 3(2)(c).

[23] ibid, s 2B.

[24] Immigration Act 2014, s 2E(3).

[25] Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill (2nd Report)*, (2013-2014, HL 142/HC 1120), 5.

The SIAC is classed as a 'superior court of record' which means that it can make final, authoritative findings of fact, which are not subject to appeal in a higher court, and can only be subject to judicial review on the grounds that such findings are 'perverse' in administrative law terms.[26] Following *Cart* judicial review of legal rulings of the SIAC can also be brought if they are thought to raise 'an important point of principle or practice' or that there was 'some other compelling reason' that the case should be heard.[27] Section 7 of the Special Immigration Appeals Commission Act 1997 deals with appeals against decisions made by the Commission. Appeal to an 'appropriate appeal court', i.e. the Court of Appeal in England and Wales, the Court of Appeal in Northern Ireland, or the Court of Session in Scotland can be made regarding 'any question of law material to that determination'.[28]

Individuals may appeal against adverse decisions involving national security on the grounds that the Secretary of State, immigration officers, or other persons responsible for entry or clearance have acted incompatibly with the Race Relations Act 1976 or the Human Rights Act 1998.[29] Bail hearings regarding persons detained under the Immigration Act 1971 on national security grounds also take place before SIAC.[30] Appeals before SIAC must be allowed if the Tribunal considers that the 'action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case'[31] or if it considers that the Secretary of State or an officer should have exercised their discretion differently when making a decision or undertaking an act.[32]

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[26] *Cart v Upper Tribunal* [2011] UKSC 28.

[27] ibid, Lord Dyson [131] and Sarah Craig, 'Judicial Review: How much is too much?' (2012) 16 Edinburgh Law Review 210, 217.

[28] Special Immigration and Appeals Commission Act 1997, s 7(1).

[29] ibid, s2A and s 2B.

[30] ibid, s 3(2)(a)-(c).

[31] ibid, s 4(1)(a)(i).

[32] ibid, s 4(1)(a)(ii).

THE LIMITATIONS OF PROCEDURAL JUSTICE

SIAC procedural protections are among the weakest assessed in this thesis. The substantive review it conducts is of a 'lighter touch' than in other areas discussed in subsequent Chapters. The four subsections which follow address the reasons for (and consequences of) lower procedural protection. The subsequent section regarding 'deprivation of citizenship' unpacks how the SIAC's procedural weaknesses are compounded by broad discretionary powers and a generally low threshold of substantive review.

I. NON-APPLICATION OF ARTICLE 6 ECHR AND COMMON LAW PROCEDURAL FAIRNESS

Unlike other statutes making use of the CMP, the proceedings under the SIAC Act 1997 are generally not concerned with making determinations which engage appellants' civil rights or obligations (one of the triggers for Article 6(1) ECHR protection). The primary subject matter SIAC deals with is removal of aliens and the power to exclude persons from the territory of a sovereign state. Both of these have been regarded *par excellence* by the ECtHR as powers that are not subject to the protection of Article 6(1) ECHR due to their distinctly public law character.[33] In *Ferrazzini v Italy*[34] the ECtHR demarcated the key differences between public law matters and those matters which, by contrast, engaged civil rights and obligations. The court acknowledged that the Convention was a 'living instrument' and that the nature of relations between the individual and the state had developed significantly since its inception. However, a 'hard core of public-authority prerogatives'[35], of which immigration proceedings and fiscal disputes remained firmly part, continued to exist.

[33] *Maaouia v France* (2001) 33 EHRR 1037.

[34] *Ferrazzini v Italy* (2002) 34 EHRR 45.

[35] ibid, [29].

Furthermore, the England and Wales Court of Appeal upheld parliament's intention to exclude SIAC appellants from the protections of procedural fairness (and, in turn, enhanced disclosure) at common law.[36] In *W (Algeria)* Sir David Keene stated that:

> Both in passing the 1997 Act and in approving the SIAC Procedure Rules, Parliament has clearly confronted the fact that the right to a fair trial was being curtailed by the powers and procedures being approved. [I] accept that there will be instances where there is obvious unfairness to an appellant, but it is an unfairness which Parliament has patently intended and authorised.[37]

The exclusion of both Article 6(1) ECHR and common law 'fair trial' rights from the proceedings leaves a vacuum in available protection. Despite this, the Court of Appeal ruled in what Chamberlain describes as a 'tersely reasoned passage'[38] that the use of the CMP and Special Advocates before SIAC was 'as fair as could reasonably be achieved'.[39]

Therefore, as a result of the non-application of Article 6(1) EHCR, the rules of procedural fairness regarding disclosure in the SIAC represent a striking anomaly. This is because of the ECtHR decision in *A v United Kingdom*[40] and its subsequent (albeit reluctant) endorsement by the House of Lords in *Home Secretary v AF (No. 3)*.[41] In *AF (No.3)* the House of Lords unanimously adopted the ruling of the ECtHR that where Article 6(1) ECHR was engaged, the affected person

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[36] *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898.

[37] ibid [52].

[38] Martin Chamberlain, n 13, 315.

[39] *A v Secretary of State for the Home Department* [2004] 1 Q.B. 335, Lord Woolf C.J. [57].

[40] *A and Others v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29.

[41] *Home Secretary v AF (No. 3)* [2009] UKHL 28.

was entitled to a 'core irreducible minimum' of information sufficient to enable him to meet the allegations against him. At paragraph [113] in *AF (No. 3)* Lord Brown made clear that there is:

> all the difference in the world between both these regimes and the appeal jurisdiction exercised by SIAC under the SIAC Act 1997 such as was recently considered by the House in *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2009] 2 WLR 512. Those cases concerned the expulsion of undesirable aliens and the House roundly rejected the attack there on the use of closed material. As was pointed out, the process in those cases was beyond the reach of article 6.[42]

In the context of SIAC subject-matter 'the domestic authorities, and courts, are entitled to reach [a] conclusion without telling the deportee anything about their grounds for doing so.'[43] Rule 10A of the tribunal's procedural rules places the Secretary of State under an obligation to disclose 'exculpatory material' to the appellant. If the Secretary of State refuses to disclose material on national security grounds the Special Advocate is empowered under Rule 38(6) to challenge the decision to place information into the 'closed' body of evidence. It is then the duty of the SIAC to examine the information and determine its rightful status. According to Rule 38(7) SIAC is under a duty to 'uphold the Secretary of State's objection under rule 37 where it considers that the disclosure of the material would be contrary to the public interest.' Chamberlain is of the view that:

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[42] ibid [113]. See also Martin Chamberlain, 'Update on Procedural Fairness in Closed Proceedings' (2009) 28(4) *Civil Justice Quarterly* 448-453, 453.

[43] Martin Chamberlain, ibid, 453.

> when the objection is maintained by the Government in these circumstances, it is almost always upheld by the court. That is not because the courts neglect their function of scrutinising the objection with "great care" (as Baroness Hale has urged). It is simply because, without access to any independent expert evidence, they have no means of gainsaying the Government's assessment that disclosure could cause harm to the public interest. *The result is that, unless the Special Advocate can point to an open source for the information in question, Government assessments about what can and what cannot be disclosed are effectively unchallengeable.*[44]

Although the majority of evidence before the SIAC is already heard in open session[45], and the SIAC has ordered further disclosure of material information in the past[46] SIAC process remains insufficiently equipped to effectively balance the competing high-stakes risks to the rights of appellants against the risk to national security present in certain cases.

II. THE CONTEXT OF REVIEW AND RISK IN THE SIAC

[44] ibid, 320, emphasis added.

[45] 'In the *Rehman* case, as in most subsequent SIAC cases, most of the evidence was heard in open sessions…Of the evidence categorised by the Home Office as unsafe to be disclosed to the appellant and therefore needing to be treated as "closed evidence", some was held by SIAC not to require protection: some was referred back to the Home Office for "redaction…some of it SIAC decided could be disclosed to the appellant but heard in private session without the presence of the public or the press.' Brian Barder, 'Written Evidence to the Constitutional Affairs Committee' in House of Commons Constitutional Affairs Committee, n 12, Ev 71 [5].

[46] *Y v Home Secretary* (Passages from Y closed judgment made open) SC/12/2005 (14 November 2006).

The *Rehman* case sets out the intensity of review conducted by SIAC.[47] This decision, considered to be 'the worst of any senior British court since the second world war',[48] had a substantial effect on the way in which SIAC reviews decisions of the Home Secretary. The Court ruled that:

> in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether *on a global approach* that individual is a danger to national security, taking into account the Executive's policy with regard to national security. When this is done, *the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion.* [49]

The effect of such a ruling, which remains good law, is that the executive need not demonstrate a connection between the actions of an individual appellant and the necessity of his or her deportation or deprivation of citizenship. This is problematic in terms of Pozen's taxonomy of Deep and Shallow secrets because it may affect the extent to which meaningful disclosure is made

[47] *Secretary of State for the Home Department v Shafiq Ur Rehman* [2000] EWCA Civ 168.

[48] Brian Barder, recounting statement of anonymous academic lawyer in his evidence to the Select Committee on Constitutional Affairs. House of Commons Constitutional Affairs Committee, n 12, HC 323-II, Ev 73, [12].

[49] *Shafiq Ur Rehman*, n 47, [44], emphasis added.

to the appellant. It terms of the line of argument advanced in this thesis – CMPs are at their fairest when courts demand the demonstration of a rational connection between the exercise of executive power and the evidence relied upon (i.e. a justifiable assessment of risk) – the SIAC appears to be in the worst possible position. A similar statutory provision removing the need for a rational connection between the risk posed and the action taken was also a feature of the Prevention of Terrorism Act 2005[50], discussed in Chapter 5. Therefore, the Secretary of State does not so much have to justify second order risks before the SIAC, as to present an amorphous risk-assessment to which the SIAC defers.

The *Rehman* case eventually proceeded to the House of Lords[51], where another aspect of the decision became an important dimension of how the appeals process would operate. The initial decision of the SIAC had reversed the Home Secretary's decision to consider Rehman's activities outside of the UK where were ostensibly not directed towards harming domestic British interests or citizens, nor were they a threat to 'national security' as the term was then legally understood. The Court of Appeal had reversed SIAC's decision on the meaning of 'national security' by stating that: 'The Government is perfectly entitled to treat any undermining of its policy to protect this country from international terrorism as being contrary to the security interests of this country.'[52] The House of Lords unanimously affirmed this ruling, effectively changing the ordinary meaning of 'national security' to encompass 'international security'. Lord Slynn held that:

> in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another

[50] Prevention of Terrorism Act 2005, s 2(9).

[51] *Home Secretary v Rehman* [2001] UKHL 47.

[52] *Shafiq Ur Rehman*, n 47, [40].

> state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. [To] require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected.[53]

In a later appeal the SIAC was cognisant that 'what can be regarded as affecting national security can vary according to the danger being considered.'[54] By removing the requirement upon the Executive to demonstrate with even *reasonable suspicion* that a deportee is a *direct* risk to the national security of the United Kingdom in this manner effectively means that the SIAC is unlikely to be able to conduct an effective and searching review of most decisions. Moreover, the standard of proof and the nature of evidence available to the SIAC differs substantially from ordinary civil proceedings. Whilst ordinary civil proceedings require that facts are proved 'on the balance of probabilities', in a case before the SIAC the Secretary of State must demonstrate that he had a 'reasonable suspicion or belief' that an appellants presence is not conducive to the public good for reasons of national security.[55] The most concrete guidance on the difference between 'reasonable suspicion' and 'reasonable belief' is found in the speech of Baroness Hale in *Belmarsh*:

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[53] *Rehman*, n 51, Lord Slynn [16]. On tthe treatment of national security under the ECHR see Iain Cameron, *National Security and the European Convention on Human Rights* (Iustus Publishing 2000), 39-58. Cameron highlights at 43 that: 'there is, in fact, more than one national security concept.'

[54] *Y1 v Home Secretary* (Deprivation of Citizenship – Substantive) SC/112/2011 (13 November 2013) [39].

[55] *Ajouaou, A, B, C and D v Home Secretary* SC/10/2002 (29 October 2003) [39].

> SIAC does not decide whether the detainee actually is an international terrorist as defined in the Act, merely whether the Home Secretary reasonably suspects that he is. Suspicion is an even lower hurdle than belief: belief involves thinking that something *is* true; suspicion involves thinking that something *may be* true.[56]

Unlike an ordinary civil or criminal court, the SIAC can make use of intercept evidence. The status of intercept evidence is such that 'the circumstances in which it will be disclosed are pretty slim, frankly, and there are sound reasons, at least arguably, why that is so.'[57] Although the SIAC can admit a wider range of evidence than a regular civil court, it remains subject to restrictions. It is not allowed to consider evidence put forward by the Executive that SIAC reasonably suspects has been acquired via treatment contrary to Article 3 ECHR, even if that treatment occurred in a third country.[58] In the second decision of the House of Lords relating to the Belmarsh detainees the House held that the inclusion of evidence obtained through third party torture in respect of the decision to certify and detain an individual went to the legality of the detention. Therefore using such evidence as the basis for certification and detention was contrary to both Article 5(4) ECHR and the common law.

Lords Hoffmann and Bingham agreed that the source of evidence was a question of fact for the SIAC to determine. If the SIAC was satisfied that there was a 'reasonable suspicion' that the evidence resulted from torture which the Executive could not rebut, then, such evidence could not be relied upon in proceedings. However, their Lordships did not see it as their legal role to

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[56] *A v Home Secretary (No. 1) "Belmarsh"*, [223].

[57] Neil Garnham QC (Oral Evidence), House of Commons Constitutional Affairs Committee, n 12, HC 323-II, Ev 3 (Question 9).

[58] *A v Home Secretary (No. 2) "Torture Evidence"*, n 7.

restrain the Executive from acting upon the 'fruits of torture', that is, making operational decisions based upon intelligence information that may have been gained from third countries using torture. Lord Rodger unequivocally stated that information which was *clearly the product of torture* was inadmissible before SIAC.[59] However, when the evidence came from an ambiguous source Lord Rodger made clear that 'the public interest does not favour rejecting statements merely because there is a suspicion or risk that they may have been obtained [by torture]…that cannot be enough.'[60] Lord Brown, who was president of the Security Service Tribunal from 1989-2000, expressed a similar sentiment, commenting that not only was the Executive entitled to make use of evidence obtained through torture, it was in fact *bound* to in execution of its duty to protect national security.[61] Regrettably, the decision does not amount to an unequivocal rejection of the role of torture or torture evidence in the sphere of (inter)national security.

III. LEVEL OF RISK AND LEVEL OF PROCEDURAL PROTECTION

In SIAC proceedings there is not necessarily a connection between the level and nature of risk to the litigant and the level and nature of procedural rights available. For example, appeals regarding the rationality of the decision to deport an individual require less procedural protection (in the form of disclosure of material) than decisions concerning whether or not a potential deportee is eligible for bail. Bail conditions set by the SIAC would later form the 'template' for the first control orders under the Prevention of Terrorism Act 2005 (see Chapter 5).[62] The emphasis upon restricted disclosure in the SIAC proceedings, with reference to explicit justification found in

[59] ibid, Lord Rodger [137], emphasis added.

[60] ibid, Lord Rodger [138].

[61] ibid, Lord Brown [161].

[62] Joshua Rozenberg, 'Bail conditions on 10 detainees a "template" for control orders' *The Telegraph* (London, 11 March 2005) <www.telegraph.co.uk/news/uknews/1485372/Bail-conditions-on-10-detainees-a-template-for-control-orders.html> accessed 01 July 2014.

Convention jurisprudence represents a vision of the HRA as a 'ceiling' as opposed to a 'floor' from which to build domestic rights protection.[63] It might be argued that it is reasonable to expect that courts are bound to construe rights-based challenges to issues of national security narrowly, so as to conform to parliamentary intention. However, the level of process rights accorded to an appellant before the SIAC is contingent upon the legal *source* from which the claim to remain in the United Kingdom is derived, and, in some cases, the citizenship of the appellant. Different levels of procedural protection are available in substantive hearings (i.e. a challenge to certification, deprivation of citizenship, or deportation) than in Bail hearings.[64] Bail proceedings before the SIAC are subject to the implicit procedural protections in Article 5(4) ECHR (which mirrors the common law right to *habeas corpus*). In *Cart*[65]the Divisional Court held that this entitled detainees at bail hearings to the level of procedural protection laid down in *A v United Kingdom*.[66] In *Cart*, the decision to revoke XC's bail had been based *wholly* upon closed evidence. Although the court acknowledged that immigration detention was essentially temporary in nature, Laws LJ considered the executive to be bound by the decision in *A v United Kingdom* to disclose a 'core irreducible minimum' of reasons for detention.[67] So, although the risk being assessed at a bail hearing is the risk relating to whether or not a potential deportee will abscond, as opposed to the arguably more

[63] The 1997 New Labour government's manifesto commitment to incorporate the European Convention as 'a floor, not a ceiling, for human rights'. Iain Dale (ed), *Volume. 2: Labour Party General Election Manifestos 1900-1997* (Routledge 2007). Lord Woolf echoed this idea: 'There is no doubt that the Human Rights Act provides solid foundations for the protection of our vulnerable minorities. That said, it is acknowledged that the introduction of the European Convention on Human Rights in domestic law provides a "floor not a ceiling" for the protection of human rights..' Lord Woolf 'Human Rights and Minorities' (Melbourne, Australia, 13 April 2003) < http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/judicial/speeches/lcj130403.htm> accessed 07 July 2014. See also David Feldman, 'The Impact of the Human Rights Act on English Public Law' (British Institute of International and Comparative Law, London, 07 October 2005): 'We also know that the [ECHR] and the transformation of the Convention rights into municipal law are intended to operate as a floor, not a ceiling …' <www.law.cam.ac.uk/faculty-resources/summary/the-impact-of-the-human-rights-act-1998-on-english-public-law/2681> accessed 07 July 2014.

[64] *R (BB) v SIAC and Home Secretary* [2011] EWHC 336 (Admin) [15].

[65] *Cart v Upper Tribunal R (U) and (XC) v Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin).

[66] *A and Others v United Kingdom*, n 40.

[67] *Cart*, n 65, [109]-[112], *Home Secretary v AF (No. 3)*, n 41, Lord Hope [81].

complex and high stakes risk to national security that detainee actually poses (which is, in turn, determinative of his deportation), the available level of disclosure is ironically greater.[68] The article 5(4) ECHR requirement also applies where bail proceedings post-date a *substantive* appeal determination by the SIAC where that substantive determination was also based *wholly* on closed evidence. Richards LJ held that:

> There can be no justification for dropping below that minimum standard in a case concerning detention, at whatever stage of the proceedings the issue of detention may arise. … As a matter of principle, it cannot be right for reliance to be placed in bail proceedings on a judgment or findings arrived at through a procedure that did not comply or cannot be shown to have complied with the minimum standard applicable to the bail proceedings. [69]

However, he went on to acknowledge that enhanced disclosure during bail proceedings would allow the detainee some insight into the substantive decision (the overarching 'national security case'), he called this 'an unattractive but inevitable consequence of applying the minimum article 5(4) standard to the bail proceedings when it did not apply to the substantive appeal.'[70]

The picture is further complicated by *ZZ v Home Secretary*[71] because the presence of EU law enhances the procedural protection available in a substantive appeal before the SIAC, at least where the appellant has EU Citizenship. In *ZZ* the European Union Grand Chamber issued a

[68] *R (BB) v SIAC*, n 64.

[69] ibid, n 64, [36]-[37].

[70] ibid [40].

[71] *ZZ v Secretary of State for the Home* Department [2013] WLR (D) 218.

preliminary ruling on the interpretation of Article 30(2) of Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States. This ruling impacted upon the conduct of substantive determinations before the SIAC. ZZ was a dual Algerian and French national who had been excluded from the United Kingdom on the grounds that he was a danger to national security. In seeking further disclosure of the case against him before SIAC, ZZ relied on the Directive to argue that national authorities applying EU law were bound by the principles of the *Kadi* case (discussed in Chapter 7). SIAC initially heard ZZ's appeal in 2008 and concluded that 'little of the case against' ZZ had been disclosed to him and that which had been disclosed failed to address 'the critical issues'.[72] The EU Grand Chamber's preliminary ruling mirrored the ruling in *Kadi* and held that ZZ was entitled to 'the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence.'[73] When ZZ's case was remitted to the Court of Appeal[74] the court ruled in favour of ZZ's interpretation of the CJEU's preliminary ruling. This meant that:

> the national court must ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which the decision was based and to disclose the related evidence to him is limited to that which is *strictly necessary* "and that he is informed, in any event, of the *essence of those grounds* in a manner which takes due account of the necessary confidentiality of the evidence". Again, the minimum requirement is to inform him of the essence of the grounds; and whilst the

[72] ibid [30].

[73] ibid [69].

[74] *ZZ v Home Secretary* [2014] EWCA Civ 7.

> manner in which that is done must take due account of the necessary confidentiality of the evidence, there is still no suggestion that the need to protect the confidentiality of the evidence is capable of justifying non-disclosure of the essence of the grounds.[75]

However, the Court of Appeal cautioned that: 'The present case concerns…an immigration context where article 6 ECHR does not apply; but even where article 6 does apply, the *extent to which non-disclosure of allegations or evidence may be justified on grounds of national security is heavily dependent on context.*'[76] But the key impact of this ruling is that in cases where the proceedings of the SIAC engage EU law, *Home Secretary v MB*[77] is *no longer* the determining authority on disclosure and procedural fairness.[78]

DEPRIVATION OF CITIZENSHIP

Of all the powers which SIAC is charged with reviewing deprivation of citizenship (or denaturalisation) is the most potent. The Supreme Court of the United States described the power to revoke citizenship as 'a form of punishment more primitive than torture'.[79] Given that citizenship has long been called the 'right to have rights'[80] and that 'the legal status of nationality remains a prized possession in the present international legal order'[81], its statutory erosion post-

[75] ibid [26], emphasis added.

[76] ibid [32], emphasis added.

[77] *Home Secretary v MB* [2007] UKHL 46.

[78] *ZZ v Home Secretary*, n 74, [36].

[79] *Trop v Dulles* (1958) 356 U.S., at 101-102, 78 S.Ct., at 598.

[80] Hannah Arendt, *The Origins of Totalitarianism,* (Meridian Books 1958), 177.

[81] Alison Kesby, n 9, 9.

9/11 is of serious concern. Although international human rights instruments have arguably reduced the extent to which rights are directly contingent upon citizenship[82] there has been a concerted effort by successive British governments to re-energise this link. Gibney writes that:

> Since 2002, when the law used against Abu Hamza was passed, British governments have legislated twice more to amend their denaturalisation powers, including dramatically reducing the standard required to revoke citizenship in 2006. These changes appear surprising in the light of [a] recent trend in Europe towards the increasing 'liberalisation' of citizenship in Europe.[83]

The power to 'denaturalise' persons has existed on the UK statute books since 1870[84], and until recently the power was restricted and its use rarefied.[85] But successive legislation has broadened the power to the extent that persons can now be denaturalised retrospectively and on the basis of closed evidence. For example, deprivation of citizenship under the British Nationality Act of 1948 could take place only in the event of 'disloyalty [to Her Majesty], trading with the enemy, criminality, commitment and fraudulent acquisition'.[86] By the time the British Nationality Act 1981 had been passed denaturalisation powers had not been used for eight years, yet this Act continued to restrict the criteria upon which a denaturalisation could be based. The power applied only to

[82] James Bohman, 'Citizens and Persons: Legal Status and Human Rights' in Marco Goldoni and Christopher McCorkindale, *Hannah Arendt and the Law* (Hart Publishing: Law and Practical Reason 2012), 321-324.

[83] Matthew J. Gibney, ' "A Very Transcendental Power": Denaturalisation and the Liberalisation of Citizenship in the United Kingdom' (2013) 61 *Political Studies* 637, 638.

[84] The Naturalisation Act 1870.

[85] Matthew J. Gibney n 83, 639.

[86] British Nationality Act 1948, s 20.

dual nationals who would not be rendered stateless by the exercise of the power.[87] However, the Nationality, Immigration, and Asylum Act 2002 enacted by the New Labour government broadened the criteria for denaturalisation significantly. Section 4 permits denaturalisation where 'the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of'[88] the United Kingdom or a British overseas territory. However, deprivation cannot occur where the effect would be to render a person stateless.[89] The 2002 Act took the unprecedented step of applying the power to all types of citizens, i.e. those by birth or naturalisation.

The Nationality, Immigration, and Asylum Act 2006 further lowered the threshold of denaturalisation by replacing the 'seriously prejudicial to the vital interests' test with the requirement that an individual's holding of citizenship was 'not conducive to the public good'.[90] This test is considerably less rigorous, and reflects the sentiment that further counterterrorism law reform was required to counter Islamic extremism after the London bombings of July 7, 2005. In a high profile press conference following the bombings, then Prime Minister Tony Blair announced that: 'Let no one be in any doubt that the rules of the game are changing.'[91] Cram writes that the unspoken assumption in Blair's words was that those associated with terrorism had 'for too long benefitted from an excessive degree of personal freedom (or, to put it another way, an inadequate level of public security).'[92] Lavi characterises the 2006 Act as a 'way to manage security risks' which envisages citizenship as being based upon community security.[93] In this regard, the

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[87] Matthew J. Gibney, n 83, 646.

[88] Nationality, Immigration, and Asylum Act 2002, s 4(2).

[89] ibid, s 4(4).

[90] ibid, s 56(2).

[91] Rt. Hon. Tony Blair, 'Full Text: The prime minister's statement on anti-terror measures' *Guardian* (London, 5 August 2005) http://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism1 accessed 13 December 2013.

[92] Ian Cram, *Terror and the War on Dissent: Freedom of Expression in the Age of Al Qaeda* (Springer 2009), 3.

[93] Shai Lavi, 'Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel' (2010) 13 New Criminal Law Review 404, 409.

British legal approach to regulating the right to citizenship is best characterised as 'a shift from traditional notions of allegiance to a new paradigm of risk management.'[94] This characterisation is apt because 'By failing to define a specific crime, or to mandate the minimal procedural conditions for a criminal trial, …the revocation of citizenship has been transformed from a legal sanction in response to the breach of a duty-that is, the punitive model-into a risk management tool.'[95] When we consider the language of risk-management in the context of loosening the statutory threshold for denaturalisation, the resulting consequence can only be a less effective standard of procedural protection. If a broader test is considered in light of the 'global' approach to risk review in *Shafiq Ur Rehman* a looser statutory test will make allegations more difficult to contest and relevant disclosures more difficult to secure. In 2014 the power to denaturalise was expanded even further by the Conservative-Liberal Democrat Coalition government: Section 66 of the Immigration Act 2014 modifies section 40 of the British National Act 1981. The new test gives the presumption in section 40 retrospective effect because it augments the 'not conducive to the public good test' by adding that citizenship can be deprived on the basis that 'the Secretary of State may take account of the manner in which a person conducted him or herself before this section came into force.'[96] This retrospective power can be used without prior judicial approval. Therefore, the process of deprivation is subject to less protection than TPIMs or control orders which require judicial review to determine if an order is 'obviously flawed.' By transferring review to SIAC the 2014 Act makes clear that deprivations can be made on the basis of closed evidence and that no gisting requirement need be met in subsequent legal proceedings. The JCHR expressed concern that the government were unwilling to reveal to parliament how many such deprivations had been based in whole or in

[94] ibid, 410.

[95] ibid, 413.

[96] Immigration Act 2014, s 66(2).

part on closed material[97] and that the government 'has made clear that it intends to exercise the new power, leaving individuals stateless, when they are abroad'.[98]

Despite the JCHR's forceful criticism, procedural challenges relating to the impracticalities from appealing whilst abroad have already been rejected by the courts. Both the SIAC and the Court of Appeal, upheld the Secretary of States' decision to exclude an individual prior to his appeal to the SIAC, on the grounds that appeal proceedings could be conducted on his behalf from abroad.[99] The appellant G1 was deprived of citizenship under s. 40 of the British Nationality Act 1981 whilst abroad and subsequently prevented from returning to the United Kingdom to appeal before the SIAC in person. He challenged the legality of this decision by way of judicial review. The Court of Appeal ruled that despite an appeal from overseas having 'a degree of unreality about it'[100] the power to exclude a citizen was a feature of the residual 'legal authority remaining in the hands of the Crown which Parliament has not abrogated or modified' through enacting section 40(2) of the British Nationality Act 1981.[101] To that end, requiring G1 to appeal from Sudan was legal because 'the legislature intended to allow deprivation and deportation appeal proceedings to take place concurrently.'[102]Regarding the practicalities of mounting an appeal from abroad, the Court of Appeal commented that the Secretary of State 'has a substantial case…to the effect that the appellant would be perfectly able to pursue his appeal, and give evidence and instructions, from the Sudan'. Moreover, the burden of proving any difficulties in this regard fell

[97] Joint Committee on Human Rights, n 25, [19].

[98] ibid, [35].

[99] *Home Secretary v G1* [2012] EWCA Civ 867.

[100] *BA (Nigeria)* [2009] QB 686.

[101] *G1 v Home Secretary*, n 107[11]-[12].

[102] ibid [13].

firmly upon the appellant.[103] This decision goes against what Applebey notes to be the 'almost unqualified right to appear in court on one's own behalf.'[104]

Unlike the other statutory regimes considered later in this thesis very little is known about the process of decision-making regarding either national security deportation or denaturalisation by the Executive. Sawyer writes that '[p]rocedurally, deprivation "by order" as envisaged by section 40 of the British Nationality Act 1981 is relatively informal. There is no hearing on the issue.'[105] For example, when former Guantanamo Bay detainee David Hicks applied for British citizenship the request was granted, then an almost simultaneous process of denaturalisation (instigated by the Home Secretary writing a letter) was commenced.[106] A similar reference to the above procedure is found in the case of G1.[107] The letter of notice is followed by the Secretary of State formally signing an order. The power to denaturalise has been subject to several procedural challenges aimed at curtailing its use. In the *Hicks* case the Court of Appeal ruled that the Secretary of State was unable to instigate a simultaneous process granting and depriving Hicks of British citizenship under section 40(3)(a) of the British Nationality Act 1981 on the grounds that his receipt of terrorist training in Afghanistan prior to his application demonstrated 'disaffection' towards the British state.[108]Pill LJ ruled that:

> the proposed parallel action would not be lawful in this case. I would not in that event consider it to be lawful, unless a fresh

[103] ibid [25].

[104] George Applebey, 'The Growth of Litigants in Person in English Civil Proceedings' (1997) 16 Civil Justice Quarterly 127, 129.

[105] Caroline Sawyer, "'Civis Britannicus sum" no longer? Deprivation of British Natioanality' (2013) 27(1) Journal of Immigration Asylum and Nationality Law 23, 34.

[106] *Home Secretary v David Hicks* [2006] EWCA Civ 400.

[107] *Home Secretary v G1* [2012] EWCA Civ 867 [3].

[108] Hicks' right to British citizenship was founded upon him having a British grandparent.

> analysis, which included a right to make representations, was conducted. The notice in writing which the Secretary of State is required to give involves a right to make representations.[109]

The Court of Appeal rejected the contention that the Secretary of State's letter informing Mr Hicks of the decision to deprive (which contained a summary of allegations) meant that he was in a position to make effective representations about the decision.[110]

Hicks' case did not involve the SIAC, as he was detained by the United States in Guantanamo Bay when he commenced legal proceedings. The approach of the SIAC in such appeals was cemented by Mitting J in *Al Jedda*.[111] In that case Mitting J ruled that an appeal should be a challenge to the *merits* of the decision, not merely the discretion to decide. Moreover, the standard of proof applied should be the civil standard of proof 'on balance of probabilities'. In the context of a decision by the Secretary of State to deprive an appellant of citizenship the SIAC 'consider[s] what inferences can properly be drawn from the Appellant's past actions and current capacity and beliefs, so as to inform our assessment of future risk.'[112] In respect of reviewing the Secretary of State's risk assessment, the SIAC took the position that it could lawfully consider information that had come to light *after* the initial decision was taken 'insofar as it is capable of telling us [the appellant's] state of mind at the time.'[113]

Deprivation of citizenship proceedings have also been subject to challenge on the grounds of abuse of power. In *L1 v Home Secretary*[114] the Home Secretary took the decision to deprive L1

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[109] *Home Secretary v David Hicks*, n 106 [44].

[110] ibid [3]-[5].

[111] *Al-Jedda v Home Secretary* (Refusal of Entry – Substantive) SC/66/2008 (7 April 2009).

[112] *Y1 v Home Secretary* (Deprivation of Citizenship – Substantive) SC/112/2011 (13 November 2013) [13].

[113] ibid [17].

[114] *L1 v Home Secretary* [2013] EWCA Civ 906.

of citizenship when it was known to her that he was in the Sudan. A further challenge was mounted to what was called a 'truncated *ad hoc* procedure' before the SIAC, which did not involve an adequate search of the closed material for exculpatory information.[115] Whilst no conclusion was reached in respect of the appeal for abuse of power, the Court did find in favour of L1 in respect of the SIAC's approach to the closed material, because 'was no search for or disclosure of exculpatory material during the currency of the proceedings before SIAC: the very tight timetable adopted for the involvement of the Special Advocate effectively precluded such a process.'[116] This can been seen as a welcome rejection of deep secrecy. In order to reach this conclusion, the Court of Appeal had to examine the closed judgment of the SIAC. In respect of this undertaking Laws LJ opined that: 'if the court concludes there is more than a fanciful possibility that the issue of permission to appeal may turn on the closed reasons, it should examine them.'[117]

In substantive terms, the review of executive decisions undertaken by the SIAC can often be light-touch. Y1 had been deprived of citizenship on the basis of both open and closed material. The Secretary of State had reached this decision on the basis that it was 'conducive to the public good' because Y1 had travelled to Pakistan for terrorism related training and also to possibly participate in acts of terrorism on the Pakistan/Afghanistan border. Y1 appealed on the grounds that the deprivation constituted an unlawful infringement of his Article 8(1) ECHR rights ('right to private and family life') and that there was no proof of his intention to prepare or commit an act or acts of terrorism in the United Kingdom. The SIAC applied the House of Lords' approach to the meaning of 'conducive to the public good' elucidated in *Rehman*: the test was not whether 'the individual endangered national security, but does he represent such a danger'.[118] By applying *Rehman* the SIAC found that the views of the executive were to be accorded considerable weight,

[115] ibid [7].

[116] ibid [33].

[117] ibid [3].

[118] *Home Secretary v Rehman*, n 51, *Y1 v Home Secretary* (Deprivation of Citizenship – Substantive) n 112 [54].

and that the Secretary of State was entitled to apply a 'preventative or precautionary approach'.[119] In finding against Y1, and in dismissing the Article 8 ECHR claim, the SIAC held that: 'The views of the Security Service as to the management of the risk cannot logically or properly detract from the principal conclusion that the appellant represented a danger to national security.'[120]

CONCLUSION

It is no small irony that the SIAC was established in response to a decision of the ECtHR. Of all the statutory regimes that make use of the CMP the SIAC stands out as remaining the most secretive due to its case-law on disclosure. In addition, the continuing dominance of *Rehman* as authority for how appeals should be conducted means that (applying Pozen's nomenclature) secrecy remains at its deepest in the arena where there is most at stake for the litigant. The continuing relevance of the *Rehman* doctrine on risk combined with the relaxation of the threshold for the deprivation of citizenship effectively means that decisions where the risk (either to national security, or the safety of the appellant) is greatest are subject to some of the weakest procedural protections across all of the statutory powers which authorise the use of the CMP.

Although the SIAC is qualitatively different from other courts in its composition (because it employs intelligence experts), and the development of its procedural rules has generated some highly significant decisions (such as the prohibition on admitting evidence gained via torture, and the permission of reversed closed evidence) appellants remain in a highly adverse position. Where progress has been made regarding disclosure of information this has either been made on an inadvertently discriminatory basis (due to the advantages that EU law bestows upon its citizens) or where the stakes are arguably the lowest (in respect of bail hearings, which are ancillary proceedings).

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[119] *Y1 v Home Secretary* (Deprivation of Citizenship – Substantive), n 112 [56].

[120] ibid [64].

What is most regrettable about the operation of the SIAC is that it truly illustrates the view that the rulings of the ECtHR form a *ceiling* and not a floor. Despite the intersection of the subject matter of the SIAC with residual prerogative powers (such as the power to exclude aliens), it is open to courts to at least attempt to enforce parity of procedural fairness with other areas of counterterrorism review which employ the CMP. However, this has not been the case. As a result, those who stand to lose most during the CMP are the subject of the lowest procedural protections.

CHAPTER FIVE:

CONTROL ORDERS

INTRODUCTION

The Prevention of Terrorism Bill was introduced into the House of Commons on 22 February 2005 in response to the decision of the House of Lords in *Belmarsh*.[1] The Lords ruled by an 8-1 majority (Lord Walker dissenting) that the policy of indefinite detention without trial of foreign terrorist suspects pursuant to sections 21 and 23 of the ATCSA 2001 amounted to a violation of Article 5(1) ECHR and was discriminatory on the grounds of nationality as prohibited by Article 14 ECHR. Baroness Hale quipped that 'if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners.'[2] The detainees were foreign nationals whom the British government could not deport to their country of origin because they might face treatment contrary to Article 3 ECHR. The House of Lords quashed the Human Rights Act 1998 (Designated Derogation) Order 2001,[3] and created a vacuum in the counterterrorism legislative architecture. The decision became one of the mostly widely discussed in recent constitutional history as scholars clamoured to add their voice to the debate.[4] David Feldman called it 'the most powerful judicial defence of liberty since *Leach* v. *Money* (1765) 3 Burr. 1692 and *Somersett* v. *Stewart* (1772) 20 St. Tr. 1'[5] whereas Ewing and Tham derided its significance:

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[1] *A v Home Secretary (No. 1)* 'Belmarsh' [2004] UKHL 56.

[2] ibid, Baroness Hale [231].

[3] Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644.

[4] Adam Tomkins 'Readings of *A v Secretary of State for the Home Department*' [2005] Public Law259, 263: *A v Home Secretary*… marks the beginnings of a much belated judicial awakening to the fact that even in the context of national security the courts have a responsibility to ensure that the rule of law is respected.'

[5] David Feldman, 'Proportionality and Discrimination in Anti-Terrorism Legislation' (2005) 64(2) Cambridge Law Journal 271, 273.

> Far from vindicating a human rights culture under the HRA, the response to *A* provides evidence the other way. It did not lead to the immediate release of the detainees, who despite the Lords' ruling on December 16, 2004 were not "liberated" from their internment until March 10 and 11, 2005, once the Prevention of Terrorism Act 2005 had eventually been rushed through.[6]

If the response to *Belmarsh* was divided, then the reaction to control orders can be seen as polarised.[7] Even more so than SIAC, which is primarily concerned with regulating states' rights to control its own borders, control orders are the blueprint for the type of 'preventative justice'[8] examined in much of this thesis. Lord Carlile pointed out that control orders were part of the government security strategy known as CONTEST[9], in particular its 'PREVENT' stream.[10]

In the wake of 9/11 there has been recognition by some that the treatment of terrorist suspects represents a schism in the legal system. In the words of Arthur Chakalson '[i]f such measures are appropriate for terrorists, why not for organised crime? And if for organised crime,

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[6] Keith D. Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] Public Law (Winter) 668, 670.

[7] Robin Simcox argued that 'Control orders perform an important function imperfectly. The new government should seriously consider retaining the system while robustly addressing its deficiencies.' Robin Simcox, 'Control Orders: Strengthening National Security' (Centre for Social Cohesion 2010), 8.

By contrast the Liberty campaign for abolition, entitled 'Unsafe, Unfair' claimed that: 'Apart from being profoundly unfair and un-British (the term "control order" comes from apartheid South Africa), this scheme is profoundly unsafe. A number of its targets have disappeared, and one former "controlee" had a habit of turning up, complete with plastic tag, at large public meetings attended by members of the present and past Cabinets….' Liberty, 'Reports of 'Coalition car crash' over control orders – will Government sell out over unsafe and unfair policy?' (*Liberty,* 01 November 2010), <www.liberty-human-rights.org.uk/news/latest-news/reports-coalition-car-crash-over-control-orders-%E2%80%93-will-government-sell-out-over> accessed 01 July 2014.

[8] Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-stepping of Due Process' in Ben J. Goold and L. Lazarus (eds), *Security and Human Rights*, (OUP 2007), 264: 'One of the most damaging aspects of the move to pre-emption is that the demands of security are deemed to warrant departure from the ordinary strictures of the criminal process.'

[9] HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (White Paper, Cm 8123, 2011).

[10] Lord Carlile, *Sixth Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act* (Home Office 2010), [13].

why not for drug lords? And if for them, why not for hardened criminals? And so on.'[11] During his initial Ministerial Speech promoting the Prevention of Terrorism Bill then Home Secretary Charles Clarke MP pointed out that the measures were required not only to meet the Lords' ruling in *Belmarsh* that the policy of internment was discriminatory but also because there were a category of dangerous persons whom the state could not prosecute for fear of 'revealing, and so endangering, [intelligence] sources and techniques.'[12]

The New Labour government intended the Bill to 'empowe[r] the Secretary of State to make control orders and to impose under them a range of controls on the individuals concerned that will be tailored to meet the threat that each poses. The purpose of the orders is to prevent an individual from continuing to carry out terrorist-related activities.'[13] This was achieved with varying degrees of success that cannot be measured using publically available information. However, we know from the findings of the 7/7 enquiry that despite the PTA receiving Royal Assent and coming into force on 11 March 2005 the bombers were known to the Security Services and subject to on-going surveillance as part of the prior Operation Crevice, but had been suspected only of travelling overseas to receive training, not of plotting a domestic attack.[14] Fenwick and Phillipson are of the view that control orders '[rely] partly upon a "prophetic" risk assessment of what [a suspect] may do in the future.'[15] But according to the Eminent Jurists Panel:

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[11] Arthur Chakalson, 'The Widening Gyre: Counter-Terrorism, Human Rights, and the Rule of Law' 67(1) (2008) Cambridge Law Journal 69, 77.

[12] HC Deb 22 February 2004 vol 431 col 152 (Charles Clarke MP, Home Secretary).

[13] ibid.

[14] Lady Justice Hallet, 'Report of the Official Account of the Bombings in London 7th July 2005, HC 1087 (The Stationary Office 2006).

[15] Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2010-2011) 56 McGill Law Journal 863, 876.

> [control] orders are not aimed at determining risk levels, and gathering information for subsequent criminal proceedings, but rather at placing restrictions (amounting to sanctions) on the individual concerned. Accordingly, control orders could give rise to a "parallel" legal system and, especially over the longer term, undermine the rule of law.[16]

What is clear is that we can trace the genesis of control orders and other powers examined here to Lord Lloyd's report *Inquiry into Legislation Against Terrorism*.[17] The first volume of that report devoted only two pages to 'safeguards and review'.[18] It recommended that emergency legislation to facilitate preventive detention in the event of a heightened terrorist threat could be an appropriate response.[19] In the wake of *Belmarsh* control orders can be seen as development of this position to the extent that they represent a compromise between the preferred policy of internment and many of the demands of human rights law.

The PTA 2005 created two categories of control order – derogating and non-derogating. Derogating control orders were designed to impose powers which represented a deprivation of the right to liberty enshrined in Article 5 ECHR. However, this power was never used. Non-derogating control orders merely represented a restriction upon Article 5 ECHR. These 'executive preventative orders'[20] comprised twenty-two separate powers, including: electronic tagging,

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[16] Eminent Jurists' Panel, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights' (International Commission of Jurists 2009), 120.

[17] Lord Lloyd of Berwick, 'Inquiry into Legislation Against Terrorism: Volume I' (Cm 3420, 1996).

[18] ibid, 107-108.

[19] ibid, Ch 18 and [18.14].

[20] Alexander Horne and Clive Walker, 'Lessons Learned from Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament' [2014] Public Law 267, 272.

curfew, telephone reporting to a private security company, compulsory daily attendance at police stations, restrictions on visitors, requirements to seek permission for and notify the Home Office of pre-arranged meetings, prohibitions on meeting certain associates, the requirement to permit random police entry and search of controlees' property, restrictions on communications (both electronic, and with named individuals in the UK and overseas), restrictions to a specific geographical area or physical relocation, financial restrictions, restrictions on education and training, restrictions on the attendance at certain mosques or on the leading of prayers, restrictions on overseas travel, exclusion from airports, train stations, and seaports together with the forced surrender of travel documents, and restrictions on the right to work.[21] Over the life of the control orders regime fifty-two persons were made subject to orders, and seven persons absconded from a control order.[22] Prior to imposing a control order the Secretary of State had a duty to consult the relevant chief officer of police about the possibility of pursuing a criminal prosecution.[23]

Although the sun has set and the dust has settled on the control orders regime unanswered questions remain which are relevant both to the general principles of procedural fairness across the CMP and to the TPIMs regime discussed in Chapter 6. The approach of this chapter differs from much of the well-known writing on control orders. For example, much has been made of the principle of 'legality' as an appropriate rubric by which to explain the shortcomings of the regime.[24] This chapter lends specificity to the over-arching themes of this thesis by arguing that abstract legality alone is an inappropriate yardstick by which to measure control orders. The

[21] Anderson notes that: 'The great majority of *modifications* to control orders were consensual, and were implemented after exchange of correspondence between the Home Office and the controlled person's solicitors…Only for significant modifications (e.g. the introduction of a relocation requirement) was it likely that ministerial approval would be required.' David Anderson QC, 'Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005' (The Stationary Office 2012), [3.9].

[22] David Anderson QC, 'Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005' (The Stationary Office 2012), [3.48].

[23] Prevention of Terrorism Act 2005, s 8. A challenge to the breach of statutory duty to consider criminal prosecution failed before the House of Lords in *E v Home Secretary* [2007] UKHL 47.

[24] Keith Ewing and Joo-Cheong Tham, n 6.

chapter explains the mechanics of the control orders regime. It then argues that the principle of legality failed to increase the overall level of fairness in judicial proceedings under the regime. The third section analyses the important judicial innovations on disclosure that the corpus of case law on control orders has contributed to the wider law context of the CMP. The final section cements the over-arching argument that the use of control orders by the executive is primarily concerned with the management of risk and controlling the depth of secrecy. This takes place by way of a study of the controversial policy of suspect relocation.

THE MECHANICS OF CONTROL ORDERS

At the legislative level the process of enactment and scrutiny of control orders has been heavily criticised. The parliamentary debate on the Prevention of Terrorism Bill (which was expedited over a mere seventeen days)[25] remains an example of the trend towards 'fast-track' or 'emergency' legislation in the field of counterterrorism.[26] According to Tham 'crucial phases of law-making were not fully public…The actual involvement of security and police agencies, while profound, was shrouded in secrecy. Indeed, the British Security Service…is said to have drafted the Prevention of Terrorism Bill; a fact only revealed after the Bill had passed into law.'[27] This represents a departure from common practice, as legislation is usually drafted by Parliamentary Counsel who have been instructed by lawyers from the relevant government department.[28]

[25] Alexander Horne and Clive Walker, n 20, 272.

[26] Colloquially known as 'emergency legislation', Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards, vol I* (15th Report), (2008-2009, HL 116-I), [10]. Tomkins considers the parliamentary response to national security emergencies to be 'a little better than the judicial record, [but] it was not exactly impressive…its successes were modest and, oftentimes, marginal.' Adam Tomkins, 'Parliament, Human Rights and Counter-Terrorism' in Tom Campbell, Keith D. Ewing and Adam Tomkins (eds), *Legal Protection of Human Rights: Sceptical Essays* (OUP 2011), 15-16.

[27] Joo-Cheong Tham, 'Parliamentary Deliberation and the National Security Executive: The Case of Control Orders' [2010] Public Law 79, 84.

[28] Daniel Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems that Shape Acts of Parliament* (Sweet & Maxwell 2011), Ch 4.

Pursuant to section 13 of the PTA 2005, sections 1-9 were subject to a 'sunset clause' or annual expiration, and could only be renewed if the Home Secretary placed a renewal order before both Houses of Parliament, and both Houses approved said order.[29] The control orders regime was renewed a total of five times. However, this 'safeguard' has also been subject to trenchant criticism. Walker and Horne note that one renewal debate was attended by only thirteen MPs[30] and the debates themselves have been characterised as 'almost formulaic' in character.[31]

In contrast, the courts have arguably made a much greater contribution to rendering secrecy shallow through a combination of procedural innovation (discussed below) and substantive review. Under the PTA 2005, the Administrative Court had duties vis-à-vis non-derogating control orders at two stages: permission (reviewing the core national security case) and variation (reviewing the need for specific measures). The Secretary of State could impose a control order where he or she had 'reasonable suspicion' that the individual concerned 'is or has been involved in terrorism-related activity'[32] and where he or she 'considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.'[33] Such a step was taken after discussion with the Control Orders Review Group (CORG) which comprised civil servants, security service officials, and other relevant personnel. Judicial review was an automatic requirement after the imposition of a control order because the Secretary of State was required to apply to the Administrative Court setting out 'the order for which he seeks permission'[34], and the Court was required to 'consider whether the Secretary of State's decision that there are grounds to make that

[29] PTA 2005, s 13(4).

[30] Alexander Horne and Clive Walker, n 20, 275.

[31] John Ip, 'Sunset Clauses and Counterterrorism Legislation' [2013] Public Law 74, 90.

[32] PTA 2005, s 2(1)(a).

[33] ibid, s 2(1)(b).

[34] PTA 2005, s 3.

order is obviously flawed'.[35] This review is based on information related to the national security case against the controlled individual. A CMP is initiated in this hearing, and open and closed evidence can be considered. The Court of Appeal issued further guidance relating to review of 'reasonable suspicion' in *Home Secretary v MB*:

> The PTA authorises the imposition of obligations where there are reasonable grounds of suspicion. The issue that has to be scrutinised by the court is whether there are reasonable grounds for suspicion. That exercise may have involved considering a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion. *The court has to consider whether this matrix amounts to reasonable grounds to suspicion and this exercise differs from that of deciding whether a fact has been established according to a specified standard of proof.* It is the procedure for determining whether reasonable grounds for suspicion exists that has to be fair if article 6 is to be satisfied.[36]

However, in *GG and NN* Collins J resolved that because the standard of review must be compliant with Article 6(1) ECHR whether or not reasonable grounds for suspicion existed was '*an objective question of fact*' and it was for the reviewing court, to 'decide whether the facts relied on by the Secretary of State amount[ed] to such reasonable grounds.'[37] Despite this apparent tension in

[35] PTA 2005, s 3(2)(a).

[36] *Home Secretary v MB* [2006] EWCA Civ 1140 Lord Phillips [67], emphasis added.

[37] *Home Secretary v GG and NN* [2009] EWHC 142 (Admin) [10].

standards of proof which crept into the control orders jurisprudence (the Administrative Court formulation appears harder to satisfy than the Court of Appeal's threshold) there is no record of any application being rejected at the permission stage.[38]

Variation hearings account for the other central function of the courts in relation to control orders. Pursuant to section 10 a controlled person was entitled to appeal to a court against renewal or modification of their control order:

> The function of the court on an appeal against a modification of an obligation imposed by a non-derogating control order (whether on a renewal or otherwise), or on an appeal against a decision not to modify such an obligation, is to determine whether the following decision of the Secretary of State was flawed—
>
> (a) in the case of an appeal against a modification, his decision that the *modification is necessary for purposes connected with preventing or restricting involvement* by the controlled person in terrorism-related activity; and
>
> (b) in the case of an appeal against a decision on an application for the modification of an obligation, his decision that the obligation *continues to be necessary for that purpose*.[39]

[38] Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37 Melbourne University Law Review 143, 162.

[39] PTA 2005, s 10(5), emphasis added.

Closed evidence could also be relied upon at the variation hearings. Although the statutory provision makes reference to an 'appeal', the Court was restricted to 'apply[ing] the principles applicable on an application for judicial review.'[40]

THE INFLUENCE OF LEGALITY

Chapter 1 introduced an important theme of the thesis, namely that constitutional lawyers in particular over-emphasise the purchase of the principle of legality in the area of judicial control of counterterrorism.[41] Some scholars argue that control orders offend the principle of legality however it is formulated.[42] For example, if we take seriously the maxim *nullum crimen, noella poena sine lege* ('no crime, no penalty without law') then the imposition of control orders against persons acquitted of terrorism related offences in criminal proceedings clearly violates the principle of legality.[43] Moreover, *Belmarsh*[44] contained no substantive discussion of the principle of legality. As a constitutional principle of the common law legality is thought to provide the protection of

[40] PTA 2005, s 10(6).

[41] Keith D. Ewing and Joo-Cheong Tham, n 6, 682.

[42] Cian Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 King's Law Journal 19, 46.

[43] Examples of controlees acquitted of crimes but subject to control orders include those involved in the 'Transatlantic Airline Plot' "AM" and "AY", see *Home Secretary v* AM [2009] EWHC 3053 (Admin) and *Home Secretary v AY* [2012] EWHC 2054 (Admin); Vikram Dodd, 'Three Guilty of Transatlantic Bomb Plot' *The Guardian* (London, 7 September 2009) <http://www.theguardian.com/uk/2009/sep/07/plane-bomb-plot-trial-verdicts> accessed 01 July 2014, Vikram Dodd and Lee Glendinning, 'Airline Bomb Plotters Case Threatened by US Fears' *The Guardian* (8 September 2009) www.theguardian.com/uk/2009/sep/08/airline-bomb-plotters-us-fears accessed 01 July 2014; "CF", see *Home Secretary v CC and CF* [2012] EWHC 2837 (Admin), BBC Staff Writer 'Student admits Afghan terror bid' BBC News, http://news.bbc.co.uk/1/hi/uk/7754602.stm accessed 22 March 2014, and "BF", see *Home Secretary v BF* [2011] EWHC 1878 (Admin).

[44] *A v Home Secretary (No. 1)*, n 1.

fundamental rights in the absence of a clear parliamentary intention to exclude such rights.[45] According to Allan 'the courts determine the relevant sphere of discretion by the application of common law principles of legality, which impose constraints of rationality and fairness in order to protect the rights and interests of those most closely affected.'[46] Legality also enshrines notions of protection from arbitrariness and fidelity to the rule of law.[47]

However, the argument herein is that the principle of legality as employed in the present context accords no more than a fig-leaf of protection to persons affected by counterterrorism measures. The reach of legality in the face of executive discretion exercise in the name of national security is in reality a shallow one. Ewing and Tham note in the present context that 'the standard at which the level of rights' violations is set is now so low that even serious restraints on liberty can cross the hurdle of legality with relative ease.'[48] The lack of effective protection stemming from the principle of legality in the counterterrorism sphere is clearly visible in the context of control orders. Although section 10(5) focusses upon ensuring the types of rational connections between restrictions upon rights driven by justifiable public policies, the PTA 2005 did not follow a consistent pattern. For example, section 2(9), concerning the power to make non-derogating control orders, mandated that:

> It shall be *immaterial*, for the purposes of determining what obligations may be imposed by a control order made by the Secretary of State, *whether the involvement in terrorism-related activity to be*

[45] Roger Masterman and Joseph E.K. Meurkens, 'Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court' [2013] Public Law 800, 811.

[46] T.R.S. Allan, 'Questions of legality and legitimacy: Form and substance in British constitutionalism' (2011) 9(1) International Journal of Constitutional Law 155, 157.

[47] B.V. Harris, 'Government "third source" action and common law constitutionalism' (2010) 126 Law Quarterly Review 373, 393.

[48] Keith D. Ewing and Joo-Cheong Tham, n 6, 682.

prevented or restricted by the obligations is connected with matters to which the Secretary of State's grounds for suspicion relate.[49]

This section was originally proposed as an amendment by Baroness Scotland of Asthal (Labour) as an amendment to the Terrorism Bill.[50] It was designed to influence the conduct of judicial review of specific measures. The amendment was discussed in the House of Lords on 3 March 2005 during which Lord Cameron of Lochbroom was concerned that it potentially contravened the principle of proportionality.[51] Lord Falconer, speaking on behalf of the government, responded that the purpose of the clause was to allow the Secretary of State to 'revisit' an initial decision to impose a non-derogating control order to supply a reviewing court with new information:

> One might come back on a second occasion, having established by material on the first occasion, that there was reasonable suspicion that that person is, or was, a terrorist. One could then put before the court, if the issue arose in relation to court, "Here is material"—perhaps from an informant—"that suggests that this person is about to do something of great danger". That material could be entirely different from the material on which we rely to show that he is a terrorist. That is the only reason why the provision is there.[52]

[49] PTA 2005, s 2(9), emphasis added.

[50] HL Hansard http://www.publications.parliament.uk/pa/ld200405/ldbills/034/amend/ml034-ia.htm accessed 22 March 2014 (Amendment 79)

[51] HL Deb 3 March 2005, vol 670, col 416, Lord Cameron of Lochbroom.

[52] HL Deb 3 March 2005, vol 670, cols 416-417, Lord Falconer of Thorton.

Lord Thomas of Gresford (Liberal Democrat) also criticised the clause for creating a situation whereby a controlled person 'does not know the allegations, he does not know the evidence, he does not know the reasons, and the obligations may have nothing to do with what is suggested against him. So he cannot even infer why these obligations are imposed upon him.'[53] In the first ever section 3 review of a control order[54] a challenge was mounted to section 2(9) on the basis that the provision offended the principle of 'legal certainty' in the European Convention. Although 'legal certainty' is a facet of the Convention which demands that restrictions upon rights must be 'prescribed by law' and 'in accordance with law' the effect of these Convention requirements in the control orders context was merely that:

> the law must be accessible, foreseeable and compatible with the rule of law, giving an adequate indication of the circumstances in which a power may be exercised and thereby enabling members of the public to regulate their conduct and foresee the consequences of their actions; that the scope of any discretion conferred on the executive, which may not be unfettered, must be defined with such precision, appropriate to the subject matter, as to make clear the conditions in which a power may be exercised; and that there must be legal safeguards against abuse[55]

The Administrative Court rejected the legal certainty challenge. The basis for the rejection was that '[n]otwithstanding the extraordinary scope of the powers conferred by the PTA on government,

[53] HL Deb 3 March 2005, vol 670, col 455, Lord Thomas of Gresford.

[54] *Home Secretary v E* [2007] EWHC 233 (Admin).

[55] *R (Gillan) v. Commissioner of the Metropolitan Police* [2006] UKHL 12 [32] Lord Bingham reproduced in *Home Secretary v E*, n 54, [181].

its provisions do not create a regime which is arbitrary and, in Lord Bingham's words, "the antithesis of legality" and thus do not violate the Convention requirement of "legal certainty".'[56] Moreover, according to the Administrative Court, the breadth of section 2(9) was tempered by the requirements that the power to make control orders was subject to statutory requirements of necessity in section 1(3) and general control via the principles of judicial review.[57]

Dyzenhaus would presumably categorise section 2(9) as facilitating a 'grey hole'. A 'grey hole' is 'a legal space where there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit the government to do as it pleases.'[58] Commentary on *Belmarsh* suggested that the 'derogation order …clothed the Government's actions under the ATCSA in relation to these foreign nationals with a sense of legality.'[59] The principle of legality undoubtedly includes the principle of legal certainty in Convention terms, given that the maxim of 'no punishment without law' in Article 7 encompasses the notion that one should be able to predict the legal consequences of one's conduct in advance. It also encompasses the idea that 'broadly expressed discretions are subject to the fundamental values, including values expressive of human rights, of the common law.'[60] Here, 'legality' reveals itself as an amorphous and unhelpful barometer by which to gauge fairness in this context. The logic expressed in *E* – that there needn't be a specific causal connection between a reasonable suspicion and a restriction – makes the fair management of risk epistemologically difficult, especially where secret evidence is involved. It is for this reason that more transparent risk

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[56] *Home Secretary v E*, n 54, [184].

[57] ibid, n 54, [189].

[58] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006), 42.

[59] Yasseen Gailani 'In defence of human rights: an evaluation of the decision of the House of Lords in the case of the Belmarsh detainees' (2005) 1(1) Cambridge Student Law Review 39, 41.

[60] David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) Oxford Commonwealth Law Journal 5, 6. Jowell also characterises 'legal certainty' and 'legality' as values under the umbrella of the Rule of Law, see Jeffrey Jowell, 'The Rule of Law and Its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (7th edn, OUP 2011), 11-35, 19

assessment procedures are so vital; they might reinvigorate legality. Notably, the Terrorism Prevention and Investigation Measures Act 2011 did not retain a clause similar to section 2(9). However, given the low number of variation hearings (as discussed in Chapter 6) it is difficult to infer whether the absence of such a provision actively contributes to either more focussed judicial scrutiny of executive risk-management, or in turn, shallower secrets.

But the anguish about the presence of 'grey-holes' offending against a 'culture of legality'[61] in respect of counter-terrorism appears little better than a descriptor, as the legal system is littered with preventative measures of this type where the executive has broad discretion enacted into legislation. A further illustration of this is *R (Gul) v Justice Secretary*[62] which concerned a challenge to additional parole conditions imposed upon the claimant who had been previously convicted of five counts of disseminating extremist publications contrary to section 2 of the Terrorism Act 2006. He challenged the conditions on the grounds that they contravened the common law requirement of legal certainty and were not properly 'prescribed by law' within the meaning of the ECHR. Both challenges relied on the fact that the additional conditions drafted were 'insufficiently precise' and it 'was, for example, arguable that reading a newspaper concerning the current events in Syria "may break" the condition, and "the breadth of the prohibition cover[ed] any historical account of military history, potentially including the Quran".'[63] Other licence conditions included broadly drafted restrictions relating to personal associations and religious worship.

In rejecting the common law challenge Beatson LJ held that '[a]t most what the principle of legality might do in this context is to require the statute and the Order to be read down so as to preclude disproportionate interferences with those rights.' Pursuant to the ECtHR a provision cannot be regarded as law properly so-called 'unless it is formulated with sufficient precision to

[61] Cian Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 King's Law Journal 19, 20.

[62] *R (Gul) v Justice Secretary* [2014] EWHC 373 (Admin).

[63] ibid, [25].

enable the citizen to regulate his conduct'.[64] Nonetheless, the Court considered legality a non-issue, deciding that the 'real issue between the parties was the question of the necessity, pressing social need, and proportionality of the restriction.'[65] Although the Order to which the claimant was subject was drafted in extremely broad and discretionary terms, the relevant policy gave guidance 'about the need for proportionality and the need to link the condition to the level of risk presented by the offender.'[66] Moreover, as the Probation Office Policy emphasised 'necessity' and 'proportionality' the additional conditions were unlikely to be interpreted in a manner that was either contrary to legal certainty, or disproportionate within the meaning of the Convention. The legality and legal certainty based challenges were effectively brushed aside in both *Gul* and *E*'s case because the courts considered that the executive would interpret discretionary powers appropriately in the context of the risk they sought to manage. This approach cannot be attributed to institutional comity; it is unprincipled deference.

Furthermore, in the control orders context the Administrative Court has held the Secretary of State is not subject to a public law duty to provide a controlee with a reasonable opportunity to show that the obligations contained in the control order were no longer necessary.[67] This conclusion was reached in spite of the fact that parallel regimes in Administrative law and criminal justice (such as Imprisonment for Public Protection) impose such a duty to ensure fairness. According to the Court, a public law duty to afford such an opportunity was neither implicit in the statutory language of the PTA 2005, nor in the Home Secretary's own policy pronouncements. Instead, the regime provided for regular court review, and 'the Control Order Review Group quarterly review minutes [demonstrate] that discussions of reduction in risk were "integral" to such

[64] *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [49] in *R (Gul)*, n 62 [59].

[65] *R (Gul)*, n 62 [63].

[66] *R (Gul)*, n 62 [65].

[67] *Home Secretary v BF* [2011] EWHC 1878 (Admin).

reviews.'[68] In short, legality in its many guises (whether as legal certainty, as a central feature in criminal procedure, or as an inherent 'quality' of the common law) is not a principle which is capable alone of effectively controlling of state power in the realm of pre-emptive sanctions. In short, the treatment of section 2(9) suggests the notion that legality or a 'presumption in favour of the Rule of Law'[69] is not taken seriously enough to produce meaningful results. Therefore, the real battle ground in which fairness has been won and lost comes in respect of securing further disclosure of 'open' evidence to shed light on the reasons for executive action.

THE CASE LAW ON DISCLOSURE

With legality providing little assistance, the real battles in control order cases have been fought in the realms of open justice and natural justice. In short, control of both risk and the depth of secrecy are influenced almost entirely by issues of effective disclosure. The progress towards greater disclosure in principle, combined with the search for clarity over what is required in practice, and changes in day-to-day practice has been somewhat fraught. This section explains the House of Lords' somewhat reluctant adoption of Strasbourg's jurisprudence on procedural fairness and examines executive attempts to resist the effect of the ruling, and the ambiguity of its interpretation in general.

Initially, it was possible for control orders to be made entirely on the basis of closed evidence. In this situation the controlled person and his lawyers could face a case against the controlee which was 'entirely undisclosed to him [with] no specific allegation of terrorism-related activity being contained in open material.'[70] This was the situation in *MB* in which the House of

[68] ibid [40].

[69] Jeffrey Jowell, n 60, 26 and *R v Home Secretary, ex parte Simms* [2000] 2 A.C. 115, Lord Hoffmann 131: 'Fundamental rights cannot be overridden by general or ambiguous words.'

[70] *Home Secretary v MB* [2007] UKHL 46 [3].

Lords was asked to consider the compatibility of closed evidence with the civil limb of Article 6(1) ECHR. The judgment is perhaps most read for Baroness Hale's 'enigmatic' speech,[71] in which she suggested that 'the ingredients of a fair trial vary according to the subject matter and nature of the proceedings'.[72] Whilst Baroness Hale was cognisant of the fact that the executive was prone to over-claim the need for secrecy in terrorism trials[73], in her view the CMP appeared to have been conducted in a manner compatible with Article 6(1) ECHR in the instant case, although the procedure may create unfairness in other circumstances.[74]

Secondly, for the executive at least, the ruling in *MB* enshrined a principle of dubious status and utility which came to be called the 'makes no difference' principle. The essence of the this principle is that, where withheld evidence against a controlee is so strong that disclosure would not facilitate a challenge that altered the decision, then neither Article 6(1) ECHR nor the common law would require disclosure.

Following the ruling in *A v United Kingdom* (concerning the procedural fairness requirements of Article 5(4) ECHR in the context of SIAC bail)[75] several controlees argued successfully that Article 6(1) ECHR required the application of the 'core irreducible minimum' of disclosure in open session which was sufficient for the controlled person to effectively meet the Secretary of State's allegations applied in all judicial proceedings concerning control orders.[76] The decision was unanimous, and in the leading speech Lord Phillips held that:

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[71] Patrick Birkinshaw, 'Terrorism, Secrecy, and Human Rights' in Katja S. Ziegler, and Peter M. Huber (eds), *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Hart 2013), 249.

[72] *Home Secretary v MB*, n 70, Baroness Hale [57].

[73] ibid, Baroness Hale [66] Serrin Turner and Stephen J. Schulhofer, 'The Secrecy Problem in Terrorism Trials' (Liberty and National Security Project, Brennan Centre for Justice and NYU School of Law 2005): 'over-classification is a constant pitfall and that executive branch officials tend to exaggerate the need to keep information secret. Indeed, 9/11 Commission Chairman Thomas Kean observed that roughly three-quarters of the classified material he reviewed during the Commission's investigation should not have been classified in the first place', 3.

[74] *Home Secretary v MB*, n 70, Baroness Hale [77].

[75] *A v United Kingdom* [2009] ECHR 301.

[76] *Home Secretary v AF (No. 3)* [2009] UKHL 28, Lord Hope [81].

> Where…the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, *however cogent the case based on the closed materials may be.*[77]

Lord Scott opined that: 'An essential element of a fair hearing is that a party against whom relevant allegations are made is given the opportunity to rebut the allegations…The degree of detail necessary to be given must…be sufficient to enable the opportunity to be a real one.'[78]Baroness Hale also revised her position as stated in *MB*, in part due to the fact that Special Advocates had revealed in their submissions that:

> [T]he objections [to disclosure] are often in the nature of class claims, relating to the sort of information it is, rather than specific to the particular case. This makes them very different from the other cases mentioned in my opinion, relating to children and mental patients, where non-disclosure may be permissible. These days, a Mental Health Review Tribunal would be unlikely to uphold a non-disclosure claim on the general ground that disclosure would be damaging to the doctor patient relationship. *They would want to know precisely what it was in this doctor's evidence that might cause serious harm to this patient or to some other person and to weigh that damage against the interests of fairness.*[79]

[77] ibid, Lord Phillips [59], emphasis added.

[78] *AF (No. 3)*, n 76, Lord Scott [96].

[79] ibid, Baroness Hale [105], emphasis added.

However, the ruling in *AF (No. 3)*, in which Lord Rodger declared 'Strasbourg has spoken, the case is closed',[80] also indicated the presence of judicial hostility towards the phenomenon of an irreducible baseline of disclosure. Four of the nine justices indicated limited support for the continuation of the 'makes no difference principle' in some shape or form. Lord Hoffmann was the most forthright, declaring that 'I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism.'[81] He went on to add: '*There may well be cases in which, from the point of view of reaching the right decision, it is clear to the Tribunal that it would be highly unlikely to make any difference. If that is the case, the procedure may be fair even though a subjective feeling of injustice is unavoidable.*'[82] Lord Phillips went as far as to say that:

> What is in issue in control order cases is whether there are reasonable grounds for suspecting involvement on the part of the controlee in terrorism-related activity. This is a low threshold to cross and there are, so it seems to me, bound to be cases where the closed evidence is so cogent that the judge can rightly form the conclusion that there is no possibility that the controlee would be able, if this evidence were disclosed to him, to dispel the reasonable suspicion.[83]

[80] ibid, Lord Rodger [98].

[81] ibid, Lord Hoffmann [70].

[82] ibid, Lord Hoffmann [72], emphasis added.

[83] ibid, Lord Phillips [62].

Two other justices (Lords Brown and Carswell) were also reticent about the principle of a categorical minimum core of disclosure. Lord Carswell supported the House of Lords' approach in *MB* despite accepting that the ECtHR ruling was binding: 'there may be cases in which it is possible to accept that the person subject to a control order…has received a fair trial, even though the material adduced by the Secretary of State in support of the control order may have been based solely or to a decisive degree on closed material.'[84] Lord Brown was of the view that the *A v United Kingdom* ruling did not reflect the reality in which the English courts must operate: 'In short, Strasbourg has decided that the suspect must *always* be told sufficient of the case against him to enable him to give "effective instructions" to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk.'[85] Lord Brown was also eager to stress the limitations of the Strasbourg gisting principle in practice, stating that '[p]lainly *A* does not require the disclosure of the witness's identity or even their evidence, whatever difficulties that may pose for the suspect. What is required is rather the substance of the essential allegation founding the Secretary of State's reasonable suspicion.'[86] This collection of dicta prompts recollection of Lord Atkin's maxim that 'when face to face with claims involving the liberty of the subject, judges show themselves more executive-minded than the executive.'[87]

The immediate reaction to this ruling was (understandably) one of confusion. The House of Lords' judgment prompted the Secretary of State to conduct an 'urgent review' of all live control orders.[88] The government was of the view that 'the regime remains viable, and that there are a number of strong reasons for maintaining it.'[89] Two controlees involved in the litigation had their

[84] ibid, Lord Carswell [107].

[85] ibid, Lord Brown [116], emphasis original.

[86] ibid [120].

[87] *Liversidge v Anderson* [1942] AC 206, Lord Atkin.

[88] *Home Secretary v AM* [2009] EWHC 3053 (Admin) [30].

[89] Lord Carlile of Berriew QC, '5th Report of the Independent Reviewer Pursuant to section 14(3) of the Terrorism Act 2005' (Home Office 2010), Annex 1 'Letter from the Home Office'.

control orders discontinued because the Home Office was unwilling to authorise further disclosure in compliance with the new standard.[90] The Administrative Court quashed control orders made in respect of AF and AE *ab initio.*[91] The extent of AE's disclosure was examined in Chapter Three. This ruling occurred despite the claimants' 'release' from control orders which had been made initially on the basis of closed material alone. The control orders were void *ab initio* because the duties of fairness applied to *both* the Secretary of State's initial actions in making the control order *and* the court procedures in respect of its review.[92] In another case, it was ruled that controlees had already been given sufficient disclosure to satisfy the standard in *AF (No.3)* prior to that judgment being officially handed down.[93] In *Home Secretary v AS*[94]Collins J noted that 'the balance between the need for national security and a fair hearing has since *AF* come…down in favour of a fair hearing'.[95] Despite this, many questions were left open by the ruling. For example, the 'distinction…drawn between the allegations and the evidence relied on to support those allegations…may in given cases not be easy to apply since, as must be obvious, what amounts to an allegation and what amounts to evidence to support an allegation may depend on the width of the allegation.'[96] In short, what was required was 'all significant allegations – I would say all significant material – should be sufficiently disclosed is closer to the mark. The judge will have to decide what is material having regard both to the establishment of reasonable suspicion which

[90] "AF", "AN", and "AE" were released from their control orders. Aidan Jones, 'Terror Suspect Freed from Control Order' *Guardian* (London, 7 September 2009) <www.theguardian.com/uk/2009/sep/07/control-order-terror-law-lords-johnson> accessed 01 July 2014.

[91] *Home Secretary v AF and AE* [2010] EWHC 42 (Admin).

[92] ibid [44].

[93] *Home Secretary v AT and AW* [2009] EWHC 512 (Admin) [27]: 'AT has had the opportunity to permit him to give effective instructions to the special advocate about his case on these issues. I am also satisfied that what appears in the closed material is not determinative of the issue of necessity. [Even] if the requirements of Article 5(4) identified by the Strasbourg Court in *A* apply to this hearing, I am satisfied that they have been fulfilled.'

[94] *Home Secretary v AS* [2009] EWHC 2564 (Admin).

[95] ibid [19].

[96] ibid [8].

justifies a control order and to the need to impose obligations under the control order.'[97] However, Lord Hope's position on the absolute requirement of disclosure was rejected. Instead, Collins J saw the judicial function as continuing to be limited by considerations of national security: 'He cannot order disclosure of material disclosure of which would compromise national security or would be contrary to the public interest.'[98] Despite this limitation Collins J attached no purchase to the 'makes no difference' principle, declaring that: 'the cogency of the undisclosed material is irrelevant. Even if the judge reasonably considers that there can be no answer to the material, if it needs to be disclosed to enable a defence (however improbable) to be put forward, it must be.'[99]

A novel solution to the problem of disclosure was reached in the case of *AM*.[100] Rather than release him from his obligations, AM was entitled to disclosure satisfying the rule in *AF (No. 3)* via a confidentiality ring. This seems to be the only control order case in which this approach was taken. The ruling occurred as part of the process of disclosure prior to the 'full' review of AM's control order pursuant to section 3(10) of the PTA 2005.[101] AM was required to give confidentiality undertakings which permitted him to access closed evidence following a judicial determination of the nature and extent of required disclosure. Keith J mandated that: 'In view of the nature and extent of that disclosure, parts of the section 3(10) review hearing will be in private, even though AM and his legal team will be present during those parts of the hearing.'[102] Counsel for AM had also requested that AM's necessary prior consultation of closed material take place in his own counsel's chambers. It is unclear from the reported judgments as to whether this request

[97] ibid [9].

[98] ibid [17].

[99] ibid [12].

[100] *Home Secretary v AM* [2009] EWHC 425 (Admin).

[101] ibid.

[102] ibid [1].

was ever granted.[103] At the section 3(10) hearing, counsel for AM unsuccessfully argued that disclosure remained insufficient to comply with the standards of Article 6 ECHR. In two other cases, the executive unsuccessfully argued that the obligations imposed as part of control orders did not engage Article 6(1) ECHR, and as such, were not subject to the disclosure rules laid down in *AF (No. 3)*. In *BB and BC* (known as 'control orders lite)[104] the Home Secretary argued that the absence of the obligation requiring random searches of the controlee's home should result in the non-application of Article 6 ECHR.[105] In the context of a section 3 review Collins J ruled that the minimum core of disclosure required by Article 6 ECHR continued to apply to control orders because '[t]he nature of the proceedings in these cases does in my view engage Article 6 because the control orders, as I have said, are intended to, and do, restrict the rights of the individuals who are subjected to them.'[106]

In *BM*[107] there was a further attempt by the executive to dis-apply Article 6 ECHR in respect of a modification appeal pursuant to section 10(5). BM's variation appeal was against his proposed relocation from London to Leicester. In respect of whether the disclosure requirements in *AF (No. 3)* applied to variation appeals, the arguments advanced by counsel for BM were that his Article 8 ECHR rights (which were civil rights) were violated by the proposed relocation in a number of ways including: his right to respect for family life, his right to contact with his children, and his right to occupy his own property. The court considered relocation for national security purposes to fall within 'the hard core of public authority prerogatives'[108] and that the measure did

[103] ibid [3].

[104] *Sectretary of State for the Home Department v BC* [2009] EWHC 2927 (Admin) 'Control Orders Lite'.

[105] ibid: 'It is perhaps unfortunate for those who look at the House of Lords decision that it was not made clear what the basis of the concession was, namely, as I say, that the search and seizure would constitute a trespass' [9].

[106] ibid [40].

[107] *Home Secretary v BM* [2009] EWHC 1572.

[108] *Ferrazzini v Italy* (2002) 34 EHRR 1068 in *BM*, n 107 [3].

not interfere with BM's access to his children, and in reality, Article 8 ECHR (although engaged) was not determinative of BM's civil rights in this context. Instead, preventing BM from residing in his own home engaged civil rights for the purposes of Article 6(1) ECHR: 'The right to occupy land, including a home, is a classic civil right. Proceedings which determine that right are subject to Article 6(1): *Gillow v United Kingdom* (1986) 11 EHRR 335 paragraph 68.'[109] The Secretary of State countered this assertion by arguing that BM's civil right to occupy his own property was not infringed in substance because he did not intend to occupy either of his homes in Essex. In rejecting this argument, Mitting J was cognisant that the executive argument, had it been successful, would have generated a 'startling result…Indeed the opportunity to avoid disclosure is the reason for advancing the argument.'[110] Had the Executive's argument – that BM's civil rights were of 'no real value' to him – succeeded, BM would have been prevented from 'give[ing] effective instructions about the decision…to deprive him of the civil right to occupy his homes because, for reasons which are not disclosed to him, this appeal does not determine that right.'[111] The important point was that BM's civil right to occupy his home was infringed 'on its face'.[112]

The second issue related to the extent of the disclosure requirements in practice. Regarding this aspect, Mitting J ruled that the only requirement of disclosure related to the *necessity of the measure contested*, not to the foundations of the national security case itself.[113] This principle predates the ruling in *AF (No. 3)*. What this specifically meant in BM's case was that the satisfaction of Article 6(1) ECHR required that the 'necessity for relocation is, on the open case, justified only by reference to the Security Service's assessment of the risk of absconding.' However, Mitting J. concluded that the 'assessment is not supported in the open case by the grounds upon which it

[109] *BM*, n 107 [4].

[110] ibid [6].

[111] ibid [6].

[112] ibid [7].

[113] *Home Secretary v AV & AU* [2008] EWHC 1895 (Admin).

was made.'[114] In spite of the non-disclosure, the necessity for relocation *had been justified on the basis of closed material*. The Secretary of State's unwillingness to disclose the risk assessment to BM meant that an order was made to vary the control order to remove the relocation requirement. If the Home Secretary wished to pursue the policy of relocation 'he would have to make the disclosure identified by me in the closed session which, *for proper reasons*, he has declined to make.'[115] The requirements of procedural fairness in this instance presented the executive with a dilemma which the court acknowledged was real: risk national security for additional disclosure, or lessen the strictness of the order to protect vital information. BM was, by his own admission, 'committed to terrorism'.[116]

While the principled effects of *AF (No. 3)* can be stated with reasonable clarity (there is an irreducible minimum threshold of disclosure required to comply with Article 6 ECHR which applies to all control orders, and must be observed by the executive during decision-making, by the court at the initial review stage, and during variation appeals), the practical ramifications are more difficult to quantify. Determination of the 'minimum core' of disclosure proceeds firmly on a case-by-case basis, and the executive has contested the application of the principle in a series of legal arguments in the Administrative Court. However, the courts have set their face against general allegations extrapolated from closed material. In *AT v Home Secretary*[117] the court reinforced that where a case was based 'to a decisive degree on closed material the requirements of a fair trial would not be satisfied.'[118] The court ruled that if the evidence that the Home Secretary used to conclude that AT was a 'significant and influential member' of the Libyan Islamic Fighting Group (LIFG) was in the closed material then 'detail[s] needed to be given to AT to enable him to deal

[114] *BM*, n 107 [11].

[115] ibid [13], emphasis added.

[116] HL Deb 5 October 2011, vol 730, col 1138, Lord Hunt of King's Heath (Lab).

[117] *AT v Home Secretary* [2012] EWCA Civ 42.

[118] ibid [35].

with it'. Alternatively, if such information was not present in the closed material then 'there was no evidence to support the allegation'[119] and the control order would be flawed as per section 3 of the PTA 2005.

Despite this it remains difficult to assess the impact upon legitimate secrecy or otherwise that the *AF (No. 3)* generated by focussing solely on the disclosure rulings on their own terms. Furthermore, the Strasbourg ruling seems to have had little impact on the 'nuts and bolts' of the physical operation of the process. Disclosure remains 'iterative'[120] and controlees' lawyers also indicated that the process of disclosure was hampered by '[t]he slow service of evidence, the need for the special advocates to be able to do their job, the secret hearings to consider closed evidence, these all mean that it is an extraordinarily prolonged process'.[121]In short 'the assessment of the requirements of procedural fairness is usually a painstaking exercise.'[122] In BM's case the procedure to determine the validity of his control order lasted twenty-two months, before it was declared to be flawed on open evidence.[123] Moreover, as Chapter 6 demonstrates, executive attempts to rely upon the 'makes no difference' principle persisted into litigation on TPIMs.[124]

PROCEDURAL FAIRNESS

IN REVIEW OF RELOCATION REQUIREMENTS

[119] ibid [50].

[120] Angus McCulloch QC and Martin Chamberlain QC *et al*, 'Justice and Security Green Paper: Response to Consultation from Special Advocates' (16 December 2011) <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wpcontent/uploads/2012/09_Special%20Advocates.pdf> accessed 01 July 2014 [33]: '(iv) The Special Advocates have previously set out our concerns about the way in which AF (No.3) has been operated in practice by the Courts on occasion, by means of "iterative disclosure".'

[121] Evidence of Gareth Pierce (Question 5), Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Bringing Human Rights Back In (16th Report),* (2009-2010 HL 86/HC 111), [42].

[122] *BX v Home Secretary* [2010] EWCA Civ 481 [56].

[123] ibid [40]-[41].

[124] *Home Secretary v BM* [2012] EWHC 714 (Admin) [22].

Over the life of the regime twenty-three of the fifty-two controlees were subject to involuntary relocation.[125] Anderson noted that '[t]he disruptive effect of relocation was as prized for national security reasons as it was resented by families.'[126] The actual process of relocation involved removing a controlee from his home to a town two or three hours travel away. Sometimes controlees were joined by immediate family, however '[o]ften they chose not to do so, and relocation conditions were challenged before the courts on the basis of their disruptive effect on family life.'[127] Such relocation could also be voluntary. Section 7(2)(d) of the PTA 2005 does not require the Secretary of State to give notice of an intention to impose control order modifications. It was the general practice of the Home Office to provide a controlee with seven days' notice of the imposition of a modification. But in exceptional cases, modifications were made without notice.[128] In the context of compulsory relocation one controlee (BX) unsuccessfully attempted to argue that the interference with Article 8 ECHR caused by relocation necessitated an additional procedural step (in the form of a right to be heard compliant with Article 6 ECHR) before relocation, allowing him to make representations relating to the national security justification and the interference with his Article 8 ECHR rights likely to be caused by relocation.[129]

Challenges to relocation (and other modifications) by way of appeal are routinely covered by section 10 of the PTA 2005. At this interlocutory stage in BX's proceedings the Court was not invited to consider the closed evidence. The Court of Appeal concluded that, save on rare occasions, parallel proceedings for judicial review (where an appeal is available) are 'unnecessary and wasteful. In principle, where an adequate remedy otherwise exists judicial review is a last

[125] David Anderson QC, Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005' (The Stationary Office 2012), 6.

[126] ibid, 7.

[127] ibid [3.35].

[128] *BX v Home Secretary* [2010] EWCA Civ 481 [54].

[129] ibid.

resort.'[130] In respect of the necessity of having an Article 6 ECHR compliant process the Court accepted that the Secretary of State had a duty to act in a manner compliant with Articles 6 and 8 ECHR when making a decision to modify a control order. However, neither Article required the procedural steps BX demanded because:

> The nature of the security assessment and the evidence on which it is based may be such that the Secretary of State is required to act urgently in the public interest. In striking the balance between the public interest and the rights of the individual in such a case it may not be practicable to seek or to receive representations before acting.[131]

According to Anderson 'conditions imposed under a control order should be specific and tailored to the individual. The aim is to secure the safety of the State by the minimum measures needed to ensure effective disruption and prevention of terrorist activity.'[132] The promise of tailoring to risk suggests that some of the priorities of the intelligence services might be at least accessible or generalizable in open court. However, as we have seen there was not always willingness to disclosure in such specificity. Nonetheless, even in the realm of a difficult and technical area such as this, judicial scrutiny has not resulted in what Pozen would class as judicial 'delegation', or what this author would more accurately describe as 'abdication'.[133] In respect of the actual decision regarding the benefit to be gained from relocating a suspect, as part of a broader matrix of

[130] ibid [52].

[131] ibid, [53].

[132] Lord Carlile, 'First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005' (Home Office 2006) [10].

[133] David E. Pozen, 'The Mosaic Theory, National Security, and the Freedom of Information Act' (2005) 115(3) The Yale Law Journal 628, 652.

measures, it is often assumed that 'judges treat mosaic claims with an augmented form of deference, which amounts to an effective delegation of mosaic theory oversight to the agencies themselves.'[134] In the context of the most intrusive and damaging power available under the control orders regime, there is little evidence to support this general claim regarding judicial behaviour in the national security and counterterrorism realm. Instead, the Administrative Court has applied the ruling in *AF (No. 3)* strictly. Although the subjection of intelligence based risk-management to legal control in this regard is commendable, the consequences of ending relocation measures on procedural fairness grounds is potentially grave.[135]

Abandoning the policy of re-location was central to the Coalition's 'rebalancing' of national security and human rights pursued as part of the Terrorism Prevention and Investigation Measures (TPIMs) legislation.[136] The removal of the power was met with trepidation in both Houses of Parliament.[137] It was clear that the power to relocate had been favoured by the Police and Security Services.[138] Lord Carlile opposed the removal of the relocation power[139] and Lord Bew urged those

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[134] ibid, 652.

[135] *Home Secretary v BM* [2009] EWHC 1572.

[136] It has been suggested that the absence of the relocation power in the TPIMs regime has led to the regime being 'allowed to wither on the vine'. Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (10th Report), (2013/2014, HL Paper 113/HC 2014), [80].

The Independent Reviewer of Terrorism Legislation resolved in his most recent report that: 'I believe that the time has now come to revisit the issue of locational restraints. As explained…above, the recent absconds have the potential, if repeated, to destroy public faith in TPIMs and prevent them from being used in future…The two-year limit on any subsequent locational restraint will be a further factor in favour of its proportionality.' [6.23] David Anderson QC, 'Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011' (The Stationary Office 2014).

[137] The Shadow Home Secretary commented that: 'many experts have concluded that in certain limited circumstances [relocation] is extremely important and can be justified. Indeed, police officers have told me that relocation can, in some exceptional circumstances, be the most effective way to disrupt terrorist activity and break someone out of a network of dangerous contacts and associations.' HC Deb 7 June 2011, vol 529, col 78
Yvette Cooper (Lab).

[138] HC Deb 28 June 2011 vol 530, col 147, Hazel Blears (Lab). Blears sought unsuccessfully to amend the Bill to reintroduce a relocation power.

[139] Lord Carlile: 'the sensitive information, the security that the Government have received, points to the need, for the time being at least, to continue as part of the main legislation the power to order relocation, used sparingly as it is and subject to the scrutiny of the courts.' HL Deb 19 October 2011, vol 731, col 317.

in favour of ending relocation to 'face up to [the] deliberate decision to take an increased risk'[140] in reducing the powers available to the executive.

At least four controlees had relocation measures struck down by the courts.[141] According to the final report of the Independent Reviewer, the evidence underpinning the necessity for relocation 'has at least been subject to a degree of judicial scrutiny.'[142]However, the case-law reflects a slightly greater degree of tension in the minds of some judges than the report suggests. According to Mitting J:

> Several individuals subject to control orders were compulsorily relocated. Some of them successfully resisted or challenged relocation on the ground that it disproportionately interfered with their and their family's right to respect for family and private life under Article 8 ECHR; but not all succeeded. *The risk to public security posed by each of them was not the only or even principal consideration.* Married men were more likely to succeed in resisting relocation than unmarried men.[143]

In the case of CA, who successfully challenged his forced relocation on Article 8 ECHR grounds, Mitting J recognised a conflict between the demands of Article 8 ECHR jurisprudence and the risk presented by the controlee:

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[140] HL Deb 5 October 2011, vol 730, col 1144, Lord Bew (XB).

[141] This is based on reported cases, available on BAILII http://www.bailii.org (Accessed 30 March 2014). The independent reviewer (David Anderson) refers to 'at least four cases'. David Anderson QC, n 21, [3.35].

[142] ibid [3.37].

[143] *Home Secretary v AM* [2012] 1854 (Admin) [15], emphasis added.

> the determinative issue in this appeal is proportionality…I do pay a degree of deference to the decision taken by the Secretary of State, on Security Service advice, that it is necessary for the protection of the public from a risk of terrorism to maintain the relocation of CA to Ipswich. Breaking up loose groupings of suspect individuals, by dispersion of some of them, is a legitimate means of minimising that risk…Even taking into account the adverse impact upon his family, *I would have been hard pressed to hold that the Secretary of State's decision was open to challenge on Wednesbury principles*…The decision is finely balanced and difficult.[144]

Whilst this dicta leaves little doubt regarding the potential impact that the enhanced scrutiny requirements of proportionality (as mandated by the Human Rights Act) had on the control orders regime, other cases (in which challenges to relocation failed) suggested that: 'At the end of the day, the issue boils down simply to a matter of judgment.'[145] The influence of the House of Lords' position in *Rehman* remains firmly present in substantive review. The approach to evaluating the proportionality of individual measures (including relocation) is based upon paragraphs [63]-[64] of the Court of Appeal decision in *Home Secretary v MB*:

> [63] Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The

[144] *CA v Home Secretary* [2010] EWHC 2278 (QB) [8], emphasis added.

[145] *Home Secretary v AP* [2008] EWHC 2001 (Admin) [93] Keith J.

> object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity… [64] The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State. That it is appropriate to accord such deference in matters relating to state security has long been recognised, both by the courts of this country and by the Strasburg court, see for instance: Secretary of State for the *Home Department v. Rehman* [2001] UKHL 47, [2003] 1 AC 153; *Republic of Ireland v. United Kingdom* (1978) 2 EHRR 25.[146]

During the Lords' debates on the TPIMs Bill those who opposed ending the power of relocation referred frequently to the unsuccessful challenge mounted by CD to his forced relocation.[147] CD was compulsorily relocated from North London to a city in the Midlands. The open national security case for such a step was that CD was the leader of a group of North London Islamic extremists whom the Security Services believed were planning a terrorist attack using firearms. He was assessed to have attended terrorist training camps in Cumbria and Syria. Relocation was assessed as necessary 'to relocate CD outside Greater London in order to prevent him from conducting covert meetings with his north London based criminal associates.'[148] The evidence

[146] *Home Secretary v MB* [2006] EWCA Civ 1140 Lord Phillips CJ.

[147] *CD v Home Secretary* [2011] EWHC 1273 (Admin). HC Deb 7 June 2011, vol 529, col 78.

[148] ibid, [24].

upon which the Secretary of State relied (as reported in the judgment) focussed upon covert meetings with other suspects, and CD's attempts to procure firearms.[149]

The court regarded their duty as one of 'intense scrutiny' in respect of the relocation measure.[150] However, the only reference to the content of the closed material concluded that it 'does not undermine the open material; and that, on the contrary, it provides cogent evidentiary support for the contentions advanced on the basis of the Open material.'[151] The court also appeared to place weight (for the purposes of proportionality) on the fact that CD's wife did not offer evidence regarding the impact of relocation. This had been the case in other relocation appeals.[152] There was no substantive discussion of how the nature of the risk mitigated by relocation was assessed in open materials, and this does not appear to have been reviewed by the court in open session.

CONCLUSION

It is difficult to assess the precise nature of the relationship between necessity, secrecy, and judicial control which characterised the control orders regime from the comfort of the Ivory Tower. Nonetheless, this chapter has demonstrated that the most appropriate rubric by which to assess these relationships is not via the so-called constitutional prism of 'legality'. Plainly, attempts to control the operation of control orders on such abstract terms failed to make sufficient inroads. The principle of legality has left Chakalson's pointed question regarding parallel systems of justice unanswered.

[149] ibid [40].

[150] ibid, [19].

[151] ibid, [57].

[152] ibid, [42].

The spectre of *Rehman*-type deference haunted judicial scrutiny of control orders throughout the life of the regime. But unlike proceedings in SIAC, the disclosure ruling in *AF (No. 3)* has equipped controlees with a greater opportunity to challenge the imposition of control orders (and specific measures), at least in principle. The reception of the House of Lords' decision by both the executive and the judiciary meant that what is required by way of disclosure in practice was unclear, and may have been inconsistent in parallel cases. It might well be that the best that can be done as an observer is to accept that '…that the answer to [the] question - what difference might disclosure have made? - is that you can never know.'[153] Nonetheless, it was clear that in a small number of cases, the stringent requirements of proportionality did constrain executive decisions to relocate suspects where the national security case for doing so was apparently made out to the standard of necessity.

Additionally, judicial resistance to executive requests for the application of the 'makes no difference' principle are to be commended. In short, however, the unwillingness of the executive to reveal their processes for assessing risk in open evidence remains perhaps the greatest barrier to fairness, and it is one that does not seem to have been penetrated by either the constraints of legality, or the ruling in *AF (No. 3)*. As Clive Walker puts it: 'The legal regulation of security intelligence remains at a nascent stage compared to traditional rules of evidence.'[154] In the cases following the rulings where the executive elected to abandon control orders in lieu of making further disclosure we are no clearer as to how the balance between secrecy, risk, and public safety was struck. Whilst it can be confidently stated that first-instance judgments are not characterised by abdication in the face of executive claims to necessary executive secrecy, Fenwick and Phillipson's concerns regarding the 'prophetic'[155] status of Security Service risk assessments remain

[153] *AF (No 3)* n 76, [36], citing Secretary of State for the *Home Department v AF (No 3)* (CA) [2008] EWCA Civ 1148, [113] Sedley LJ in Ryan Goss, 'To the Serious Detriment of the Public: Secret Evidence and Closed Material Procedures' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement*, (Hart 2014), 18.

[154] Clive Walker, *Terrorism and the Law* (OUP 2011), 327 [7.113].

[155] Helen Fenwick and Gavin Phillipson, n 15, 876.

a cause for concern. Regrettably their concerns were not capable of being alleviated by what was arguably the strongest step forward in terms of due process in the realm of counter-terrorism in British legal history.

CHAPTER SIX:

TERRORISM PREVENTION AND INVESTIGATION MEASURES

INTRODUCTION

In the approach to the 2010 general election both the Conservative and Liberal Democrat Manifestos contained pledges related to national security and civil liberties law reform. The Liberal Democrats made an explicit pledge to 'scrap control orders, which can use secret evidence to place people under house arrest'[1] and the Conservatives pointed out that 'Labour have subjected Britain's historic freedoms to unprecedented attack.'[2] In 2009 Conservative Peer Baroness Neville Jones, then Shadow Security Minister, commented that '[a] Conservative government would review the morally objectionable and costly control order regime with a view to replacing it by the trial of suspects through the normal [criminal] court system.'[3]

Both the New Labour record regarding civil liberties in general, and the control orders regime in particular have attracted significant criticism from commentators within academia and civil society.[4] By way of a political compromise by the Coalition government, the Terrorism Prevention and Investigation Measures Bill was introduced into Parliament on May 23, 2011 and

[1] Nick Clegg, *Change that Works for You: Liberal Democrat General Election Manifesto 2010: Building a Fairer Britain* (Liberal Democrat Publications, 2010), 94.

[2] Conservative Party, *An Invitation to Join the Government of Britain: Conservative Manifesto 2010* (Conservative Research Department 2010), 79.

[3] Robin Simcox, 'Control Orders: Strengthening National Security' (Centre for Social Cohesion 2010), 31, James Kirkup, 'Terror Suspects get £600,000 handout for "living costs".' *The Telegraph* (London, 17 November 2009) <www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/6585514/Terror-suspects-get-600000-handout-for-living-costs.html> accessed 01 July 2014.

[4] Keith D. Ewing, *Bonfire of the Liberties*: *New Labour, Human Rights and the Rule of Law* (OUP 2010), Chapter 7, 241-243. See also the Liberty 'Unsafe. Unfair' Campaign related to both control orders and TPIMs as their replacement: http://www.liberty-human-rights.org.uk/campaigns/unsafe-unfair/index.php accessed 09 July 2014.

received Royal Assent on December 14, 2011. At the Bill's Second Reading[5] Home Secretary Theresa May MP remarked that:

> [The] current control orders regime is neither perfect nor entirely effective. I believe that the Bill will give us appropriate, proportionate and effective powers to deal with the risk posed by people we believe are involved in terrorist-related activity whom we can neither prosecute nor deport.[6]

The aim of the 2011 TPIM Act, therefore, was to reorient counter-terrorism powers away from a 'preventative justice' or 'pre-punishment'[7] model towards a closer relationship with criminal justice. It was hoped that a reduction on substantive restrictions placed upon persons designated under the new regime, coupled with an increase in surveillance, would lead to successful criminal prosecutions. The Home Office *Review of Counter-Terrorism and Security Powers* revealed that, despite criticism of the existing control orders regime, both the police and security services felt that there was a need to provide a mechanism of *control* for some individuals where surveillance alone was insufficient to mitigate the threat posed by such persons.[8] Moreover, despite calls to end the '…splintering of terrorism from ordinary criminal justice that results in human rights abuses…'[9] the Review made clear that due to issues related to both intelligence sharing, and the fact that some individuals fell through the cracks in terms of eligibility for deportation or criminal prosecution,

[5] HC Deb 7 June 2011, vol 529, col 69.

[6] Theresa May MP, HC Deb 7 June 2011, vol 529, col 70.

[7] Lucia Zedner, 'Preventative Justice or Pre-Punishment: The Case of Control Orders' (2007) 60 Current Legal Problems 174, 175

[8] Home Office, *Review of Counter-Terrorism and Security Powers* (Cm 8004, 2011), 38 [13].

[9] Adam Tomkins, 'Readings of *A v Home Secretary*' [2005] Public Law 259, 265.

there was still a need for a 'system which will protect the public but will be less intrusive, more clearly and tightly defined [than control orders] and more comparable to restrictions imposed under other powers in the civil justice system.'[10]

But the future of the relatively new TPIMs regime is already in doubt. Individual TPIMs have a life-span of two years, and no new orders have been imposed since 2012. Two persons have absconded from the regime: Ibrahim Magag[11] escaped surveillance using a black taxi cab and Mohamed Ahmed Mohamed escaped disguised in a burka.[12] In view of this it has been suggested the legislation is 'withering on the vine'.[13] The Home Secretary commented that TPIMs 'remain an option'[14] but issued a Delphic statement as to the possibility of instituting alternative measures, stating in a January 2014 Commons debate that:

> '[T]he police and Security Service have now been working for some time to put in place tailored plans to manage each individual once their TPIM restrictions are removed. Those plans, which are similar to those put in place for the release of prisoners who have served their sentences, are kept under constant review, and they are

[10] Home Office, n 8, 41 [23].

[11] Tom MacTague, 'Terror suspect "escaped from police surveillance by jumping into black cab"' *Daily Mirror* (London, 08 Jan 2013) <www.mirror.co.uk/news/uk-news/ibrahim-magag-missing-terror-suspect-1524543#ixzz32Y836LuO> accessed 01 July 2014.

[12] Matthew Weaver, 'Terror suspect Mohammed Ahmed Mohamed "fled after cutting off tag"' *Guardian* (London, 7 November 2013) www.theguardian.com/uk-news/2013/nov/07/terror-suspect-fled-tag-mosque-burqa accessed 01 July 2014.

[13] Nigel Morris, 'Out of control: The verdict on May's terror suspect policy' *The Independent* (London, 23 January 2014) <www.independent.co.uk/news/uk/politics/out-of-control-the-verdict-on-mays-terror-suspect-policy-9078159.html?origin=internalSearch> accessed 01 July 2014. Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (10th Report), (2013/2014, HL Paper 113/HC 2014) [80].

[14] HC Deb 21 January 2014, vol 574, col 230.

> similar to the plans the police and Security Service use every day to manage other suspects who are not subject to restrictions.'[15]

This was followed by a report by David Anderson QC, which suggested that reintroduction of the relocation power present in the former control orders regime should be considered.[16] On 1 September 2014 the Prime Minister stated that 'we will introduce new powers to add to our existing terrorism prevention and investigation measures, including stronger locational constraints on suspects under TPIMs, either through enhanced use of exclusion zones or though relocation powers.'[17] Therefore, the coalition attempts to rebalance the substantive relationship between liberty and security appear some-what ill-fated. This chapter begins with an examination of the substantive differences between control orders and TPIMs, examining whether procedural fairness has improved under the TPIMs regime. It argues that, in spite of explicit rhetorical commitments by the governing parties to 'rebalance' the relationship between liberty and security, many of the defects present in the control orders regime continue to persist.

SUBSTANTIVE DIFFERENCES BETWEEN CONTROL ORDERS AND TPIMS

TPIMs aim to 'balance and rebalance the equation between individual liberty and collective security.'[18] First of all, unlike control orders which could be renewed indefinitely, TPIMs are temporally *finite*. Section 5 places a two-year limit on TPIM notices overall, subject to conditions. Initially, an order lasts for one year[19], and is subject to renewal provided that conditions A, C, and

[15] ibid, col 234.

[16] 'Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011' (The Stationary Office 2014),

[17] HC Deb 1 September 2014, vol 585 col 38.

[18] HC Deb 7 June 2011, vol 529, col 82, Paul Goggins (Labour).

[19] TPIM Act, s 5(1).

D in section 3 are met (see discussion below).[20] Only one extension can be issued per TPIM order.[21] The control order regime was renewed five times using secondary legislation, and on Monday 1 March 2010 the debate lasted only 90 minutes.[22] In terms of legislative procedural justice, the use of a 'sunset clause' to prevent what Gross sees as 'normalisation of the extraordinary'[23] can be seen as something of a failure. This use of sunset clauses was among the 'least impressive, as evidenced by the frequent, almost formulaic renewal of…the PTA's control order provisions.'[24]

Unlike control orders the TPIM Act does not separate between 'derogating' and 'non-derogating' orders. Instead, there is a temporary power for imposition of 'enhanced measures' in section 26, and these Enhanced TPIMs can last only for 90 days or less.[25] Enhanced Orders can be made without the consent of Parliament, provided a copy of such an Order is laid before Parliament retrospectively 'as soon as practicable'.[26] The publication of a Draft Enhanced Terrorism Prevention and Investigation Measures Bill indicates that Enhanced TPIMs would reactivate some of the more draconian powers associated with non-derogating control orders.[27] Such measures include the potential reintroduction of forced relocation, curfews of up to 16 hours, a complete ban on the use of electronic communication devices, exclusions from defined areas and bans from associations with *any individual* without prior permission of the Secretary of State. A further difference between TPIMs and their 'enhanced' counterparts is that Enhanced TPIMs

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[20] ibid, s 5(3)(a).

[21] ibid, s 5(3)(b).

[22] Editor, 'Control order regime renewed for the fifth time' (Coalition Against Secret Evidence, 7 March 2010) <http://coalitionagainstsecretevidence.com/2010/03/07/control-order-regime-renewed-for-the-fifth-time/> accessed 01 July 2014.

[23] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" (2003) 112 Yale Law Journal 1011, 1089–1090.

[24] John Ip, 'Sunset Clauses and Counter-Terrorism Legislation' [2013] Public Law 74, 90.

[25] TPIM Act, s 27(1).

[26] ibid, s 27(3).

[27] Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill (1st Report)* (2012-2013, HL Paper 70/HC 495) [10].

require a more demanding standard of proof – the recognised civil standard of proof 'on balance of probabilities'.[28]

In contrast with control orders, the TPIM Act 2011 empowers the Secretary of State to impose a limited, and exhaustive, number of restrictions upon a controlled person. Whereas the PTA 2005 did not contain an exhaustive list of measures that could be imposed, the TPIM Act 2011 does. These are contained in Schedule One of the 2011 Act, and include measures relating to overnight residence, overseas travel restrictions, exclusion from defined areas, movement directions, financial services, property restrictions, restrictions relating to the ownership and use of electronic communication devices, association restrictions, and restrictions related to the undertaking of work and studies. There are further measures which may be required of the affected person including the requirement to report to a police station, the requirement to be photographed, and monitoring of the individual's movements and communications. By contrast, there were over twenty-five commonly used restrictions under the control order regime.[29]

The changes of central interest are the abolition of the relocation power which was previously widely used and struck down by judges on several occasions.[30] Relocation has been replaced with an 'overnight residence measure'.[31] In practice this means that a controlled person can be compelled to spend time overnight in his own, or in another agreed residence. The amount of time required to constitute 'overnight' varies but has not as of March 2013 exceeded 10 hours,

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[28] Draft Enhanced Terrorism Prevention and Investigation Measures Bill, Clause 2.

[29] Clive Walker and Alexander Horne, 'The Terrorism Prevention and Investigations Measures Act 2011: one thing but not much the other?' (2012) 6 Criminal Law Review 421, 424 citing Lord Carlile, *Sixth Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act* (Home Office 2010) [19].

[30] Owen Bowcott, 'UK terror suspects sent into internal exile under control orders', *Guardian* (London, 26 March 2012) <www.guardian.co.uk/politics/2012/mar/26/terror-suspects-exile-control-orders> accessed 01 July 2014.

Alan Travis, 'Scrap worst aspects of control orders now, says former DPP Lord Macdonald', *Guardian* (London, 8 February 2011) www.guardian.co.uk/uk/2011/feb/08/control-orders-dpp-lord-macdonald?INTCMP=SRCH accessed 01 July 2014.

[31] TPIM Act 2011, Schedule 1 Part 1(1).

and has averaged at 9.4 hours.[32] It can be inferred that in the circumstances which they were upheld, relocation measures were effective security measures. It should be noted that the seven persons who absconded from control orders were subject to less restrictive measures which did not include relocation.[33] To date one individual, Ibrahim Magag, has absconded from a TPIM which he had not sought to challenge. He was previously subject to a control order and known as BX. This control order had a relocation element which was upheld by the Administrative Court.[34] Finally, the power of random entry and search of a controlled persons' property has also been discontinued.

TPIMs are designed to facilitate a stronger connection with criminal prosecutions than their predecessors. In the *CONTEST* document, HM Government argued that control orders would be replaced by 'Terrorism Prevention and Investigation Measures which provide security but also enable the collection of evidence which can lead to prosecution.'[35] Section 8 of the PTA 2005 and section 10 of the TPIM Act 2011 set out the relationship between their respective measures and criminal investigation. But there appears to be little more than semantic modification between the two provisions, as prior to the making of a control order or a TPIM the Secretary of State was required to consult the 'appropriate police force' regarding the possibility of prosecution. If there was no such possibility of prosecution and an order was made, the Secretary of State is obliged under both Acts to inform the Chief Police Officer of the relevant police force. Thereafter,

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[32] David Anderson QC, 'Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011' (The Stationary Office 2013) [5.18].

[33] ibid [8.19].

[34] *BX v Secretary of State for the Home Department* [2010] EWHC 990 (Admin). Anthony Bond, 'Police launch manhunt for 'terror suspect' who went missing on Boxing Day...while under close surveillance', *Daily Mail* (London, 1 January 2012) <www.dailymail.co.uk/news/article-2255394/Ibrahim-Magag-Police-launch-manhunt-terror-suspect-went-missing-Boxing-Day--close-surveillance.html> accessed 01 July 2014.

35 HM Government, *Pursue Prevent Protect Prepare: The United Kingdom's Strategy for Countering International Terrorism (CONTEST)* (Cm 7545, 2009) [1.18].

the Chief Police Officer – which is in practice Senior National Co-ordinator of Terrorist Investigations at SO15[36] is under a duty to keep the possibility of prosecution under review.

David Anderson QC has openly criticised the notion that TPIMs offer a renewed opportunity to re-connect suspects with criminal process, concluding that '[the] logical course for any TPIM subject is simply to lie low.'[37] Moreover, four individuals currently subjected to TPIMs have already faced criminal prosecution for terrorism related offences and have been acquitted. This could be partly due to the fact that criminal courts remain unable to consider intercept evidence, despite the recommendations of the Chilcot Committee.[38] Whereas both control orders and TPIMs contain the same provision about the admission of evidence: 'The court may receive evidence that would not, but for this rule, be admissible in a court of law.'[39] This means that a wider range of evidence can be relied upon to make a TPIM than would be available for the prosecution of a criminal offence. All of this strengthens Middleton's conclusion that '[some] of the proposed modifications are welcome, but the process largely appears to be an exercise in rebranding.'[40]

IMPOSING A TPIM NOTICE

I. HOME OFFICE PROCEDURE FOR MAKING TPIMS

[36] David Anderson QC, n 32, 20 note 45.

[37] ibid, 70 [8.15].

[38] Home Office, *Privy Council Review of Intercept as Evidence, Report to the Prime Minister and Home Secretary* (Cm 7324, 2008), 48 [204].

[39] CPR 76.26(4) and CPR 80.22(4).

[40] Ben Middleton, 'Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: the Counter-Terrorism Review 2011' (2011) 75 Journal of Criminal Law 225, 236.

TPIMs continue the trend of their predecessor control orders insofar as, numerically, they form an extremely small part of the United Kingdom's counter-terrorism matrix. During the House of Commons Second Reading debate on the TPIM Bill Conservative MP Dominic Raab noted that there were, according to the Security Services (MI5), some 4,000 suspected terrorists in the UK, compared with (at that time) a mere 10 controlees. Each control order came with implementation costs of £135,000.[41] So, it seems reasonable to infer that there is a complex calculus of risk, some of it concerned with the allocation of financial resources, which occurs prior to selecting candidates for TPIM orders, and imposing such an order.

The report of the Independent Reviewer offers some new insight into the internal decision making process which underpins the making of a TPIM. The function of imposing and reviewing TPIMs is undertaken by the TPIM Review Group (TRG), which was formerly the Control Order Review Group (CORG). The Group met eight times in 2012 and is comprised of civil servants with operational responsibility for TPIMs. In addition the meetings are attended by officers from MI5 (the Security Service) and officers from the relevant police force. According to the Independent Reviewer a representative for the Crown Prosecution Service will sometimes attend. In addition, the solicitors of controlled persons are informed in advance of review hearings so that they can make representations to the group. However, no legal representatives are allowed to to be present at the actual meetings. The Independent Reviewer observed four of the eight total meetings and concluded that 'such written representations are always considered.'[42] In his discussion of the TPIM Review Group, he concluded that discussions were 'structured and unhurried' and that each TPIM order was discussed related to a criteria labelled (a) through (l). These considerations include the standard of proof, necessity, the national security case, the prospect of criminal prosecution, case management issues, the health of the restricted person, and

[41] HC Deb 7 June 2011, vol 529, col 111, Dominic Raab (Con).

[42] David Anderson QC, n 32 [8.8].

exit strategy, among other things. Anderson concluded his analysis of this process by cautioning that '[the] TRG has a strong responsibility to make proportionate decisions. Whilst excessive measures can be corrected by the courts, the months that tend to elapse before appeals and reviews…can be heard mean that this remedy is far from immediate.'[43] Section 11 compels the Secretary of State to 'keep under review whether conditions C and D are met.'

TPIMs continue the trend set by the early days of SIAC (of the 'Three Wise Men'),[44] which was modified and carried through to control orders of separating this process of intelligence analysis and processing for policy-making (i.e. for imposing restrictions) from the activities of the Joint Intelligence Committee (JIC).[45] Both are clearly concerned with 'risk assessment' related to terrorism, and it seems reasonable to infer that there may be some direct cross-over in subject matter. The JIC, which is tasked with processing 'raw intelligence' related to 'events and situations relating to external affairs' and passing it to the government, works by consensus.[46] Glees points out the task of the JIC is to evaluate intelligence, which should not be equated with hard facts, and make them accessible to political decision-makers.[47] One former chairman of the JIC described its task as being 'dispassionate', indicating that the Committee should be 'divorced from the pressures of both intelligence gathering and of operational decision making…'[48] Obviously the secretive nature of both the TRG and the JIC make any comment on the relative merits and demerits of either process potentially reducible to mere speculation. However, it is interesting to note that these processes have developed independently of each other. It is unclear from the report of the

[43] ibid [8.11].

[44] Brian Barder, Ch 4, n 10.

[45] Joint Intelligence Committee <https://www.gov.uk/government/organisations/national-security/groups/joint-intelligence-committee> accessed 10 July 2014.

[46] Anthony Glees, 'Evidence-Based Police or Policy-Based Evidence? Hutton and the Government's use of Secret Intelligence' (2005) 58 (1) Parliamentary Affairs 138, 141.

[47] ibid, 141.

[48] Sir Roderick Braithwaite, ibid, 142.

Independent Reviewer whether the TRG works on the basis of consensus or some other form of majority, for example. Neither is the relationship between the Secretary of State and the TRG clear, either. Reported cases do not reveal the extent to which a Minister considers the views of the TRG when imposing a TPIM. So, it is obviously unclear – due to the secretive nature of the subject matter – if one system or the other affects the outcome or quality of the judgement being exercised.

II. Abuse of Process

Prior to the decision in *CC and CF* there was no suggestion that any jurisdiction for finding an 'abuse of process' existed in relation to the making of control orders or TPIMs. The doctrine of abuse of process is a jurisdiction of the criminal courts which is 'rooted in the recognition by the common law of an inherent or residual discretion vested in the courts to prevent otherwise lawful prosecutions which are oppressive and an abuse of the process of the court.'[49] In view of this, its extension to 'administrative' or 'pre-criminal' sanctions seems unlikely. In the Supreme Court, Lord Dyson stated[50] that an abuse of process is evident where conduct of the trial would damage public confidence in the justice system or where 'the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety".'[51]

CC and CF claimed that the making of their control order (and subsequent) TPIM was vitiated by an abuse of process. The substance of their conjoined claim was that the British Security Services had been complicit in their detention at Hargeisa Prison between January and March 2011 where both men had been subject to documented mistreatment which was within the knowledge

[49] F.G. Davies, 'Abuse of Process – An Expanding Doctrine' (1991) 55 Criminal Law Journal 374, 374.

[50] *R v Maxwell* [2010] UKSC 48.

[51] ibid, citing *R v Horseferry Road Magistrate's Court, ex parte Bennett* [1994] 1 AC 42 74G (Lord Lowry).

of the British authorities. Both men claimed to be subject to *unlawful* arrest and detention in Somaliland, followed by *unlawful* deportation. They claimed that had these unlawful events not occurred they would not have been in the jurisdiction to face control order or TPIM proceedings.[52]

There are three interesting aspects to the abuse of process element of *CC and CF*. The first is that the jurisdiction was held to exist in respect of control orders and TPIMs, the second was that the disclosure obligation in *AF (No. 3)* was deemed initially *inapplicable* to the abuse of process proceedings (this was reversed by the Court of Appeal)[53], and finally, the court held that there was no abuse of process on the facts.

Generally speaking the burden of proof lies with the party alleging abuse of process.[54] Counsel for CC and CF submitted that it would be essentially unfair if this rule remained unmodified in the present situation because the Secretary of State relied on a CMP, which excluded essential information from the reach of his clients, and thus impaired the effectiveness of any abuse of process allegations. It was further argued that a modified approach to the burden of proof was required because the approach to allegations that evidence may have been obtained through torture in *A v Home Secretary (No. 2)*[55] justified such departure from the general norms.[56] In *A (No. 2)* it was deemed appropriate that where evidence was alleged to be obtained through torture that SIAC should adopt an 'inquisitorial' role.[57]

Wilkie J denied the need for *AF (No. 3)* disclosure, concluding that unlike the appellants before SIAC in *A (No. 2)* the respondents were 'well aware of the case they wish to advance in

[52] *Home Secretary v CC and CF* [2012] EWHC 2837 (Admin) [77]-[79].

[53] *Mohamed Ahmed Mohamed and CF v Home Secretary* [2014] EWCA Civ 559 [20].

[54] *R v Hounsham* [2005] EWCA Crim 1366 [24].

[55] *A v Secretary of State of the Home Department (No.2)* [2006] 2 AC 221.

[56] *CC and CF*, n 52, [83]-[84].

[57] *A v Home Secretary (No.2)*, n 55, [68].

relation to abuse of process.'[58] This also meant that modification of the process was not required to sustain the overall fairness of the trial.[59] In turn, neither were CC and CF entitled to *AF (No. 3)* disclosure in relation to this head of claim, precisely because they *made the allegations* and *AF (No. 3)* disclosure operated to assist persons who were *the subject of allegations.*[60]

The Court of Appeal took a different view. It held that *AF (No. 3)* disclosure was applicable to the abuse of process claim precisely because it related to an allegation of infringement of the claimants' liberty:

> the underlying proceedings are ones in which the Secretary of State is seeking to restrict the liberty of the appellants and the abuse of process application is a potentially dispositive form of attempted resistance to proceedings in which the appellants did not choose to engage.[61]

Therfore, disclosure was required in order to satisfy wider public confidence in the justice system.[62] The Court of Appeal also railed against the intelligence services' policy of 'neither confirm nor deny' as a means of justifying non-disclosure:

> Lurking just below the surface…is the governmental policy of "neither confirm nor deny" (NCND), to which reference is made. I do not doubt that there are circumstances in which the courts

[58] *CC and CF*, n 56 [85].

[59] ibid [87].

[60] ibid [85].

[61] *Mohamed Ahmed Mohamed and CF v Home Secretary* [2014] EWCA Civ 559 [18].

[62] ibid [19].

> should respect it. However, *it is not a legal principle*. Indeed, it is a departure from procedural norms relating to pleading and disclosure.[63]

It is one thing to make an allegation, but quite another to be impaired from accessing all the relevant information that may help to sustain and prove that allegation. The extension of the *AF (No. 3)* disclosure rules to abuse of process is therefore welcome. But from the claimants' perspective, the NCND principle renders the basis for decisions much like the cat in Schrodinger's famous box – the national security case may be dead or alive – but before the box is opened and disclosure is compelled all is uncertain.[64] Therefore, the tacit support for NCND (revisited in Chapter 8) remains deeply problematic.

III. Statutory Mechanism for Imposition

There have been noticeable statutory changes in the tests for imposing restrictions under the TPIM Act compared with the control order regime.[65] Whereas section 2(1)(a) of the PTA 2005 required reasonable suspicion of current or past involvement of terrorism related activity, section 2(1) of the TPIM Act requires that five conditions (A-E) are met before a TPIM can be imposed. Amongst these conditions the Home Secretary must 'reasonably believe'[66] that an individual is involved in terrorism or related activity. This is, on paper, a higher civil standard of proof which falls somewhere between 'reasonable suspicion' at the weaker end of the spectrum and the 'balance of probabilities' which is the recognised civil standard of proof. If the Home Secretary wishes to

[63] ibid [20].

[64] John Gribbin, *In Search of Schrödinger's Cat: Quantum Physics and Reality* (Black Swan 2012), 18-19.

[65] TPIM Act 2011, s 1.

[66] ibid, s 3(1) Condition A.

impose an 'enhanced TPIM' upon an individual – which is of a similar substance to the unused power to make a derogating control order - the standard of proof required is the 'balance of probabilities'.[67] In the case of BM[68] Collins J made clear in respect of the ordinary TPIM notice that he was satisfied that 'BM's involvement in TRA has been established on the balance of probabilities.'[69] When questioned by the JCHR, the Independent Reviewer said that he could not consciously or publically point to an existing TPIM order which would not have passed the test of balance of probabilities, but there may have been control order cases where the threshold was lower.[70]

Condition B requires that some of the Terrorism Related Activity (TRA) is 'new', but in practice it seems that attention is not paid the temporal dimension. The fact that four of the ten persons subjected to TPIMs as of March 2013 had previously been acquitted of criminal charges relating to terrorism suggests that new does not mean new in the sense of 'brand new' or 'immediate'. However, if the Home Secretary proposes to extend a TPIM notice beyond its initial two year duration renewal requires new information. Walker and Horne argue that this must mean ' "new" information in the sense of arising during the currency of the previous order and not just "new" in the sense of not having been previously taken into account.'[71]

Condition C[72] is a necessity test which mirrors section 2(1)(b) of the PTA 2005. However, the TPIM Act mandates that the Home Secretary must 'reasonably consider' it is necessary for 'for purposes connected with protecting members of the public from a risk of terrorism'. The

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[67] ibid, s 26(2).

[68] *Home Secretary v BM* [2012] EWHC 714 (Admin).

[69] ibid [24].

[70] Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (10th Report), (2013/2014, HL Paper 113/HC 2014), 'Transcript of Uncorrected Oral Evidence of David Anderson QC' 19 March 2013, Question 5, 9.

[71] Clive Walker and Alexander Horne, n 29, 346.

[72] TPIM Act 2011, s 3(3).

requirement that considerations be reasonable is a new addition. Condition D is a specific necessity requirement requiring specific *measures* imposed as part of a TPIM to be justified. First, all TPIMs, unless the claim of 'urgency' is made under section 3(5)(b) must be referred to the Administrative Court for a 'permission hearing' under section 3(5)(a). This is condition E. As with control orders permission hearings are conducted *ex parte* and the court is restricted to determining whether or not the order is 'obviously flawed'.[73] In both the Commons' and Lords' debates on the TPIMs Bill both government and opposition members queried the use of the term 'obviously flawed' at the permission stage. An amendment was tabled in the House of Lords by Baroness Hamwee (Liberal Democrat) to remove the word 'obviously' but this was unsuccessful.[74]The JCHR also pointed out that imposing such a restrictive test of review on a court at a permission stage was 'not usually the approach when a court's prior permission is required to authorise the taking of an intrusive step by the police or the executive…'[75] All that is known about the meaning of the term from the statute is that it is meant to be interpreted using the principles applicable on an application for judicial review.[76]

As with control orders no TPIM order has been refused at the permission stage, and there has been no further judicial definition of the term 'obviously flawed'. Therefore, it seems that unless a TPIM order was vitiated by perversity[77] permission remains a formality.

IMPOSING AN ENHANCED TPIM

[73] ibid, s6(3)(a).

[74] HL Deb 19 October 2011, vol 713, col 333.

[75] Joint Committee on Human Rights, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (16th Report), (2010-2012 HL Paper 180/HC 1432) [1.31].

[76] TPIM Act, s 6(6).

[77] *Lord Alton of Liverpool & Ors (People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department* PC/02/2006, *Secretary of State for the Home Department v Lord Alton of Liverpool & Ors (in the matter of the People's Mojahedeen Organisation of Iran)* [2008] EWCA Civ 443.

The process for 'triggering' the system of enhanced TPIMs has also been the subject of criticism.[78] The trigger comes by way of secondary legislation using the Negative Resolution Procedure in Parliament.[79] Hazell notes that in the NRP 'the initiative lies with the Opposition to table annulment motions but unless the Opposition can persuade the Government to provide time, the SI will not be debated.'[80] This is to be contrasted with two things: the first would be having the TPIM Act 2011 demand the more stringent Affirmative Resolution Procedure which requires the positive approval of Parliament[81], and the second would be the use of the Civil Contingencies Act 2004 (CCA 2004).[82] Whilst the powers in section 26 and 27 are probably too well demarcated to fall afoul of the principle in *ex parte Simms* as expressed as affirmed in *Ahmed (No. 1)* it is axiomatic that secondary legislation receives less parliamentary scrutiny than its primary counterpart. Given the fundamental rights involved this is a constitutional concern.[83]

The failure to use the CCA 2004 as an enabling framework for enhanced TPIMs has led Walker and Horne to suggest that we are seeing a division appear between 'hard' and 'soft' emergencies which allows the government to avoid the more robust procedural safeguards inherent in the CCA 2004.[84] Readers will recall from Chapter One that the Designated Derogation

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[78] Helen Fenwick and Gavid Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2010-2011) 56 McGill Law Journal 863, 906, and Clive Walker & A. Horne, n 29, 427.

[79] TPIM Act, s 27(3).

[80] Robert Hazell, 'Westminster as a Three in-One Legislature for the United Kingdom and its Devolved Territories' (2007) 13(2) The Journal of Legislative Studies 254-279, 268.

[81] T. St. John N. Bates, 'Parliament, Policy, and Delegated Power' (1986) Statute Law Review 114, 118: 'debates on affirmative resolutions are normally limited to one and a half hours. These debates are usually taken after 10 p.m. and are often poorly attended.'

[82] For detailed analysis see Michael Head, 'Calling out the troops and the Civil Contingencies Act: some questions of concern' [2010] Public Law 340, Clive Walker and James Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford 2006), John Norton-Doyle, 'State of Emergency' (2007) 29(1) Health and Safety at Work 10.

[83] *R v Secretary of State for the Home Department*, *Ex Parte Simms* [1999] UKHL 33 and *Mohammed Jabar Ahmed v HM Treasury (No. 1)* [2010] UKSC 2.

[84] Clive Walker and Alexander Horne, n 29, 427.

Order used to facilitate internment of the *Belmarsh* detainees was also considered a 'soft' emergency procedure.[85]

The CCA 2004 contains a wide-ranging definition of emergency in section one which includes 'war, or terrorism, which threatens serious damage to the security of the United Kingdom.'[86] Like the TPIM Act 2011 the CCA 2004 is a framework statute containing Order making powers in Part II. The stated aim of the Civil Contingencies Act 2004 was to consolidate the governance of the Critical National Infrastructure (CNI)[87] and to consolidate existing legislation on defence and civil emergencies.[88] Before the DDO 2001, the most recent declaration of a 'State of Emergency' occurred in 1973 in response to industrial action. The process for declaring this state of emergency involved using the power in section 1(1) of the Emergency Powers Act 1920. Section 1(1) placed a requirement upon the relevant Minister that such an emergency be *extensive in scale*.[89] This also reinforces Walker's notion of a 'hard' state of emergency when directly contrasted with both the DDO 2001 and the process for making enhanced TPIMs.[90]

There are also greater process hurdles for enacting emergency powers under the CCA 2004 than the TPIM Act 2011. Although the 2004 Act uses the NRP, Parliament has an additional power to bring the state of emergency to an end[91], or to pass legislation amending the conditions of such an emergency.[92] Additionally, emergency regulations under the 2004 Act are treated as subordinate legislation for the purposes of the Human Rights Act 1998.[93] In practice this means

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[85] See Ch 1, n 56.

[86] CCA 2004, s 19(1)(c).

[87] Clive Walker, 'Governance of the Critical National Infrastructure' [2008] Public Law 323.

[88] Clive Walker and James Broderick, n 82, 63-80, 153-188.

[89] Gillian S. Morris, *Strikes in Essential Services,* (Mansell Publishing Ltd 1986), 50-72.

[90] Clive Walker and Alexander Horne, n 29, 427.

[91] CCA, s 27(2).

[92] ibid, s 27(3).

[93] ibid, s 30(2).

that any regulations made thereunder could be quashed by a court as being incompatible with the HRA. Therefore, Fenwick and Phillipson are correct to argue that use of the CCA 2004 requires the government to 'persuade the public, Parliament and, finally, the courts that the risk from terrorism is so overwhelmingly serious that this step is absolutely necessary'[94] in a manner that the current mechanism for imposing Enhanced TPIMs clearly does not.

TYPES OF STATUTORY APPEAL HEARINGS

Aside from the permission hearing there are directions hearings under section 6 (which the individual concerned can attend). At such a hearing, a date is agreed and set for a substantive review hearing which takes place pursuant to section 9. Section 9 hearings are judicial review hearings[95] and the function of the court is to 'review the decisions of the Secretary of State that the relevant conditions were met and continue to be met.'[96] The court can discontinue a review hearing at the request of the affected individual[97] or in 'any other circumstances'.[98] However, if the court wishes to exercise its power in section 9(3)(b) it must allow representations from both the individual and the Secretary of State.[99] At a section 9 hearing the court has the following powers: to quash the TPIM notice[100], to quash specified measures in the TPIM notice[101], to revoke the

[94] Helen Fenwick and Gavin Phillipson, n 78, 906.

[95] TPIM Act, s 9(2).

[96] ibid, s 9(1).

[97] ibid, s 9(3)(a).

[98] ibid, s 9(3)(b).

[99] ibid, s 9(3)(4).

[100] ibid, s 9(5)(a).

[101] ibid, s 9(5)(b).

TPIM notice[102], or to vary the TPIM notice.[103] If the court does not choose to exercise any of these powers it must decide that the TPIM notice is to remain in force.[104] So far there have been four section 9 reviews conducted.[105]

Section 16(2) allows for an appeal against variation made by the Secretary of State which has the effect of increasing restrictions on the affected person. This is again in reality a judicial review. In a section 16 hearing the court may quash the extension or revival of a TPIM notice, quash specified measures in a notice, or direct the Secretary of State to revoke a TPIM notice or to vary measures therein. So far there have been only two section 16 variation applications. The first application for variation was brought by CC[106], and the second was made by CF.[107] It is accepted in that section 16 appeal it is not the duty of the court to review the Secretary of State's belief that the appellant is or has been involved in terrorism related activity (i.e. Condition A in section 3 TPIM Act 2011, or, what this thesis terms 'the national security case').[108]

PROCEDURAL FAIRNESS IN JUDICIAL REVIEW OF TPIMS

I. THE GENERALLY APPLICABLE DISCLOSURE RULES

[102] ibid, s 9(5)(c)(i).

[103] ibid, s 9(5)(c)(ii).

[104] ibid, s 9(6).

[105] *Home Secretary v BM* [2012] EWHC 714 (Admin), *Home Secretary v AM* [2012] EWHC 1854 (Admin), Home Secretary v AY [2012] EWHC 2054 (Admin), and *Home Secretary v CC and CF* [2012] EWHC 2837 (Admin).

[106] *CC and CF*, n 52.

[107] *CF v Home Secretary* [2013] EWHC 843 (Admin).

[108] *AV and AU v SSHD* [2008] EWHC 1895 (Admin) [7] affirmed in *CF v Home Secretary* [2013] EWHC 843 (Admin) [20].

Anderson notes that although 'the procedures for judicial scrutiny have been much improved since 2005, the courts do no more than review (albeit "*intensively*") decisions taken by the Home Secretary in respect of TPIMs.'[109] But the idea that 'factors to be taken into account in considering whether a control order is necessary require an assessment of risk, a value judgment…'[110]is as true of TPIMs as it was of control orders. So, is the transition from control orders to TPIMs, in judicial review terms, really a case of *plus ça change, plus c'est la même chose*? Yes and no. TPIMs have been disparagingly referred to as 'control orders lite' because, much like many diet sodas, they fail to represent a sufficiently healthy rebalancing of their substantive ingredients.[111] Little attention, beyond speculation, has been paid to aspects of procedural fairness in judicial review to date. And although TPIMs remain in their infancy, several matters of interest have come to light.

The two main issues are obviously the impact of the alleged rebalancing of security and risk, and the impact of the operation of disclosure on fairness. In respect of disclosure, the government sought to avoid cementing the *AF (No. 3)* ruling in the main body of the statute, confining it instead to the explanatory notes. By way of compromise, § 114 of the Explanatory Notes makes clear that '[the] disclosure obligations required by the judgment in *AF (No. 3)* will be applied *as appropriate* by the courts in TPIM proceedings.'[112] Despite Ministerial assurances that the rule would apply to all TPIMs[113] there was continued concern over the scope of application.[114] Debate continued in the course of other judgments as to the ability of Special Advocates to

[109] David Anderson QC, n 32, 94 [11.37] at (c).

[110] *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin) [84].

[111] Liberty, 'Terrorism Prevention and Investigation Measures: TPIMs'. The campaign argues that 'TPIMs are simply a 'control order-lite', replicating the worst aspects of the control order regime.' Liberty, 'Unsafe, Unfair: TPIMs are fundamentally unsafe – they must go' <https://www.liberty-human-rights.org.uk/human-rights/terrorism/control-orders/index.php> accessed 10 July 2014.

[112] TPIM Act 2011, Explanatory Notes §114 (emphasis added).

[113] HL Deb 19 October 2011, vol 731, col 341.

[114] David Anderson QC 2011, n 32, [5.36]: 'TPIMA 2011, like PTA 2005, is silent in relation to the circumstances in which the gist of the allegations, sufficient to allow him to give effective instructions to the Special Advocate, will be communicated to the controlled person. There is no acknowledgment in the statute of the effect of *AF (No. 3)*'.

mitigate unfairness in CMPs. In *AHK and Others v Home Secretary*[115] Ouseley J suggested that the unfairness of CMPs may have been somewhat overstated by the Special Advocates,[116] echoing the dicta of Lord Dyson in *Al Rawi*.[117]The application of the 'gisting' rule in *Home Secretary v AF (No. 3)* was finally resolved in *Home Secretary v BM*.[118] This ruling sounded the death knell in respect of the controversial and ambiguous 'makes no difference' principle.

Baroness Hale revealed that the legal relationship between control orders and detention for the purposes of procedural fairness was actually more tenuous underneath the surface than the leading cases indicated in a 2011 lecture:

> Although *A v United Kingdom* was concerned with detention, and the control order cases were not, the House of Lords in AF (No 3) considered it inevitable that Strasbourg would take the same view of the procedural requirements for confirming control orders. Strangely enough, and despite some provocation from the Bench, the government did not challenge our bold interpretation of the legislation and invite us to make a declaration of incompatibility instead. So we adopted the Strasbourg view.[119]

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[115] *AHK and Others v Home Secretary* [2012] EWHC 1117 (Admin).

[116] ibid [78], Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (19th Report): 28 days, intercept and post-charge questioning* (2006-2007, HL 157/HC 394) [210] and, Joint Committee on Human Rights, *16th Report: Annual Renewal of Control Orders Legislation (16th Report),* (2009-2010, HL 64/HC 395).

[117] *Al Rawi and Others v The Security Service and Others* [2011] UKSC 34, Lord Dyson [37].

[118] *BM*, n 68.

[119] Baroness Hale of Richmond, 'Argentoratum Locutum: Is the Supreme Court Really Supreme?' The 2011 Nottingham Human Rights Lecture, University of Nottingham, (1 December 2011), <www.supremecourt.gov.uk/docs/speech_111201.pdf> accessed 10 July 2014.

Therefore, without an explicit statutory guarantee of sufficient disclosure there was an even greater concern that the Government would seek to ensure that the principles in *Home Secretary v AF (No. 3)* would not carry over to TPIMs. After all, analysis in Chapter 3 demonstrated that the reason for concluding Article 6(1) ECHR was applicable to control orders was that the power of random entry and search of controlees' property was sufficiently akin to the tort of trespass.[120]

During the first section 9 TPIM review hearing the government once again sought to argue that *AF (No. 3)* did not apply.[121] BM had been subject to a Terrorist-Asset Freezing Order, followed by a control order which included relocation measures, and is now subject to a TPIM. Collins J concluded that on the basis of the open and closed material the TPIM notice in respect of BM was necessary.[122] Two aspects to the application of the *AF (No. 3)* test in relation to TPIMs are important. The first is that:

> [In] deciding whether there has been sufficient disclosure to enable any particular allegation to be relied on against a subject, the court has to recognise that there is a need to balance the protection against terrorism, which is obviously of great importance, against the rights of the subject in question. That balance is to be applied in accordance with the principles set out in *AF (No 3)*, but how it should be applied in a particular case will depend on the facts of that case.[123]

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[120] *Secretary of State for the Home Department v BC* [2009] EWHC 2927 (Admin) 'Control Orders Lite': 'It is perhaps unfortunate for those who look at the House of Lords decision that it was not made clear what the basis of the concession was, namely, as I say, that the search and seizure would constitute a trespass' [9].

[121] *BM*, n 68.

[122] ibid, [18].

[123] ibid, [21].

Secondly:

> It is important to bear in mind that the need for disclosure is not avoided because the view is taken that there can be no answer to the undisclosed material. However cogent it may be, if the subject must know it to enable him to deal properly with the allegation, it must be disclosed. If he can, he will be able to refute it: if he cannot, he and others will at least know and understand why the order was imposed upon him.[124]

So, whilst the second extract makes clear that the 'makes no difference' principle does not apply to TPIMs review hearings the second extract acknowledges that there is a balancing exercise to be undertaken between protecting against terrorism on the one hand, and the rights of the suspect on the other. Given Collins J's concession that TPIMs were *less restrictive* than controls orders it can be speculated that there is a possibility a balancing exercise of this nature would give rise to less disclosure than under the previous control orders regime. However, this is something which could only be tested empirically. Finally, in terms of how disclosure actually works (as opposed to what is disclosed) there is nothing in the case law to suggest a significant departure in the operation of the *AF (No. 3)* rule from the 'iterative' process described by the Court of Appeal in the immediate wake of that ruling.[125] In short:

> '[The] House of Lords contemplated an iterative process, as more and more information is produced to the controlee. [In] such a case it is important that the decision should not be made too soon. [On]

[124] *BM*, n 68, [22].

[125] *Home Secretary v AF and Others* [2008] EWCA Civ 1148 [89].

> the other hand, if the position is clear, we can see no reason in principle why the decision should not be made at a comparatively early stage. *The question when the decision is to be made is, as we see it, essentially a case management decision for the judge to take* and thus a decision with which this court should be most reluctant to interfere.[126]

II. The Effect of the Implied 'Rational Connection Requirement' on Disclosure in Review Hearings

The TPIMA 2011 no longer contains a clause similar to section 2(9) of the PTA 2005 (discussed in Chapter Five) which sought to actively *restrict* the principle of a rational connection between the suspicions held and the measures imposed. Under the control orders regime Parliament had obviated the need for the Secretary of State to justify before a court that the measures he imposed on a controlee were in any way related to his suspicions regarding the controlee, nor need they have been justified as measures which would assist in preventing further terrorism related activity. The absence of such a provision is a significant legislative step in respect of variation hearings pursuant to section 16 of the TPIM Act 2011. It is to be remembered, however, that the requirement of a rational connection is now *implied* by the doctrine of proportionality – it is not expressly mandated by statute.

CC brought an appeal under section 16(3) in response to a refusal by the Secretary of State to vary certain measures relating to his TPIM notice. The open national security case against CC alleged that he was 'linked to a group of six British nationals who received terrorist training from Al Qaida operatives, Saleh Nabhan and Harun Fazul in Somalia in 2006.'[127] Moreover, the Security

[126] ibid, [89], emphasis added.

[127] *CC and CF*, n 52 [34].

Services assessed that that '[the] UK-based group supports the activities of the associates in Somalia and also seeks to recruit and radicalise further individuals.'[128] Lloyd Jones LJ was also satisfied, on the basis of the closed material, that CC had *inter alia* 'played a role in' in attack planning in Somalia and elsewhere overseas, and that he had fought on the front line in support of Al-Shabaab. Al-Shabaab is a Somali group with links to Al Qaeda.[129] Lloyd Jones LJ considered 'that the national security case against CC is overwhelming.'[130] Furthermore:

> Disclosure in this case has been exhaustively considered in a series of interlocutory hearings, including one before me. [I] am satisfied that CC's complaint of inadequate disclosure is totally lacking in substance. The appropriate disclosure has been made so as to permit CC to respond.[131]

However, there is nothing reproduced in the judgment which assesses the *level* of risk posed by CC vis-à-vis other individuals subjected to a TPIM. Knowledge of the level of risk (first-order risk) posed must surely be necessary to mount an effective challenge to the *necessity* of specific measures in the TPIM. It is unclear from the judgment whether disclosure of the national security cases against CC was done 'in general' or there was specific disclosure relating to the section 9 issue (the 'national security case'), followed by specific disclosure relating to the necessity of measures (the section 16 issue). In respect of CC the Home Secretary refused to vary three specific measures, namely, ending the condition of daily reporting to a police station, refusal to let CC use the garden of his residence during the 'overnight residence requirement'; and finally, refusal to let CC attend

[128] ibid [34].

[129] ibid. The full list of accusations based upon closed evidence is at [35].

[130] ibid [38].

[131] ibid [36].

prayers at the local mosque during his 'overnight residence requirement'. In CC's case the 'overnight residence requirement' lasted from 9pm-7am.[132]

The scrutiny of the necessity of the measures in the open judgement in CC's appeal was woefully inadequate and out of step with the approach in the later variation appeal conducted by Wilkie J on behalf of CF.[133] On behalf of CC it was argued that the requirement of necessity in terms of public protection could be fulfilled by increasing surveillance upon CC and thereby reducing some of the more restrictive measures.[134] Lloyd Jones LJ rejected this argument, agreeing that whilst a degree of deference to expertise of the Security Services was indeed appropriate 'the court will nevertheless be vigilant to ensure that these extraordinary measures are necessary.'[135] Regrettably, no insight as to the operation of this scrutiny is available because it was 'not possible to set out…consideration of each of the heads of appeal in this open judgment.'[136] There was no reasoning offered in the open judgment as to why this was the case. For example, it may have been to protect a source of human intelligence, or a surveillance technique, or so on. There may have been a legitimate deep secret, but this is impossible to verify. However, it seems implausible that some form of open justification could not be provided as to why the public was safer if CC was not allowed to use his own garden between 9pm and 7am beyond that it was necessary and proportionate for the purposes of protecting the public from the risk of terrorism.[137] After all, these few open paragraphs are not solely for the benefit of the general public: they are the only explanation offered to CC and his lawyers.

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[132] ibid [41].

[133] *CF*, n 107.

[134] *CC and CF*, n 52 [41].

[135] ibid [42].

[136] ibid [43].

[137] ibid [44].

In the case of CF, a section 16(3) appeal was also lodged against the Secretary of State's refusal to vary measures relating to five aspects of the TPIM notice. CF was previously tried and acquitted under section Section 5(1)(a) of the Terrorism Act 2006 for allegedly attempting to travel to Afghanistan to engage in acts of terrorism. The open judgment states that between 2009 and 2011 CF engaged in terrorism related activities such as advising and recruiting fighters in Britain to fight abroad. He also fundraised for Al-Shabaab and, prior to being arrested, he may have been involved in attack planning. He was arrested in Somaliland along with CC and imprisoned there. He was then severely mistreated and illegally deported to the United Kingdom. CF had been the subject of a control order since 11 May 2011 and a TPIM notice from 3 January 2012. Despite the above similarities (including companionship) between CC and CF, CF's TPIM variation appeal was dealt with quite differently. The first obvious difference is the attention paid to open justice: CC's variation appeal was dealt with in a handful of open paragraphs whereas CF's appeal received a 20 page judgment running to 101 paragraphs.

CF's TPIM notice included restrictions on: overnight residence, electronic communications (namely, CF's request to possess an iPod to listen to hip-hop music and famous recitations of the Quran), association, work and studies, and reporting to the police station whilst at University. CF studied international relations. Wilkie J refused CF's appeal in relation to all of the measures with the exception of the association measure which related to how CF could socialise in the context of his university studies. Wilkie J concluded that CF should be able to meet fellow students on campus for social purposes in a manner that is ancillary to his studies.

There are several interesting aspects to the procedure adopted in CF's variation hearing. The first is that the disclosure requirement in *AF (No. 3)* did apply to separate variation hearings of this sort, and moreover, disclosure had been on-going prior to the hearing.[138] At the oral hearing on 5 March 2013 there was on-going argument about disclosure to CF's counsel in the closed

[138] *CF*, n 107 [27]. The information about disclosure is drawn from my observation on part of the oral hearing in this case on 5 March 2013.

session pursuant to CPR Rule 80.25 (which relates to the objection to disclosure by the Secretary of State). Presumably, then, in variation hearings any disclosure will relate to the proportionality and necessity of the individuated measures, as opposed to the general national security case against the controlled individual. In respect of the individual measures, guidance on the applicable tests of proportionality and necessity found in *MB* was accepted to be applicable:[139]

> Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. [The] obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism related activities of which he is suspect. They may also depend on the resources available to the Secretary of State and the demands on those resources.[140]

This evaluation requires 'intense scrutiny'.[141] The applicable proportionality test was enumerated in *De Freitas*.[142] However, it is important to note that this test is *silent* on whether justifications as to proportionality and necessity need be given in open or in closed session. In CF's case the national security case as documented by Lloyd Jones LJ stated that 'CF was not merely involved in the network but played a substantial role'.[143] This view was endorsed by Wilkie J.

CF argued that his application for variation should be considered because there had been no allegations of terrorism related activity made against him since the imposition of his TPIM. He

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[139] *Home Secretary v MB* [2007] QB 415 in *CF*, n 138 [23].

[140] *MB*, n 139 [63].

[141] ibid [65].

[142] *De Freitas v Permanent Secretary of Ministry of Agriculture and Housing and Lands* [1999] 1 AC 69.

[143] *CC and CF*, n 52 [54].

also argued that the Secretary of State had failed to make arrangements to normalise his life in the period leading up to the cessation of the TPIM. In response the Secretary of State argued that there was a national security case that made the TPIM a necessity in the first instance, that the Security Service still assessed that CF was at risk of absconding, and that the TPIM Act 2011 placed no obligation upon her to facilitate an 'exit strategy' for controlees.

Several things stand out: first, the overall justification given for the measures contested is that CF is at risk of absconding. Beyond that, the only further justification offered for the 'overnight residence measure' is that it supposedly reduces the risk of CF engaging in terrorism related activity. There is no suggestion in the open judgment as to exactly *how* the overnight residence measure reduces this risk. Wilkie J concluded that the test of necessity was satisfied in the case of this measure, and went on to evaluate the three complaints CF had regarding the impact of the measure on his life in proportionality terms.[144] The open conclusions on the requirement that the obligation to report daily to a police station was necessary are equally un-instructive. This, for Wilkie J was a question of deference and:

> having regard to the material in open and closed session, and bearing in mind the deference this court should pay to the views of the Security Service based on their expertise and experience, the daily reporting requirement at a police station is necessary.[145]

This conclusion was reached in spite of the fact that CF constantly wears a GPS tag which tracks his location, and he reports daily via phone to a monitoring company. Such requirements may well

[144] *CF*, n 107 [59]-[63].

[145] ibid [83].

satisfy the general principle of necessity, but it is not clear from the open judgment that CF's counsel were supplied with sufficient information regarding the risk-assessment to mount an effective challenge. Nor is it clear that the Secretary of State is 'tailoring' more or less onerous TPIMs based upon the supposed threat level of those subject to them.

The more tailored and specific approach to the imposition and review of Serious Crime Prevention Orders (SCPO) under the Serious Crime Act 2007 makes for an interesting comparison. There is only one reported review of the proportionality and necessity of such an order to date.[146] Whilst the obvious differentiating factor is the absence of a CMP, there are several similarities which point to a more tailored balancing of security and risk. Unlike TPIMs these orders are imposed by a *court* after an individual is convicted of an offence from a statutorily defined list of serious crimes. The test for imposition has several marked differences from a TPIM. The first is that the standard of proof for imposition is the civil standard (balance of probabilities). Secondly, section 19(2) of the 2007 Act states that an order may only be imposed if 'the court has reasonable grounds to believe that an order would protect the public by preventing, restricting or disrupting involvement by the defendant in serious crime'. As with TPIMs, the Court of Appeal in *Hancox* made clear 'that the court, when considering making such an order, is concerned with future risk. There must be a real, or significant, risk (not a bare possibility) that the defendant will commit further serious offences'.[147] In *Hancox* the defendant had been convicted of counterfeiting on a commercial scale. Therefore, his SCPO restrictions (all of which were judged to be proportionate) were tailored to his offence. These included notification measures related to his address, his vehicle, and a duty to notify the authorities of a change of address. Crucially, however, he was only restricted in other ways insofar as the pertained to his *convicted offence* and to eliminate

[146] *R v Hancox* [2010] EWCA Crim 102.

[147] ibid [9].

the *risk of future offences of that nature.* Other restrictions included bans upon the ownership and use of equipment which could be used in the counterfeiting process.[148]

The imposition of such an order can be appealed in the Court of Appeal, but jurisdiction on appeal is limited to judicial review.[149] The Court of Appeal recognised that SCPOs will inevitably engage Article 8 ECHR, and reviewed them as such.[150] Furthermore, when considering an application for an SCPO the court is not limited to the evidenced adduced at the criminal trial. However, the coalition government in its review of the national security strategy considered serious organised crimes falls within the domain of national security, making the parallel particularly apt.[151] When TPIMs are contrasted with SCPOs the effectiveness of the implied rational connection requirement is further called into question. Moreover, the alleged link between TPIMs and criminal prosecution pales in comparison to the defined link evident in the statutory framework and operation of SCPOs. To the argument that TPIMs are part of a *sui generis* category owing to the presence of national security considerations, the following response is offered: evidence gathering for the prosecution of serious organised crime may also involve the use of covert surveillance techniques, anonymous informants, sensitive information, intercept evidence, cross-border agency cooperation, and risk management. Therefore, the justification for the better available procedural protections under the SCPO scheme cannot be anchored to the exceptional nature of national security alone.

III. The Treatment of Oral Evidence and Cross-Examination at Review Hearings and Variation Hearings

[148] ibid [16].

[149] ibid [8], and Serious Crime Act 2007 (Appeals under s 24) Order 2008, SI No 1863/2008, article 4.

[150] ibid [10].

[151] HM Government, *Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review* (Cm 7948, 2010). Organised crime is now considered to be part of the threat to national security [1.5], albeit it falls somewhere down the list of 'tiered threats', 27-28.

The second point of procedural interest was that CF gave oral evidence at his variation hearing and was cross-examined. This is novel in respect of judicial review relating to national security, and to judicial review procedure generally. Cross-examination of witnesses is permitted in the closed session by the special advocate under CPR 80.22(2) and 80.22(5) and specific provision with respect to variation hearings is dealt with in 80.17(1)(b). The issue of calling witnesses in an open session in relation to the variation of a control order previously arose in *AF v Secretary of State for the Home Department* where Goldring J had refused to allow the cross-examination of a member of Home Office staff in relation to the Secretary of State's application for modification of the control order.[152] Goldring J detailed a summary of his reasons in the open judgment at [13]-[20], concluding that although the tendering of witnesses for cross-examination was something to be kept under review throughout the hearing, the test for ordering cross examination was essentially a negative one. Both sides accepted that cross-examination would not be ordered '[i]f on proper analysis of the issues nothing could be achieved by cross-examination, then it was not appropriate to direct the Secretary of State to tender the witnesses'.[153] Moreover, Goldring J made clear that: 'A submission by [the special advocate] of the need for [open] cross-examination would have weighed heavily.'[154] Obviously the special advocate and the lawyers for the controlled person cannot ordinarily coordinate to discuss strategy after closed material has been served.

At CF's variation hearing, Wilkie J applied the ruling of Goldring J in *AF* with the agreement of both sides. He also granted CF the opportunity to give oral evidence and to be cross-examined, despite the general presumption against calling witnesses in judicial review hearings it may assist the court to view CF 'in three-dimensional way.'[155] By contrast, Wilkie J concluded that

[152] *AF v Secretary of State for the Home Department* [2007] EWHC 2001 (Admin).

[153] ibid [18].

[154] ibid [17].

[155] *CF*, n 107, author's notes from open oral hearing 5 March 2013.

hearing oral evidence from the Home Office or the Security Service in open session would be neither useful nor necessary. Instead, CF's lawyers submitted a number of questions to the Home Office and the Security Service which were answered in written form.[156]

But a very different approach has been taken by judges where controlled persons have been unwilling to submit to cross-examination regarding the national security case against them. During a section 9 review hearing it transpired that BM had made 'a number of statements' in relation to his control order and his TPIM but chose 'not to give evidence which could have been tested in cross-examination but to rely on those statements.'[157] Collins J concluded that he was therefore 'entitled to attach less weight to an untested statement, particularly if…satisfied that explanations could but have not been given to deal with any material which has been disclosed.'[158] He then reemphasised that the present review procedure was distinct from a criminal trial:

> This is not a situation such as applies in a criminal case where a defendant is entitled to say nothing and play his cards close to his chest. A failure to take steps reasonably open to him to deal with any of the allegations can therefore mean that the adverse view will be maintained.[159]

In CF's case, Lloyd Jones LJ also concluded that 'there was no satisfactory explanation for CF's failure to give oral evidence.'[160] It seems that the current procedures – which differ between both review and variation hearings, and between the controlled person and the executive –

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[156] ibid [34].

[157] *Home Secretary v BM*, n 68 [2012] EWHC 714 (Admin) [23].

[158] ibid.

[159] ibid [36].

[160] *CC and CF*, n 52 [48].

enshrine an imbalance in favour of the executive. This comparison seems to reveal a further, erstwhile hidden issue related to the emerging principle of 'equality of arms'.

CONCLUSION

The aim of this chapter has been to critically evaluate whether TPIMs have achieved their stated aim of rebalancing the competing interests of security and liberty by enhancing procedural justice. The academic commentary and literature emanating from civil society has largely labelled TPIMs as an exercise in 'rebranding' control orders.[161] In light of the above, the Coalition claim that TPIMs would provide more proportionate and effective powers to deal with the risk posed by terrorists has been of mixed success. Given the general consensus that more severe powers should be reintroduced the political metaphor of 'rebalancing' rings hollow. Although some of the more odious substantive powers under the control orders regime were excised by the TPIMA, the difficulties that come with ensuring adequate procedural justice seem as pronounced as ever.

Moreover, the re-branding of the control order review group (CORG) as the TRG still leaves control of intelligence outwith the purview of the more established Joint Intelligence Committee, and contains no independent check at the initial decision-making stage. Furthermore, containing the mechanism for imposing 'enhanced powers' within an Order making power as opposed to the more public and structured mechanism of the Civil Contingencies Act 2004 effectively avoids procedural checks from all constitutional actors, presumably including public pressure from the people themselves.

[161] Pete Wishart MP: 'Will not the Home Secretary simply accept that these TPIMs are nothing other than a repackaging and rebranding of the old, discredited control orders regime?' HC Deb 7 June 2011, vol 529, col 71. According to Walker and Horne '…most features which made control orders unpalatable to critics will continue to cause aggravation in the courts and beyond.' Clive Walker and Alexander Horne, n 29, 437. Matthew Ryder, 'Control Orders Have Been Rebranded: Big Problems Remain' *Guardian* (London, 28 January 2011) <www.guardian.co.uk/commentisfree/libertycentral/2011/jan/28/control-orders-protection-of-freedoms-bill> accessed 01 July 2014.

The promised enhanced link with criminal investigation and prosecution receives some attention in statutory language but has not borne fruit. Instead, TPIMs have been used in several cases to control persons who were acquitted during criminal proceedings. So, the gap between administrative and criminal procedure remains just as wide. At judicial review *plus ça change* regrettably appears to hold good. There is no indication that the courts exercise a greater degree of influence at the decision-making stage than under the control orders regime. Judicial involvement is largely a formality until the section 9 review process begins. Although the gisting rule in *AF (No. 3)* has not given way to Executive claims that it is surplus to requirements due to the 'lighter' nature of the TPIMs regime it is not a panacea, and significant barriers to effective procedural justice remain. But the definitive destruction of the 'makes no difference' principle is a welcome development, as is the obliteration of the presumption against requiring a rational connection between the risk an individual poses and the measures enacted against him. However, the operation of the disclosure rule in relation to rationality continues to impede the overall quality of such assessments compared with parallel areas. Moreover, review of variation requests in relation to control orders was often searching, with relocation measures being quashed as inappropriate on several occasions. So it remains to be seen whether the abolition of section 2(b) in the PTA 2005 enhances review as a matter of fact.

The abuse of process doctrine is a welcome innovation in theory, but could only be so in practice if the risk assessment associated with balancing of interests inherent in its exercise was more transparent. At present a claimant may not be assisted by the abuse of process doctrine even if he had been the subject of rendition and torture, provided he was adjudged in closed proceedings to be of high enough risk. Finally, the approach to evidence verification through cross-examination remains problematic. There is a serious imbalance in the way witnesses are treated in respect of oral evidence depending on whether they appear for the executive, or as an appellant. The recent parliamentary discussion on strengthening the powers available under the regime (discussed above) suggests that the scales are likely to tip further in favour of security.

CHAPTER SEVEN:

ASSET-FREEZING IN NATIONAL SECURITY AND COUNTERTERRORISM LAW

INTRODUCTION

The initiatives aimed at preventing the financing of terrorism in the immediate aftermath of 9/11 are both the most symbolic and real manifestations of the interaction between the spread of the risk paradigm and its impact upon procedural fairness. In essence the rationale for asset-freezing is that 'terrorists rarely kill for money, but they always need money to kill'.[1] It was thought that stopping the international flow of funds could seriously disrupt the efforts of international terrorism.[2] In 1999 the understanding of Islamist international terrorism was dramatically different from the present, post-9/11, perspective (see Chapter One). The Independent Task Force reported in 2002 that: 'Organizationally, al-Qaeda is notably and deliberately decentralized, compartmentalized, flexible, and diverse in its methods and targets. The same description applies to its financial network.'[3] The present understanding of the terrorist threat generated a new network of intersecting, individually targeted 'smart sanctions' underpinned by the UN Security Council acting in a quasi-legislative capacity.[4] The resulting regimes developed to meet the

[1] Directorate General Internal Policies of the Union, Policy Department C, Citizens Rights and Constitutional Affairs, *Overview of European and International Legislation on Terrorist Financing*, April 2009, PE 410. 695, 8 < http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410695/IPOLLIBE_ET(2009)410695_EN.pdf> accessed 04 July 2014.

[2] On Al Qaeda's financial structure see Victor Comras, 'Al Qaeda Finances and Funding to Affiliated Groups' in Jeanna K. Giraldo and Harold A. Trinkunas (eds), *Terrorism Financing and State Responses: A Comparative Perspective* (Stanford University Press 2007), 115-133. Comras notes that: 'The 9/11 Commission pointed to a core number of financial facilitators [who] raised funds from donors primarily in the Gulf region but also from other countries around the world. Using bogus and legitimate charities and businesses as covers, they develop[ed] a substantial financial network in Southeast Asia, Europe, Africa, and Asia', 117.

[3] Maurice R. Greenberg et al, 'Terrorist Financing: Report of an Independent Task Force Sponsored by the Council on Foreign Relations' (Council on Foreign Relations 2002), 6.

[4] On the nature of the Security Council Resolutions and whether they share the features of legislation, see Asif Hameed, 'Legislation and Law on the International Plane' (2015) SSRN Working Paper (ID: SSRN-id2614614) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614614, accessed 05 June 2015.

challenges of terrorism finance as it is presently understood are described by Harlow as 'a composite: a multi-level, multi-functional process, in which the same functions may be carried out at different nodal points on the network and relationships are ambiguous.'[5] Omand echoes this from a strategic perspective: 'Security cannot be achieved within a single country…We have a patchwork of formal and informal arrangements with institutions that find it hard to shed long-held habits of protecting turf or restricting inter-institutional cooperation.'[6] The regimes examined herein are those which are directly applicable to the United Kingdom legal system. These are the Terrorist Asset Freezing, etc. Act 2010, the Counter-Terrorism Act 2008 the Al-Qaida (Asset-Freezing) Regulations 2010, and the relevant European Union Regulations.[7]

Asset-freezing in UK domestic law is not an extraordinary phenomenon. It is routine in the case of those *convicted* of organised crime, money laundering, or serious drugs offences.[8] However, the character of the national security and counterterrorism asset-freezing regimes instigated by the United Nations represent a manifestation of the 'precautionary principle'. The precautionary principle 'broadly states that where there are environmental and public health risks, lack of full scientific certainty should not be used as a reason for inaction.'[9] As Dershowitz notes: 'This principle, which originated in Germany and grew out of efforts to prevent environmental and other "natural" disasters, has now moved beyond these concerns, which have traditionally

[5] Carol Harlow, 'Composite Decision-Making and Accountability Networks: Some Deductions from a Saga' (2013) Yearbook of European Law 1-27, 6.

[6] David Omand, 'Countering International Terrorism: The Use of Strategy' (2005) 47 (4) Survival: Global Politics and Strategy 107, 110-111.

[7] Council Common Position (EC) 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ L 344/93 implementing UNSCR 1373 and Council Common Position (EC) 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama Bin Laden, members of the Al Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them [2002] OJ L 139/4 implementing UNSCR 1267.

[8] Proceeds of Crime Act 2002.

[9] Elizabeth Fisher, 'Review: C. Sunstein "The Laws of Fear: Beyond the Precautionary Principle" ' (2006) Modern Law Review 288-292, 288.

been raised by the left.'[10] One of the hallmarks of the post-9/11 fight against terrorist financing is 'the politics of pre-emption…a practice of securitization that has to be conceptualised through the larger philosophical-political turn towards *risk* in diverse areas of contemporary politics.'[11] In less lofty terms, this meant that 'the use of risk-assessment and statistical profiling in the field of security had accelerated [but] the sheer uncertainty and randomness of terrorist attack renders conventional risk assessment techniques inadequate.'[12] This is a key challenge for courts grappling with protecting both security and the procedural rights of the claimant.

The international dimension of terrorist asset-freezing only complicates the picture further. All of the asset-freezing regimes examined here owe their existences to Resolutions of the United Nations Security Council. Scheppele considers the public international law response to 9/11 to have engendered 'a new global security law [which] now coordinates the diverse efforts of states around the world in a common campaign against terrorism.'[13] Underpinning this new 'global security law' is a blurring of 'the boundary between domestic policing and international intelligence'.[14] This has undoubtedly impacted upon procedural fairness (and disclosure in particular) as these intelligence sharing relationships often take the form of 'concentric rings'.[15] The executive processes involved in terrorist asset-freezing reflect the nature of international intelligence sharing. Clunan characterises this as 'a collective action problem posed by terrorist financing' with the consequence that intelligence agencies move 'from a paradigm of "need to

[10] Alan M. Dershowitz, *Preemption: A Knife that Cuts Both Ways* (W.W. Norton 2007), 5.

[11] Marieke De Goede, 'The Politics of Preemption and the War on Terror in Europe' (2008) 14 European Journal of International Relations 161-185, 163-164, emphasis original.

[12] ibid, 164.

[13] Kim Lane Scheppele, 'Global Security Law and the Challenge to Constitutionalism After 9/11' [2011] Public Law (April) 353-377, 355-356.

[14] Marieke De Goede, n 11, 162.

[15] Simon Chesterman, 'The Spy Who Came in From the Cold: Intelligence and International Law' (2005-2006) 27 Michigan Journal of International Law 1071, 1093.

know" to one of "need to share""[16] to a greater extent than the other domestic pre-emptive sanctions such as control orders or TPIMs.[17] The impact, in real terms, of the fight to maintain the secrecy and confidentiality of these intelligence sharing relationships is evident in the arguments raised by governments, particularly before the EU judicature (discussed below). The former US Treasury Secretary Paul O'Neill outlined the original impetus behind the legal structure of international asset-freezing:

> '[We] moved on … setting up a new legal structure to freeze assets on the basis of evidence that *might not stand up in court* … Because the funds would be frozen, not seized, the threshold of evidence could be lower and the net wider.'[18]

O'Neill's statement reflects a sentiment which Sepper relates to the use of intelligence post-9/11:

> Characterized by secrecy, flexibility, and informality, the intelligence sharing networks are *constrained almost exclusively by a shared professional ethos, rather than law*. Such an ethos can exert some degree of accountability to professional norms, but has been

[16] Anne L. Clunan, 'The Fight Against Terrorist Financing' (2006) 121(4) Political Science Quarterly 569-596, 572.

[17] See: 'The Committee…encourages Member States to share with it information regarding such incidents, as this information can greatly assist the Committee in carrying out its mandate.' United Nations Security Council, 'Factsheet: The 1737 Committee and its Panel of Experts' (https://www.un.org/sc/committees/1737/pdf/Fact_Sheet_en.pdf accessed 01 July 2014, [3].

Obviously, the operation of control orders and TPIMs have been facilitated by international intelligence and police cooperation in the past (see: *Home Secretary v CC and CF* [2012] EWHC 2837 (Admin)). However, the argument made here is that given the avowedly *international* character of the sanctions regimes, and the use of supra and international institutions means that the need to insulate intelligence information from court scrutiny is doubtless exacerbated in the eyes of the various state actors.

[18] Quoted in Marieke De Goede, n 11, 166, emphasis added.

> strained by the inclusion of less professional and often ruthless intelligence services in the network.[19]

This chapter argues that courts have taken some significant steps forward towards combating the ethos of terrorist asset-freezing as being an initiative which was intended to be effectively 'court proof'. However, this progress has only come so far, as the regimes which exist continue to manifest significant pitfalls and anomalies. Despite a notable transition in all of the UK and EU regimes from a situation where all of the decisions were founded entirely upon non-reviewable 'closed' evidence towards the availability of a legal framework of procedural protection, significant disparities remain between the UK and EU regimes, and even between the individual regimes operated by the UK itself. This means that the intersecting counterterrorism asset-freezing regimes remain characterised by 'complexity' which 'leave[s] much additional leeway to the authorities engaged in proscription and asset-freezing'.[20] The need for appropriate procedural control of these powers is as essential as any other regime considered in this thesis. In the Supreme Court Lord Brown declared that: 'The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated' and asset-freezing may be 'even more paralysing than control orders.'[21] In parliamentary debate, the UN powers were called 'close to a control order by another name.'[22] Despite this, the international nature of the regimes and the disparities in procedural protections available may mean that secrecy could be at its deepest in this context. Moreover,

[19] Elizabeth Sepper, 'Democracy, Human Rights, and Intelligence Sharing' (2010-2011) 46 Texas International Law Journal 153, 153, emphasis added.

[20] Carol Harlow, n 5, 14.

[21] *Mohammed Jabar Ahmed v HM Treasury* [2010] UKSC 2 (*Ahmed No. 1)*, Lord Brown [192].

[22] HL Deb 27 July 2010, vol 720, col 1258, Baroness Hamwee.

recent plans to institute a version of the CMP in the European Union judicature[23] may undermine the thus far principled stances in favour of open justice expressed in EU jurisprudence.

LEGISLATIVE REGIMES AND EXECUTIVE DECISION MAKING PROCESSES

I. THE UN SECURITY COUNCIL RESOLUTIONS AND THEIR LEGISLATIVE IMPLEMENTATION

Three separate foundational UNSC Resolutions underpin the UK and EU regimes examined herein: those which deal with threats specific to Al Qa'ida and the Taliban, those which deal with terrorism more generally, and those which relate to the threat posed by nuclear proliferation. Each has led to the creation of overlapping legislative regimes in UK domestic law, and EU law, and in turn, courts have reached different conclusions on procedural rights. The Resolutions differ in their aim and scope. Resolution 1267(1999) is aimed at the activities of Al Qa'ida, the Taliban and (the now deceased) Osama Bin Laden. It requires states to do two things: (1) to recommend persons in their territory suspected of financial or other links to Al Qa'ida, the Taliban or (the now deceased) Osama Bin Laden to be added to a centrally administered UNSC list (the '1267 Consolidated List'), and (2) to immediately freeze the funds of those persons already on the list within their territory. Responsibility for the domestic administration of UNSCR 1267 powers currently lies with the UK Foreign and Commonwealth Office (FCO).[24] The EU also maintains its own version of this regime, which is administered by a committee of the European Council.[25]

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[23] Council of the European Union, 'Rules of Procedure of the General Court' [2015] OJ L 105/1 (Vol. 58, 23 April 2015), for background see: Maya Lester, 'Draft European Court Rules Propose Secret Hearings' (*European Sanctions: Law and Practice Blog*, 6 April 2014) <http://europeansanctions.com/2014/04/06/draft-european-court-rules-for-secret-hearings/> accessed 01 July 2014.

[24] Al-Qaida (Asset-Freezing) Regulations 2011, SI 2011/2742.

[25] Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain restrictive measures directed against Usama Bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001

Resolution 1373(2001) is wider in scope, applying to all those individuals or entities engaged in terrorism, or terrorist finance, generally. This Resolution requires domestic administrations to create and operate their own 'terrorist lists', freezing the assets of anyone within their territory suspected of involvement in terrorism or terrorist finance of any sort. This sweeping provision was approved by the UNSC in a mere five minutes in direct response to the 9/11 attacks which the earlier, more specific Resolution 1267 had apparently failed to prevent.[26] Resolution 1373 (2001) might be seen as a failsafe or 'catch-all' provision which complements Resolution 1267. In the United Kingdom, this regime is currently administered domestically by HM Treasury, and forms the basis of the Terrorist Asset-Freezing, etc. Act 2010 (TAFA). The European Union Regime was created by Council Common Position 931.[27]

Finally, Resolutions 1737 (2006) and Resolution 1747 (2007) call upon Iran to suspend its nuclear proliferation. Specifically, Resolution 1737 (2006) requires states to take measures to restrict the availability of materials and services to Iran that could be used to make nuclear weapons. Paragraph twelve of that Resolution required states to freeze the funds of persons annexed to the Resolution. This Resolution was followed by Resolution 1747 (2007) which expanded states' asset-freezing obligations to include additional persons, whilst Resolution 1803 (2008) called upon states to: 'exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran…and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems.' Decision-making regarding the implementation of these Resolutions is taken at United Nations Level. These Security Council Resolutions are the

prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9.

[26] United Nations Security Council, 4385th Meeting 28 September 2001, 9.55pm-10.00pm EST (S/PV.4385) (New York, USA).

[27] Council Common Position (EC) 2001/931/CFSP, n 7. Council Regulation (EC) No. 2580/2001 of Dec. 27, 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L 344/70.

basis for the Counter-Terrorism Act 2008, Schedule 7, a regime administered by the UK Treasury. The European Union also maintains a list of entities sanctioned under this regime.[28]

II. Decision-Making Processes under each Regime

(a) The Security Council Regimes

All of the thirteen UN Sanctions Committees have procedural similarities. UNSCR 1267 (1999) established a sanctions committee known as the '1267 Committee' responsible for the administration of the 'Consolidated List' of those subject to financial sanctions. Given the nature of the subject matter (often information from national intelligence agencies), Chesterman writes that 'there is no burden of proof as such for imposing sanctions'.[29] The listing procedure allows any state to propose a listing but mandates that the Committee usually meets to decide upon listings in *closed session*.[30] Although the regime has existed since the late 90s listing criteria and disclosure requirements have been developed incrementally in a largely piecemeal manner.[31] The process is secretive to the point that designating states have the right to maintain their confidentiality, even to the suspect and his legal team. Currently those listed are required to be informed[32] but disclosure of reasons for listing only amounts to 'narrative summaries published on the Committee's website'.[33]

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[28] Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103/1), challenged in C 280/12 P *Council v Fulmen* [2013] All ER (D) 38 (Dec).

[29] Simon Chesterman, n 15, 1110.

[30] Compare SC Res. 1735 (2006), para. 5; Committee Guidelines in the amended Version of 9/12/2008, 6(a), (c).

[31] Adele .J. Kirshener, 'Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al- Qaida and Taliban Sanctions Regime?' (2010) 70(3) Heidelberg Journal of International Law 585, 589-591.

[32] UNSCR 1735 (2006).

[33] UNSCR 1822 (2008) in Adele J. Kirshener, n 31, 591.

There is a separate, but very similar, sanctions committee established by UNSCR 1737 (2006) which deals with individuals and entities suspected of aiding Iranian nuclear proliferation. The effective operation of the Committee depends upon member states sharing intelligence. Meetings can be called formally or informally, as and when necessary. The Committee is also assisted, pursuant to UNSCR 1929 (2010) by a Panel of Experts. The mandate of this panel is 'to provide neutral, fact-based assessment and analysis'.[34] Such a panel is common amongst all UNSC committees dealing with targeted sanctions. Both the 1267 Committee and the 1373 Committee operate under the 'no objections procedure' and require decisions to be unanimous. The 'no objections procedure' requires that the Chairperson circulates the proposed decision to all members of the committee, who then have a fixed time period within which to lodge any written objections. This is usually ten working days, but can be as little as two working days in an emergency. Moreover, statements of the cases circulated can vary considerably in length and detail: 'the average statement of case on the 1267 Committee runs to about a page and a half. [At] the other extreme, one statement of case requesting the listing of seventy-four individuals included a single paragraph of justification for the entire group.'[35] In the context of UN-driven asset-freezing initiatives, which usually proceed at the initiative of one state (without the objection of others on the United Nations' '1267 Committee'), the effect confidentiality is that:

> The capacity of members of the Committee to make an informed decision on whether to agree to a listing depends significantly on their *access to intelligence information*, either through their own services or their relationship with the designating state. In the absence of

[34] United Nations Security Council, n 17, [7].

[35] Simon Chesterman, n 15, 1115.

> some national interest in a situation, however, there is little incentive to challenge a specific listing.[36]

The Delisting Procedure also requires unanimity. In common with the Iranian anti-nuclear proliferation committee the 1267 Committee is aided by a panel of eight experts known as the Analytical Support and Sanctions Monitoring Team who are specialists in 'counter-terrorism, financing of terrorism and other related issues.'[37]

The greatest procedural innovation under the Al Qa'ida and Taliban sanctions regime was the creation of an Ombudsman pursuant to UNSCR 1904 (2009). Recourse to an Ombudsman is unavailable to those designated under UNSCR 1737 (2006). The first Ombudsperson, Canadian Judge Kimberly Prost saw the role of the Office as follows:

> In aid of coherent analysis and observations from the Ombudsperson, the information gathered and the reasoning applied to it must be assessed to a consistent standard. This standard must be one which is appropriate to the unique context of decisions by a committee acting under the express direction of the Security Council. It must take into account the purely international framework, where the benchmark used cannot be premised on the precepts of one particular legal system or tradition. It must instead focus on concepts generally accepted as fundamental across legal systems.[38]

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[36] ibid.

[37] The Team was established pursuant to UNSCR 1526 (2004), [7] in Adele J. Kirshener, n 31, 589.

[38] Judge Prost, quoted in *Yousef v Foreign Secretary* [2013] EWCA Civ 1302 [8].

Although, to date, the Ombudsman has only considered sixteen complaints, with five having been decided and three of those resulting in suspects being de-listed,[39] courts have displayed mixed reactions to the utility of the Office. The EU judicature did not consider it sufficient to displace independent curial control, or to obviate the need to disclose sufficient information to the suspect to argue his case in court. The EU General Court held that notwithstanding the introduction of an Ombudsman service by way of UNSC Resolution 1904 (2009), the Sanctions Committee still continued to fail in its obligation 'to offer guarantees of effective judicial protection, as the [Grand Chamber of the] Court of Justice considered to be the case at paragraph 322 of *Kadi*'.[40] This decision was reached because 'even if account is taken of the 'Office of the Ombudsperson' [in] essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee.'[41]

By contrast, the UK Administrative Court in *R (On the Application of Hany Youssef) v Foreign Secretary*[42] acknowledged that although the Ombudsman continued to be in some way hampered in accessing classified information and the identity of listing states, 'the Ombudsperson is of high repute and impartial. It is clear that her reports have in some instances led to people being de-listed. However, it remains the case that the ultimate decision rests with the Sanctions Committee and *no part of the Ombudsperson's report is published even in redacted form*.'[43] This observation, among others, underpinned the High Court's conclusion that the Foreign Secretary could not be compelled to take action before the Security Council to secure the applicant's delisting.

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[39] Carol Harlow, n 5, 12.

[40] Case T-85/*09Yassin Abdullah Kadi v. Commission (No. 2)* [2010] ECR 00000 (30 September 2010) [127].

[41] ibid [128].

[42] *R (On the Application of Hany Youssef) v Foreign Secretary* [2012] EWHC 2091 (Admin).

[43] ibid [50], emphasis added.

(b) THE EUROPEAN UNION REGIMES

At EU level, the discretionary regime pursuant to UNSCR 1373 (2001) is administered by the CP-931 Working Party.[44] Working Party internal proceedings are secret, i.e. there are no recorded minutes and none of the proceedings are given official EU document numbers.[45] Instead it publishes short press releases,[46] consistently emphasising the confidentiality of proceedings. The United Kingdom is part of the CP931 Working Party and has voting rights in proceedings. The addition of an individual or entity to the central EU List results in the EU-wide freezing of that individual or entity's monetary and proprietary assets, as opposed to a state by state freeze. Under the internal procedure a national authority may propose an individual or entity for inclusion on the list, and thereafter members of the Working Party have two weeks to consult officials in their own governments. The procedures of the Working Party also appear to require intelligence sharing by member states. Eckes comments that 'the specific level of scrutiny that the Council and its CP931 Working Party exercise over the listing proposed by a Member States remains ambiguous. Many details of the adoption procedures of autonomous EU sanctions, including the precise listing requirements remain blurry.'[47]

(c) THE UNITED KINGDOM UNSCR 1373 (2001) REGIME

[44] Council Common Position (EC) 2001/931/CFSP, n 7.

[45] Email reply to request for minutes of CP 931 Working Party: request refused on confidentiality grounds (19 April 2010).

[46] European Union Factsheet, 'The EU list of persons, groups and entities subject to specific measures to combat terrorism' available at: http://www.consilium.europa.eu/uedocs/cmsUpload/080206_combatterrorism_EN.pdf accessed 01 July 2014.

[47] Christina Eckes, 'Decision-Making in the Dark – Autonomous EU Sanctions and National Classification', in Iain CAMERON, (ed), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Intersentia 2013), 6.

The United Kingdom's management of the discretionary regime has been characterised by gradual improvement in procedural clarity and, in some cases, encouraging links with parallel regimes of risk-management in the administrative state. The operation of the Terrorist Asset-Freezing, etc. Act 2010 (TAFA) is subject to annual independent review pursuant to section 31. Initial reports on the operation of the designation procedure suggested a cultural gap between the Home Office (which is widely experienced in the counterterrorism field) and the Treasury. Initially, the Treasury procedures were criticised by the Independent Reviewer for lacking transparency and formality (see Chapter 3). The process for designating persons under the 2010 Act (or the Counter-Terrorism Act 2008) requires both 'reasonable belief' that an individual is connected with terrorism and that an asset-freezing measure is 'necessary' on the part of the Treasury. The previous regime of Orders in Council required the lower threshold of 'reasonable suspicion', mirroring the standard of proof in the contemporaneous control orders regime. However, the Independent Reviewer expressed concerns regarding the informality of the procedure: Initially 'the Treasury's Asset-Freezing Unit collate[d] information from the police and from departments and agencies by email, before preparing submissions which go to Ministers.'[48]

However, the Independent Reviewer suggests significant recent improvements. The Treasury adopted the Independent Reviewer's recommendations for a formalised process mirroring that of control orders and TPIMs.[49] An Asset-Freezing Review Group (AFRG) now exists, and its procedures mirror the counterpart TPIM Review Group. The TAFA asset-freezing framework is now more integrated within the MAPPA framework (discussed in Chapter 3). In practice this means that: '[t]he Treasury attends MAPPA meetings where appropriate, and considers MAPPA issues when conducting [reviews] for individuals who have been in custody. [The] MAPPA community (specifically, the Probation Service, the Police and staff at Approved

[48] ibid [6.7].

[49] David Anderson QC, 'Third Report on the Operation of the Terrorist Asset-Freezing, etc. Act 2010' (The Stationary Office 2014), Ch 3.

Premises) as a matter of course consult the Treasury on any financial matters pertaining to a Designated Person before approving any financial undertaking.'[50] Whilst this level of integration with the 'ordinary' criminal justice system is welcome, it is driven by the fact that many of the persons designated under TAFA have been convicted and are serving prisoners.[51] There is a much more tangible link to the criminal justice system present in the use of asset-freezing pursuant to TAFA than has been experienced with control orders or TPIMs.

DEVELOPMENT OF PROCEDURAL FAIRNESS IN THE UNITED KINGDOM COURTS

I. THE DEVELOPMENT OF THE INDIVIDUALISED ASSET-FREEZING REGIMES

The proliferation of secret procedures within the United Nations, European Union, and United Kingdom level initially went virtually unchallenged before the UK Courts. The initial absence of a meaningful procedural challenge was undoubtedly related to the fact that neither UNSCR regime had a foothold in primary legislation. Although provision for terrorist asset-freezing had already existed in primary legislation in the Anti-Terrorism, Crime and Security Act 2001.[52] ATCSA 2001, enacted in response to the 9/11 attacks, prima facie provides a regime for the implementation of Resolution 1373 (2001) obligations despite making no explicit reference thereto.[53] Two features of this Act are important. The first is the presence of the affirmative resolution procedure in section 10, which required asset-freezes to be approved by parliament prior to being imposed.[54] This

[50] ibid [3.6].

[51] ibid [2.16].

[52] Part 2 of the ATCSA 2001 was used only once to enact the Landsbanki Freezing Order 2008, SI No. 2008/2668 to freeze the assets of the Icelandic central bank at the outset of the 'credit crunch'. For analysis see Clive Walker, Clive and Genevieve Lennon, 'Hot Money in a Cold Climate' [2009] Public Law 37.

[53] *Ahmed v H.M. Treasury (No. 1)*, n 21, Lord Hope [23].

[54] Anti-Terrorism, Crime and Security Act 2001, s 10.

contrasts with the order-making regime in the United Nations Act 1946, which required no parliamentary scrutiny at all.

The second important feature of ATCSA 2001 is the higher standard of proof required to freeze assets (set at 'reasonable belief').[55] By contrast, the Terrorism (United Nations Measures) Order 2006 required only the presence of 'reasonable suspicion' of involvement in terrorist activity or finance to be present in the mind of a Treasury official when designating an individual. Whereas the nature of the Al Qa'ida Order requires no discretionary judgement on the part of the executive at all. Judicial authority tells us that the standard of 'reasonable suspicion' is a lower threshold than 'reasonable belief'.[56] Instead of using the ATCSA 2001 regime (which required some transparency) designations were made using Orders in Council made under section 1(1) of the United Nations Act 1946 (UN Act).[57] There was no provision for Special Advocates, and intercept evidence could not be examined in judicial review proceedings because of the application of section 17 of the Regulation of Investigatory Powers Act 2000 (RIPA). Moreover, in the initial litigation involving UNSCR 1373 (2001) requests for a CMP were refused.[58]

Both regimes were eventually struck down by the Supreme Court prompting the enactment of the current legislation. In *Ahmed (No.1)*[59] the Court's Deputy President Lord Hope declared:

> The consequences of…this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the

[55] ibid, s 4(2).

[56] *Belmarsh* [2005] 2 AC 68, [223] Baroness Hale of Richmond: 'Suspicion is an even lower hurdle than belief: belief involves thinking that something *is* true; suspicion involves thinking that something *may be* true.'

[57] The Al-Qa'ida and Taliban (United Nations Measures) Order 2002, SI 2002/111; The Al-Qa'ida and Taliban (United Nations Measures) Order 2006, SI 2006/2952; The Terrorism (United Nations Measures) Order 2001, SI 2001/356; The Terrorism (United Nations Measures) Order 2006. SI 2006/2675; The Terrorism (United Nations Measures) Order 2009, SI 2009/1747.

[58] *A, K, M, Q & G v HM Treasury* [2008] EWCA Civ 1187 [60] Clarke MR.

[59] *Ahmed No. 1*, n 21, emphasis added.

> Treasury have taken really is within [its] powers. *[Even] in the face of the threat of international terrorism, the safety of the people is not the supreme law.*[60]

This vigorous dictum preceded the quashing of the various Orders in Council. The case involved successful challenges to the legality of the Terrorism Order 2006 (TO) (raised by designated persons A, K, and M) and the Al Qa'ida Order 2006 (AQO) (raised by G and HAY). The majority held that the AQO violated the common law right of access to a court, whilst the TO 2006 (and, in turn, its counterpart the Terrorism (United Nations) Order 2009)[61] fell afoul of some combination of the principles in *Simms*[62] and *Pierson*[63]. These principles were applied to create constraints upon the activities that secondary legislation pursuant to section 1 of the 1946 Act could authorise. Both principles require that parliamentary intention to interfere with fundamental rights is explicitly clear. The principle in *Pierson* holds that: 'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.'[64] The principle in *Simms* was elucidated by Lord Hoffmann. It holds that '[f]undamental rights cannot be overridden by general or ambiguous words'.[65]

However, the challenge mounted to the regimes before the Supreme Court was founded upon of the principle of legality and as such failed to strike at the core of the unfairness inherent

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[60] ibid [6].

[61] The Terrorism (United Nations Measures) Order 2009, SI No. 2009/1747.

[62] R v *Secretary of State for the Home Department*, *Ex Parte Simms* [1999] UKHL 33.

[63] R *v Secretary of State for the Home Department, Ex Parte Pierson* [1997] UKHL 37.

[64] *Pierson*, n 63, p. 575, Lord Browne-Wilkinson.

[65] *Simms*, n 62, Lord Hoffmann.

in both regimes. Knight notes that the international legal framework in which the Orders existed meant that the common law was 'the only available source of rights which could be relied upon'.[66] A number of arguments which struck at the core of the unfairness inherent in the regimes had already failed. Although human rights challenges to the regimes were raised (including their incompatibility with Article 6(1) ECHR) the designated persons were not entitled to the protections of the ECHR or the Human Rights Act 1998. This was so for two reasons, one related to the status of the Charter of the United Nations, and the other to the pre-existing jurisprudence of the House of Lords. The inapplicability of the Convention related to the supremacy clause in Article 103 of the UN Charter which reads as follows:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This provision was read alongside Article 25 of the UN Charter, which obligates member states to obey Security Council Resolutions. The combined effect of both provisions is that any domestic legal act which can directly attribute its genesis to a UNSC Resolution supersedes all other Treaty obligations. As such, in *Ahmed (No. 1)* Lord Hope applied the reasoning of Lord Bingham in *Al-Jedda*:

> For the time being we must proceed on the basis that article 103 leaves no room for any exception, and that the Convention rights

[66] C.J.S. Knight, 'Striking Down Legislation Under Bi-Polar Sovereignty' [2011] Public Law 90, 111.

> fall into the category of obligations under an international agreement over which obligations under the Charter must prevail.[67]

Because the creation of the Al Qa'ida Order and the Terrorism Orders could be directly attributed to obligations generated by UNSC Resolutions, the Lords' ruling in *Al-Jedda* was applicable. By contrast, the Human Rights Act 1998 is an Act of the UK Parliament, not a Treaty in public international law. Nonetheless, the designated persons were not entitled to any of the human rights protections argued for because the finding of a violation of the Human Rights Act 1998 in *Ahmed (No. 1)* was precluded by the House of Lords ruling in *Quark Fishing*.[68] In *Quark Fishing* the House of Lords held that it would not find a breach of section 6(1) of the Human Rights Act 1998 unless it was certain that Strasbourg would find a breach in the same situation.[69]

These issues were mirrored in the emergency legislation which followed, and by its permanent replacement. In response to the ruling in *Ahmed (No. 1)* the Terrorist Asset-freezing (Temporary Provisions) Act 2010 was rushed through the Commons and Lords over two days in February. Its effect was to re-enact the Terrorism Order 2009 word-for-word, and to re-designate A, K, and M. However, the subsequent enactment of TAFA 2010 has provided opportunities for the application of Human Rights Act 1998 protections and the operation of CMPs.

II. THE TERRORIST ASSET-FREEZING, ETC ACT 2010 AND THE AL-QA'IDA AND TALIBAN (ASSET-FREEZING) REGULATIONS 2010

[67] *Ahmed (No. 1)*, n 21, Lord Hope [74].

[68] R *(on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57.

[69] *Ahmed (No. 1)*, n 21, Lord Phillips [93].

The Temporary Provisions Act had a sunset clause of 31 December 2010 and was replaced by the Terrorist Asset-Freezing, etc Act 2010 (TAFA) on 16 December 2010. An amendment to the Civil Procedure Rules facilitated made CMPs available[70], and these proceedings were added to the list of exceptions in section 17 of the Regulation of Investigatory Powers Act 2000 to make intercept evidence admissible. This new legislation covered asset-freezing undertaken by the Treasury pursuant to the UNSCR 1373 (2001), whereas the Al Qa'ida and Taliban sanctions regime remained the subject of secondary legislation (the 2010 Regulations).[71]

The new 2010 Act raised the threshold for designating persons from 'reasonable suspicion' to 'reasonable belief' following recommendations from the JCHR[72] and the Lords' Constitution Committee.[73] However, statutory obligations guaranteeing minimum disclosure were resisted by government before Parliament. An amendment to place the procedural guarantees in *Home Secretary v AF (No. 3)*[74] on a statutory footing was tabled on three separate occasions[75] but ultimately failed. The government successfully argued before parliament that asset freezes were sufficiently dissimilar to control orders to merit such protection. Lord Sassoon, Commercial Secretary to the Treasury, enthusiastically denied any qualitative similarity between the two regimes:

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[70] Civil Procedure (Amendment No. 4) Rules 2010, S.I 2010/3038.

[71] The Al-Qaida and Taliban (Asset-Freezing) Regulations 2010, SI No. 2010/1197.

[72] Joint Committee on Human Rights, *Legislative Scrutiny: Terrorist Asset-Freezing, etc. Bill (4th Report)*, (2010-2012, HL Paper 53/HC 598), [19]-[21].

[73] The efforts of the Constitution Committee and the JCHR, combined with the concerns of several of Supreme Court Justices in *Ahmed (No. 1)* succeeded in raising of the standard of proof from 'reasonable suspicion' to 'reasonable belief'. Amendment to Clause 2 tabled by Lord Pannick QC 17 September 2010, Amendment to Clause 2 tabled by Lord Sassoon, 5 October 2010, amendment tabled by Tom Brake MP and Dr Julian Huppert MP, 16 November 2010.

[74] *Home Secretary v AF (No. 3)* [2009] UKHL 28.

[75] Amendment to Clause 28 tabled by Lord Pannick and Lord Lester of Herne Hill, October 20, 2010, amendment tabled by Tom Brake MP, November 16, 2010 and Amendment tabled by Dr Julian Huppert MP, November 23, 2010.

> [The] Treasury and the Home Office agree that there are significant differences between asset-freezing and control orders, and that in consequence the approach that we take on asset freezing reflects the circumstances of this tool and does not need to be aligned with the Government's approach to control orders, which is still under consideration.[76]

However, in *Gulam Mastafa v H.M. Treasury*[77] the Administrative Court applied the *AF (No. 3)* disclosure requirement to the TAFA regime. GM had been designated pursuant to s 2(1) of TAFA 2010. Collins J. held that Article 6 ECHR applied to proceedings thereunder and '[t]he extent of disclosure required to produce a fair hearing will depend on the facts of the particular case… I do not think I can do more than say that the requirements of disclosure are not in my view likely to be any less because this is not a TPIM and so there is no direct restriction on liberty.'[78]

By contrast, disclosure under the Al Qa'ida Regulations received different treatment. In *FCO v Maftah and Khaled*[79] the Court of Appeal ruled that acts or omissions, including those related to seeking de-listing by the '1267 Committee' by the Foreign office on behalf of a designated individual, were determinations of 'civil rights or obligations' as per Article 6(1) ECHR. The reasoning was based upon the foreign relations aspect of the listing procedure being classified as falling within the 'hard core of public law prerogatives' designated by the ECtHR in *Ferrazzini v Italy*.[80] Despite this, and in regard to the analogous position at common law, the Court of Appeal ruled that the protection provided was equally robust as that available pursuant to Article 6(1)

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[76] HL Deb 6 October 2010, vol 721, col 121, Lord Sassoon.

[77] *Gulam Mastafa v H.M. Treasury* [2012] EWHC 3578 (Admin).

[78] ibid [31]-[37].

[79] *Foreign Secretary v E Maftah and A Khaled* [2011] EWCA Civ 350.

[80] *Ferrazzini v Italy* (2002) 34 EHRR 45.

EHCR. The engagement with common law rules of procedural fairness *prima facie* places those designated under the regulations in a better position vis-à-vis disclosure than deportees appealing before the SIAC.

III. THE COUNTER-TERRORISM ACT 2008 AND THE EXTENSION OF THE CMP TO THE UK SUPREME COURT

(a) PROCEDURAL FAIRNESS UNDER THE COUNTER-TERRORISM ACT 2008

Despite the proliferation of asset-freezing regimes applicable in the United Kingdom, the New Labour government claimed that the 2008 Act has a different intention from other related Acts of Parliament. During its passage through parliament, the clauses dedicated to asset-freezing were described as:

> an important element of the Government's toolkit to deal with risks posed to the UK by money-laundering, terrorist financing and the development or production of chemical, biological, radiological or nuclear weapons. [It] also [enables] the Government to take action where the Financial Action Task Force has advised that measures should be taken because a country poses a money-laundering or terrorist-financing risk.[81]

Schedule 7 of the 2008 Act allowed the Treasury to act on the recommendations of the UN Financial Action Task Force (FATF) where it 'advised that measures should be taken in relation

[81] HL Deb 27 July 2010, vol 720, col 1254, Lord Sassoon.

to the country because of the risk of terrorist financing or money laundering activities being carried on' in any country by the government of that country or by persons resident or incorporated in that country.[82] The second required condition is that 'the Treasury reasonably believe that there is a risk that terrorist financing or money laundering activities are being carried on' in any of the three contexts previously mentioned.[83]

The 2008 Act made specific provision for the operation of a CMP and for the Appointment of Special Advocates.[84] In a seemingly superfluous provision in section 67(6) regarding 'rules about disclosure' under the CMP the Act provides that: 'Nothing in this section, or in rules of court made under it, is to be read as requiring the court to act in a manner inconsistent with Article 6 of the Human Rights Convention.' What this meant in terms of mandatory disclosure was eventually resolved by the Court of Appeal in *Bank Mellat v HM Treasury.*[85] Bank Mellat is an Iranian bank subjected to a freezing order pursuant to the Treasury's power under section 62 of the CTA 2008.[86] The Treasury believed that the Bank financed the Iranian government's nuclear weapons and ballistic missiles programmes. The Treasury unsuccessfully contested the application of the *AF (No. 3)* disclosure requirements before the Court of Appeal, arguing that the application of Article 6(1) ECHR to the proceedings did not mean that the disclosure requirements in *AF (No. 3)* constituted 'an immutable rule.'[87] In ruling for the Bank Lord Neuberger held that 'the requirements of article 6(1) are such that the information to be provided by the Treasury must not merely be sufficient to enable the Bank to deny what is said

[82] Counter-Terrorism Act 2008, Schedule 7, s 1(2).

[83] ibid, s 1(3).

[84] ibid, s 68.

[85] *Bank Mellat v HM Treasury* [2010] EWCA Civ 483.

[86] Financial Restrictions (Iran) Order 2009, SI 2009/2725.

[87] *Bank Mellat v HM Treasury*, n 85, [17].

against it. The Bank must be given sufficient information to enable it actually to refute, in so far as that is possible, the case made out against it.'[88] Thereafter he cautioned that:

> if a party is dissatisfied with a decision as to what information should be disclosed in a case such as this, an appeal would, at least in principle, represent an uphill task. An appellate court would normally be reluctant to interfere with a first instance judge's determination of what has to be disclosed…although it would, of course, do so if satisfied that the judge had gone wrong in principle.[89]

A successful appeal to the Supreme Court on substantive grounds followed. However, the appeal stands out as much for the preliminary ruling which extended the CMP to the Supreme Court on a controversial statutory construction.

(b) EXTENDING THE CLOSED MATERIAL PROCEDURE TO THE SUPREME COURT

In *Bank Mellat (No. 1)* the Supreme Court revisited a closed judgment of the Administrative Court. It also ruled that it had the implied statutory power to hold its own CMP and then opted to do so. The majority (Lords Neuberger, Clarke, Sumption, Carnwarth, and Lady Hale) held that it was both competent and appropriate to adopt a CMP, whereas the minority (Lords Hope, Kerr, and Reed) reached the opposite conclusion. Lord Dyson partially dissented, agreeing with the majority that the Court had power to adopt a CMP, but holding that it was inappropriate to do so in this

[88] ibid [21].

[89] ibid [22].

case. Despite explicit statutory authorisation, there had been no closed judgment rendered by the Court of Appeal.[90]

Notwithstanding forceful arguments from the perspective of pragmatism implicit in the majority position, this author shares the minority's reticence regarding the expansion of the CMP to the Supreme Court absent express statutory authority. It subsequently transpired that there was nothing to be gained from revisiting the closed judgment, nor was there anything substantive to be gained from holding a CMP in the Supreme Court. But even if the content of the closed judgment had revealed a vitiating procedural error and unfairness to the Bank; the majority position is unfavourable in principle. This is so for several reasons; first the CMP was adopted without sufficient recourse to a necessity test. Secondly, whilst the case did yield helpful obiter guidance from Lord Neuberger on the future application of CMPs (discussed in Chapter 2), the principles of natural justice and open justice are already too vulnerable and important to compromise for the sake of doing justice in one case (see Chapter two). Moreover, *Bank Mellat (No. 1)* was arguably the most appropriate context for the Supreme Court to take a principled stand, as there was comparatively little at stake: the case concerned corporate financial restrictions, as opposed to a severe intrusion into the life of an individual unanswered by closed evidence. Moreover, the international context of terrorist asset-freezing makes it especially important that courts of last resort adjudicate according to the strongest conceptions of open justice and equality of arms.

The catalyst underlying the majority's position was that *Al Rawi v Security Services*[91] (discussed further in chapter 8) was distinguishable. In *Al Rawi* the Supreme Court unanimously held that the right to fair trial at common law precluded the adoption of a CMP in an ordinary tort action. Lord Neuberger, speaking for the majority, recalled that '[i]n *Al Rawi*…this Court

[90] Counter-Terrorism Act 2008, s 67, CPR 79.2.

[91] *Al Rawi v Security Service and Others* [2012] 1 AC 531.

uncompromisingly set its face against introducing a closed material procedure.'[92] However, because the present case concerned an appeal against a statutory measure, as opposed to a common law action; a purposive interpretation of both the Constitutional Reform Act 2005 (CRA) and the Supreme Court Rules (SCR) suggested that a CMP was permissible. Moreover, the majority took the view that the procedure may well be necessary in the interests of justice; and the CRA required the Supreme Court to do justice in appeals before it. Lord Neuberger declared that 'it is *for the courts to decide*…how the tension between the two needs of natural justice and confidentiality is to be resolved in any particular case.'[93]

To reinforce this viewpoint the majority looked to the CRA. Section 40(2) mandated that an appeal to the Supreme Court is available from any case in the Court of Appeal, and section 40(5) requires that '[t]he Court has power to determine any question necessary…for the purposes of doing justice in an appeal'. The majority also considered the SCR[94], Rule 29 stated that '[i]n relation to an appeal …the Supreme Court has all the powers of the court below.' From this, the majority inferred that if a CMP had been lawfully conducted at first instance, it would be 'a little surprising' if it could not conduct its own CMP.[95] The majority presumed that it was more acceptable for the Court to regulate its own procedure, even where the damage to open justice and natural justice are potentially egregious, in the context of statutory procedure than in civil proceedings at common law. Why such statutory appeals (conducted subject to judicial review)[96] require less procedural protection than actions at common law (*per Al Rawi*) is a vexed question; and the majority answer, predicated on purposive statutory interpretation remains unpersuasive.

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[92] *Bank Mellat v HM Treasury (No. 1)* [2013] UKSC 38 [49].

[93] ibid Lord Neuberger [52], emphasis added.

[94] Supreme Court Rules 2009, SI 2009/1603.

[95] *Bank Mellat (No. 1)*, n 92, Lord Neuberger [35].

[96] Counter-Terrorism Act 2008, s 63(3).

The minority's perspective on statutory construction differed, and in turn, so did their conception of the relationship between *Al Rawi* and the present case. Lord Hope considered that the majority had erred in their interpretation of the relevant provisions of the CRA. In his view the majority's reasoning (which was driven by some combination of pragmatism and necessary implication) was misguided because the CRA did not *expressly* authorise the use of a CMP in the Supreme Court. Furthermore, because the CTA 2008 was enacted after the CRA: '[t]his makes it plain that Parliament was not asked to address its mind to this issue at all.'[97] In Lord Hope's view, the majority's approach obscured the inherent 'weakening of the law's defences' and this 'would be bound to lead to [a] state of uncertainty and, sooner or later, to attempts to widen the breach still further'[98] between the rule of law and executive action.

Lord Kerr, who dissented forcefully against the expansion of CMPs into the Employment Tribunal in *Home Office v Tariq*[99], agreed that the 'principle recognised in *Al-Rawi* is both fundamental and general. Its effect is straightforward. Courts do not have power to authorise a [CMP] unless they have been given that power by Parliament.'[100] The obvious downside of the minority position is the potential denial of justice in the substantive appeal. But the Justices appeared to regret revisiting the closed judgment. Lord Sumption reiterated in *Bank Mellat (No. 2)* that the closed judgment 'contains nothing which alters or supplements the findings in [the] open judgment in any respect relevant to the present appeal.'[101] Had the judgment revealed a procedural irregularity capable of altering the outcome of the case, the temptation towards backwards induction may have been substantially greater. However, it is unwise to separate the possibility of

[97] *Bank Mellat (No. 1)*, n 92, Lord Hope [86].

[98] ibid, Lord Hope [81].

[99] *Secretary of State for the Home Department (Appellant) v Tariq (Respondent), Secretary of State for the Home Department (Respondent) v Tariq (Appellant)* [2011] UKSC 35.

[100] *Bank Mellat (No. 1)*, n 92, Lord Kerr [104].

[101] *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39, Lord Sumption [17].

doing (or not doing) substantive justice in one case from the argument about whether the approach is meritorious *in general.* To favour pragmatism (supported by poor statutory construction) in any given circumstance, is to ignore Oliver Wendel Holmes' cautionary remark that 'hard cases make bad law.'[102]

The majority explained their decision to conduct a CMP in the following terms:

> By a bare majority, with those in the majority…all having real misgivings, the Court decided that it should accede to the proposal to have a closed material procedure…And, as…there was a real possibility that we were going to allow the appeal…we felt that there would be a real risk of justice not being seen to be done, and an outside possibility of justice actually not being done …if we did not…hold a closed hearing…[103]

Immediately after the decision, Lord Neuberger attempted at [98]-[99] to assuage any fears that the decision represented an endorsement of "secret justice" in Britain's Supreme Court by highlighting the majority's agreement with Lord Hope that:

> …Secret justice at this level is really not justice at all…[104]

Any future closed judgment could mark a point of no return for open justice, for it is unlikely that complaints about either the efficacy, or fundamental fairness, of such a procedure in the Supreme

[102] *Northern Securities Co v United States*, 193 US 197, 400 (1904) (Holmes dissenting).

[103] *Bank Mellat (No. 1),* n 92, Lord Neuberger [64].

[104] ibid, Lord Hope [98]-[99], emphasis added.

Court could be effectively challenged before the European Court of Human Rights (ECtHR). This is due to the absence of any power of that court to compel sight of sensitive material from the British government. Such a barrier to the scrutiny of closed evidence in Strasbourg was recently affirmed in *Wang Yam v HM Attorney General*.[105] The High Court held that an order mandating that a criminal court judgment be 'closed' for reasons of national security precluded references to material used in either the *in camera* proceedings or the closed judgment in an application to the ECtHR. Although the English courts did not have inherent jurisdiction to impose procedural requirements for handling closed material upon the Strasbourg court (and there was already some procedural provision in Strasbourg for such circumstances)[106] Ouseley J rejected counsel for Wang Yam's reliance upon the majority's dicta in *Bank Mellat (No. 1)* which held that 'one would normally expect an appeal court to be entitled to have access to all the material available to the court below and to see all the reasoning of the court below.'[107] Instead, he concluded that the jurisdiction of Strasbourg was not analogous to the jurisdiction of an English appellate court:

> The ECtHR is not another domestic appellate tier. Its Judges and staff owe no allegiance to the Crown. They do not apply UK domestic law. The various protected interests cannot be explained to it without risk of harm to those interests. It may take a different view of what is justified in the national interest, applying different tests and balancing the interests differently.[108]

[105] *Wang Yam v H.M. Attorney General* [2014] EW Misc 10 (CCrimC).

[106] *Janowiec and Others v Russia*, Applications 55508/07 and 29520/09 21 October 2013.

[107] *Bank Mellat (No. 1)* in *Wang Yam v H.M. Attorney General*, n 105, [48].

[108] *Wang Yam v H.M. Attorney General*, n 105, [76].

One further concern raised by the majority approach in *Bank Mellat (No. 1)* is that the decision to revisit the closed judgment was apparently taken with little regard for the wider interests engaged. To this end Lord Hope's speech castigated the Treasury for requesting a CMP in the Supreme Court:

> [the] attitude which they have adopted in this appeal was a misuse of the procedure, because they invited the court to look at the closed judgment when there was nothing in it that could not have been gathered equally well from a careful scrutiny of the open judgment. *This experience should serve as a warning that the State will need to be much more forthcoming if an invitation to this court to look at closed material were to be repeated in the future*.[109]

Lord Reed criticised the Treasury's request for a CMP because it 'was unsupported by any specific reasons why such an exceptional course should be adopted',[110] and Lord Kerr highlighted the absence of the application of a necessity test in the majority's reasoning.[111] Lord Reed expressed concern that the majority's decision might lead to the 'degradation of standards of justice at the highest level' and, any future resort to closed justice in the Supreme Court, 'should be resorted to only where it has been convincingly demonstrated to be genuinely necessary in the interests of justice.'[112]

(c) The Contextual Relationship between the CMP and Substantive Review

[109] *Bank Mellat (No. 1)*, n 92, Lord Hope [100], emphasis added.

[110] ibid, Lord Reed [139].

[111] See Chapter 2.

[112] ibid, Lord Reed [140].

The decision to extend the CMP to the court of last resort neatly illustrates the tension between pragmatism and principle inherent in the desire to do justice in the instant case, versus the desire to preserve ideals of justice in the wider context. Therefore, it is perhaps unsurprising on one level that the Bank's substantive appeal was subject to the most searching proportionality analysis in the national security and counterterrorism sphere since *Belmarsh*.[113]The majority allowed the Bank's appeal on both grounds, concluding that the freezing order interfered irrationally and disproportionately with Convention rights under Article 1 Protocol 1; and that the Treasury's failure to give notice of its decision, and hence to allow representations to be made, was procedurally unfair. Both of these conclusions represent a departure from general trends in pre-emptive counterterrorism cases which engage the CMP. The substantive ground departs from the trends seen before the SIAC, and in control orders litigation because the guiding authority used by the majority as a template for the proportionality analysis is *Belmarsh* as opposed to *Rehman*.[114] The procedural ground also represents a departure because no other regime in English law stays the imposition of pre-emptive sanctions to allow the claimant to make representations of any kind.

In respect of the substantive decision to designate Bank Mellat, Lord Sumption (speaking for the majority) acknowledged that 'this case lies in the area of foreign policy and national security which would have once been regarded as unsuitable for judicial scrutiny.'[115] However, the 'question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country…is pre-eminently a matter for the Executive.'[116] Nonetheless, according to the majority, the Executive had acted disproportionately. Applying *Belmarsh*, the majority held that: 'A measure may respond to a real problem but nevertheless be irrational or disproportionate for

[113] *Belmarsh*, n 56.

[114] *Home Secretary v Rehman* [2001] UKHL 47.

[115] *Bank Mellat (No. 2)*, n 101, [21].

[116] ibid [21].

reason of its being discriminatory in some respect that it is incapable of objective justification.'[117] There was a parallel with *Belmarsh* because:

> [O]nce it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continue to enjoy…The Direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make its objective.[118]

The Bank also succeeded on procedural grounds, because it was denied the right to make representations prior to its designation. In this respect, the CTA 2008 also demonstrates a sharp divergence from the other pre-emptive counterterrorism regimes, insofar as the Bank was entitled to a prior hearing (although hearing would not be required in every circumstance). The Court noted that:

> Some directions that might be made under Schedule 7 of the Act could not reasonably give rise to an obligation on the Treasury's part to consult the targeted entity, for example because there was a real problem about the implicit or explicit disclosure of secret intelligence or because prior consultation might frustrate the object of the direction by enabling the targeted entity to evade its

[117] ibid [25].

[118] ibid [27].

> operation, notably in a case involving money laundering or terrorism.[119]

This can be directly contrasted with the dicta of Lord Rodger in *Ahmed (No. 1)* in respect of the 1267 Committee and procedural fairness: 'It would, of course, be absurd to expect the Committee to notify individuals of any proposal to list them: any funds would quickly be disposed of.'[120] Moreover, the majority's contention on the duty to consult was the subject of dissent. Lord Reed considered that the majority dismissed the risks inherent in a duty of prior consultation too quickly: 'In some circumstances, prior consultation could in addition reduce the effectiveness of the requirements…by affording the designated person an opportunity to take avoidance action. The risk is discounted by Lord Sumption…but I am less confident that it can be entirely disregarded.'[121]

In sum, then, the review undertaken of designations pursuant to the Counter-Terrorism Act 2008 sits uneasily alongside the other asset-freezing powers explored in this chapter and with the judicial approach to other pre-emptive powers examined in the thesis. First, the extension of the CMP to the court of final appeal without the application of a necessity test represents too low and malleable a threshold by which to allow the principles of natural justice and open justice to be compromised. Moreover, *Bank Mellat (No. 1)* was arguably the most appropriate context for the Supreme Court to take a principled stand: it concerns corporate financial restrictions, as opposed to severe intrusions into the life of an individual unanswered by closed evidence. Therefore, the (potential) injustice caused by secret evidence would have been lesser than in other circumstances. Finally, the attempt to compensate the presence of a closed hearing with an unusually searching proportionality review meant that the Bank's substantive interests were better protected than

[119] ibid [31].

[120] *Ahmed v H.M. Treasury (No. 1)*, n 21, Lord Rodger [181].

[121] *Bank Mellat (No. 2)*, n 101, Lord Reed [59].

individuals subject to the highly invasive control orders regime, or the high risks inherent in deportation associated with the SIAC.

DEVELOPMENT OF EFFECTIVE JUDICIAL PROTECTION AND THE RIGHTS OF THE DEFENCE IN EUROPEAN UNION LAW

I. THE DEVELOPMENT OF JUDICIAL REVIEW BY THE EU JUDICATURE

When the legal regimes for smart sanctions were initially adopted by the EU, the choice of legal basis was controversial.[122] However, since the power to impose targeted financial sanctions was placed on a firm footing by the Lisbon Treaty,[123] the EU judicature has developed what are arguably the most stringent disclosure requirements under the UNSCR 1267 (1997), UNSCR 1373 (2001) and the anti-Iranian nuclear proliferation regimes.

The nature of the relationship between EU law and the UNSC Resolutions had been in doubt until the Grand Chamber held in *Kadi (No. 1)*[124] that UNSC Resolutions imposing targeted financial sanctions on individuals implemented by European Union law were not immune from judicial scrutiny by virtue of their genesis in international law. As a court of final instance, from which there is no appeal, the ECJ Grand Chamber made clear that notwithstanding Articles 25 and 103 of the Charter of the United Nations and Articles 297 EC and 307 EC, judicial review of the validity of any Community measure in the light of fundamental rights must be considered to be the expression of a constitutional guarantee stemming from the EC Treaty as an autonomous

[122] The use of the (then) Article 307 EC was described as a 'surprising leap'; Gráinne De Burca 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51(1) Harvard International Law Journal 1, 20.

[123] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01, Article 75.

[124] C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commissi*on *(Kadi No. 1)* [2008] ECR I-6351.

legal system. This guarantee could not be prejudiced by an international agreement; the agreement in this case being the Charter of the United Nations.[125] As such Regulation (EC) 881/2002 was annulled insofar as it pertained to Mr Kadi.

The CJEU held that as a consequence, those subjected to targeted sanctions were entitled to 'in principle the full review'.[126] In parallel, stringent disclosure requirements were developed under the UNSCR 1373 (2001) regime.[127] A series of decisions involving the People's Mojahedin Organisation of Iran (PMOI) required disclosure, to some extent, of evidence upon which the listing of the Organisation was based. The evidence was held by France, and despite repeated argument that disclosure was contrary to French national security, the (then) Court of First Instance held that the refusal to disclose the evidence upon which the designation of the PMOI was based infringed the PMOI's right to effective judicial protection. The EU Council's argument (supported by France) was that its refusal to share the evidence upon which the PMOI's relisting rested was required to preserve French national security. The Council had put before the CFI a summary of the reasons for relisting the PMOI. They, however, refused to declassify point 3(a) of that summary at the request of the French authorities. A letter from the French Ministry of Foreign Affairs alleged that the passage in question 'contained information of a security nature with implications for national defence which is, therefore, under Article 419-3 of the Penal Code, subject to protective measures to restrict its circulation.'[128] This argument failed to impress the CFI, who found the classification to be a categorical infringement of the right to effective judicial protection:

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[125] *Kadi (No. 1)*, n 124, [316].

[126] ibid, [326].

[127] Council Common Position (EC) 2001/931/CFSP, n 7.

[128] Case T-284/08 *People's Mojahedin Organisation of Iran v Council (PMOI II)* [2008] ECR Page II-00334 [71].

> [The] Court considers that the Council is not entitled to base its funds-freezing decision information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community Judicature whose task is to review the lawfulness of that decision.[129]

This approach, which clearly goes beyond the disclosure requirements in *A v United Kingdom*[130]insofar as it requires *evidence* as opposed to mere reasons or summaries was subsequently adopted by the General Court in *Kadi (No. 2)*.[131] The General Court also accepted the dicta of Lord Brown of the UK Supreme Court in *Ahmed (No. 1)* who described the UN-driven asset-freezing regime as rendering those subject to it 'prisoners of the state'.[132] In doing so, the General Court also rejected the Commission's argument that factual review of any sort would undermine the international nature of the sanctions regime. The Commission argued this was so because it was often individual *states* that communicated with the 1267 Committee, and as such, the Commission did not have all of the evidence upon which Kadi's listing was based. The Council, the Commission and the intervening states also sought to argue that if the Community judicature were to institute a procedure of evidential review it would lead to the undesirable situation where member states of both the European Union and the United Nations were subject to competing obligations: a situation which would damage the operation of the United Nations.[133] This stands out as a significant attempt by courts to impose legal requirements upon a system of sanctions designed to be incompatible with judicial oversight.

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[129] *PMOI II*, n 128, [73]-[75].

[130] *A and Others v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29.

[131] *Kadi (No. 2)*, n 40.

[132] *Ahmed* (No. 1), n 21 [60] and *Kadi (No. 2)*, n 40 [192].

[133] *Kadi (No. 2)*, n 40, [109]-[110].

The General Court also rejected the core distinction drawn by the Commission *et al* in between the sanctions regimes created by UNSC Resolution 1267 and UNSCR 1373, concluding that both required equal procedural protection. The General Court concluded that the Commission's response to the judgement in *Kadi (No. 1)* (i.e. the act of simply reissuing Kadi with a statement of the Sanctions Committee's published reasons for his listing) had disregarded the marked procedural differences between the two Community regimes used for the freezing of funds.[134]

The General Court acknowledged that the UNSCR 1267 Community fund-freezing regime involved a two-tier procedure, first at United Nations level, then at Community level. However, they concluded that the Community level regime was characterised by an absence of any safeguards of the rights of the defence, which may be the subject of effective judicial review, as it merely followed the directions of the Sanctions Committee. In light of this, Community institutions are required to ensure that such safeguards amounting to effective judicial review are put in place and implemented at Community level.[135] The General Court concluded that any judicial review of the EU UNSCR 1267 sanctions regime must be equally intense as that undertaken with respect to the UNSC Resolution 1373 regime. In effect, this meant 'full review' as defined by the General Court in the PMOI cases. Such 'full review' also included the rule that a decision to freeze assets by the Community could not be based on closed evidence from a national government.[136]

The Grand Chamber decision in *Kadi (No. 2)*[137] refined the General Court's position on what constituted 'full review' and appropriate disclosure. The Grand Chamber clarified that the principle of effective judicial protection meant that:

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[134] ibid, [185].

[135] ibid [187].

[136] *PMOI II*, n 128.

[137] *Commission v Kadi (No. 2)* [2013] ECR 00000 Grand Chamber.

> judicial review cannot be restricted to an assessment of the abstract cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.[138]

However, it is not immediately clear whether or not evidence is required, or if detailed allegations would be sufficient. In Mr Kadi's case specifically, the court ruled that the last of the four reasons presented in the UN Sanctions Committee summary of reasons for listing (relating to Mr Kadi's role as a shareholder in the now closed Bosnian bank Depositna Banka) was 'insufficiently detailed', but the 'same cannot be said of the other reasons stated in the summary provided by the Sanctions Committee.'[139]

In light of this decision it is now the duty of the relevant EU institution to carry out a careful and impartial examination of the information in its possession in order to determine whether the individual or entity should continue to be annexed to the relevant EU Regulation. In doing so it is for the EU authority to assess whether or not it is required to contact the UN Sanctions Committee for further disclosure.[140] This is a pragmatic method of balancing fundamental rights in EU law with the need to preserve external and foreign relations of the relevant institutions, but it also places very considerable emphasis on finding a court procedure to navigate this complex situation.

The Grand Chamber also took the view 'that the *information or evidence* produced should support the reasons relied on against the person concerned.'[141] It was also recognised that there

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[138] ibid [119].

[139] *Kadi (No. 2)*, Grand Chamber [141]-[142].

[140] ibid [115].

[141] ibid [122], emphasis added.

would inevitably also be situations where evidence or information (notice the court did not settle on a particular term) could not be disclosed, either because it was too sensitive, or the competent authority was not in possession of it. In that situation 'it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them.'[142] However, if this creates a situation whereby:

> material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.[143]

In respect of disclosure, the Grand Chamber made clear that 'overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned.'[144] In a situation of this type it was suggested that striking a balance between fairness and the protection of the interests described above made it 'legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question.'[145] But this greater emphasis upon disclosure by the EU judicature must be tempered by the fact that judicial review in the EU draws upon a fundamentally different legal tradition. The EU judicial review procedure draws inspiration from the Continental legal tradition (and the French legal system in particular). Therefore, EU courts subject reasons justifying decisions to searching review of a type unfamiliar to the English adversarial system.[146] Fritzsche

[142] ibid [123].

[143] *Kadi (No. 2)*, n 137, [123].

[144] ibid [125].

[145] ibid [129].

[146] Patrick Birkinshaw, *European Public Law: The Achievement and the Challenge (2nd edn)* (Walters Kluwer 2014), 19, 121-123.

notes that: 'Once a ground of review has been named, the courts possess powerful inquisitorial instruments to determine the factual basis on which to decide the matter. *They do not rely solely on the evidence voluntarily provided by the parties.*'[147]

The first ruling to apply these refined principles related to the EU regime combating Iranian Nuclear Proliferation (i.e. the equivalent of the CTA 2008).[148] The applicant, Fulmen, was an Iranian company which was believed to have installed equipment on a site used for Uranium enrichment. It had been given the following rather sparse statement of reasons by the EU authorities to account for the freezing of its funds: 'Fulmen was involved in the installation of electrical equipment on the Qom/Fordoo site before its existence had been revealed.'[149] The EU Council claimed that the evidence used for Fulmen's listing came from a confidential source and could not be disclosed. The Fifth Chamber set its face against such limited disclosure:

> It is…necessary that the information or evidence produced should support the reasons relied on against the person concerned…If the competent European Union authority finds itself unable to comply with the request by the Courts of the European Union, *it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them*, [O]verriding considerations pertaining to the security of the European Union or of its Member States or to the conduct of their international relations *may preclude the disclosure of some information or some evidence to the person concerned.* [In] order to

[147] Alexander Fritzsche, 'Discretion, Scope of Judicial Review, and Institutional Balance in European Law' (2010) 47(2) Common Market Law Review 361, 366, emphasis added.

[148] Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39, and corrigendum OJ 2010 L 197/19).

[149] *Council v Fulmen*, n 28 [16].

> strike such a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question.[150]

II. PROPOSALS FOR CLOSED EVIDENCE IN THE GENERAL COURT OF THE EUROPEAN UNION

Up until recently closed proceedings have not encroached upon the EU Courts. But the time to think seriously about techniques for accommodating confidential information in the EU judicature has arrived. Of all the subject-matter areas analysed in this thesis, terrorist asset-freezing in European Union law is the only area which does not, as yet, have some system of non-disclosure in judicial review hearings. The CMP has no basis in EU law, but has garnered support from a prominent Advocate General[151] and from the academy.[152] Additionally, the Grand Chamber has recently affirmed that '[it] is difficult to conceive of a more important and more complex policy area which involves assessments concerning the protection of international security'.[153] In light of this complexity, and the fact that *Kadi (No. 2)* represented the culmination of a series of disputes concerning the balance between effective judicial protection and the rights of the defence on the one hand, and the maintenance of the confidentiality of information sensitive to international security on the other, the Court made clear that:

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[150] *Council v Fulmen*, n 28, [67]-[74], emphasis added.

[151] Case C-27/09 P *France v People's Mojahedin Organization of Iran* [2011] ECR 00000, Opinion of Advocate General Sharpston. [244]: Sharpston noted that the ECtHR '…did not find that the system [of Special Advocates] in question was, of itself, non-compliant.'

[152] Christina Eckes, n 47, 170-220.

[153] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and United Kingdom v Yassin Abdullah Kadi (No. 2)* [2013] ECR 00000, Opinion of Advocate General Bot (19 March 2013) [66]-[78].

> In such circumstances, it is none the less the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process. [In] order to strike such a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content…

The foregoing section demonstrates that the EU judicature has dealt more boldly with perceived demands of disclosure to achieve fairness than its British counterparts, and it now stands at a cross-roads: in order for its rulings to achieve continuing support it may need to adopt some form of confidential or closed procedure. In her Opinion in *France v PMOI*[154] Advocate General Sharpston mentioned that the European Court of Human Rights (ECtHR) in *A v United Kingdom*[155] had considered the legality of the United Kingdom's use of Special Advocates and the Closed Material Procedure (CMP) in relation to administrative counterterrorism detention. Sharpston noted that the ECtHR had ruled that there was a 'perceived need to protect the population of the United Kingdom from a terrorist attack meant that there was a "strong public interest" in maintaining the secrecy of sources of information concerning Al-Qaida and its associates. It did

[154] *France v People's Mojahedin Organization of Iran*, n 151, Opinion of Advocate General Sharpston.

[155] *A and Others v United Kingdom*, n 130.

not find that the system [of Special Advocates] in question was, of itself, non-compliant.'[156] Eckes also suggests that the British system could be a source of inspiration.[157] In particular, the 'difficulties arising from a closed material procedure would have to be studied in detail and rules to anticipate any illegitimate restrictions would have to be put in place.'[158]

Such views appear to have gained political momentum, as on 23 April 2015 new Rules for the General Court of the European Union were approved. Chapter 7 of Title III of these Rules provides for the 'Treatment of Information or Material Pertaining to the Security of the Union or of its Member States or to the Conduct of their International Relations'. Article 105 is a new addition to the rules of procedure. It sets out a new procedural regime available 'by way of derogation' from Article 103 which ordinarily governs the treatment of confidential information before the General Court. Article 103 governs confidentiality in ordinary circumstances and provides *inter alia* for the Court to 'weigh that confidentiality against the requirements linked to the right to effective judicial protection, particularly observance of the adversarial principle'[159] and to either order disclosure, or to design an ad hoc procedure to protect confidentiality 'including ordering the production of a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof'.[160] The Article 105 regime also prescribes a specific course of action for material relating to security and/or international relations.

The key changes proposed in Article 105 are that claims to confidentiality by the 'main party' (i.e. a Member State or EU institution) can entail a departure from the adversarial principle guaranteed in Article 64. Any request for such a departure must be justified on the grounds that

[156] Case C-27/09 P *France v People's Mojahedin Organization of Iran*, n 151, Opinion of Advocate General Sharpston. [244].

[157] Christina Eckes, n 47, 170-220.

[158] ibid, 190.

[159] Council of the European Union, 'Rules of Procedure of the General Court', n 23, Article 103(2) 'Treatment of Confidential Information and Material'.

[160] ibid, Article 103(3) 'Treatment of Confidential Information and Material'.

they are 'strictly required by the exigencies of the situation.'[161] If the request for confidentiality meets this threshold the next stage is requires the General Court to refrain from disclosing the information to other parties in the litigation, and to conduct a balancing exercise by 'weigh[ing] the requirements linked to the right to effective judicial protection, particularly the observance of the adversarial principle, against the requirements flowing from the security of the Union or of its Member States or the conduct of their international relations.'[162] Thereafter, the General Court must invite the party with the closed material to:

> produce, for subsequent communication to the other main party, a non-confidential version or a non-confidential summary of the information or material containing the essential content thereof, and enabling the other main party, *to the greatest extent possible*, to make its views known.[163]

The commentary explains that 'the interference with the adversarial nature of the procedure must remain proportionate'.[164] It goes on to state with reference to the ECtHR decision in *A v United Kingdom*[165] that 'the European Court of Human Rights has held that there may be restrictions of the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person'.[166] Article

[161] ibid, Article 105 (1).

[162] ibid, Article 105(5).

[163] ibid, Article 105(6), emphasis added.

[164] Council of the European Union, 'Rules of Procedure of the General Court', n 159, Commentary, 104.

[165] *A and Others v United Kingdom*, n 130.

[166] Council of the European Union, 'Rules of Procedure of the General Court', n 159, Commentary, 104.

105(9) vests discretion in the General Court to design mechanism to implement this confidentiality system.[167] Eckes, observes that: 'The Court of Justice has an inquisitorial role also in ordinary proceedings. This should be emphasized in closed evidence procedures. Beyond this it would be desirable that judges are given training on how to handle sensitive information, evaluate disclosure decisions, and give closed judgment'.[168] The Rules do not mandate the adoption of a Special Advocate procedure, although it is likely to be considered by the General Court. Another possible alternative is the German approach to dealing with security sensitive information. In the German procedure for reviewing national security information the court examines the material in camera, without the presence of counsel or the parties. The German courts regard it as their responsibility 'to arrive at the truth, not to adjudicate between competing versions of the truth; and the participation of lawyers in a hearing of the case is therefore not regarded as absolutely essential to the court's performance of its function.'[169]It is possible that this procedure (or a variant thereof) may be adopted in the EU, given the relative power of Germany in the EU, and the shared civil tradition of its legal system.

Although the obligation imposed is to achieve disclosure to facilitate the other party's case to the 'greatest extent possible' a test which arguably goes further than the Strasbourg formulation of 'sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'[170] or the House of Lords' interpretation of a 'core irreducible minimum'[171] the formulation is complicated by both the discretionary application of the Article 105 procedure, and the inclusion of material pertaining to international relations within the

[167] ibid, Article 105(9): The General Court shall determine, by decision, the security rules for protecting the information or material produced in accordance with paragraph 1 or paragraph 2, as the case may be. That decision shall be published in the *Official Journal of the European Union*.'

[168] Christina Eckes, n 47, 21.

[169] Lord Robert Reed, 'The Common Law and the ECHR' (Inner Temple Lecture London 2013), 2.

[170] *A and Others v United Kingdom*, n 130, [220].

[171] *Home Secretary v AF (No. 3)*, n 74, Lord Hope [81].

category of sensitive information. Whilst the Civil Procedure Rules governing CMPs also place a non-disclosure obligation on courts regarding information pertaining to 'the international relations of the United Kingdom'[172] careful steps were taken to exclude this category of information from the province of the CMP in respect of the Justice and Security Act 2013 discussed in Chapter 8. At the Lords' Committee stage Lord Wallace sought to assure the House that:

> The Bill deliberately omits other aspects of the public interest from CMP clauses, such as international relations... I hope that that gives the assurance that it is certainly the intention of the Government that there should not be definition creep, as it were… The intention is that the concept should be a narrow one that will come into play in a very small number of cases. However…Factors that are damaging to national security can change in accordance with assessments about the threat to the country.[173]

But information pertaining to international relations is potentially a much broader church, and in the present circumstances (which involve international organisations and multiple Member States) the boundaries between the categories of security and international relations may be especially fluid. In this regard, the presence of a necessity test prior to any closed process is welcome (and was something clearly lacking in the Supreme Court's approach in *Bank Mellat (No. 1)*). However, the inclusion of national security *and* international relations as justifications for triggering the discretionary procedure under Article 105 could have the effect of broadening and deepening

[172] Council of the European Union, 'Rules of Procedure of the General Court', n 159, Rule 4 (1): 'the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.' A similar formulation of this rule appears at CPR 76.1(4) (control orders), 79.2(2) (asset-freezing), 80.1(4) (TPIMs).

[173] HL Deb 17 July 2012 vol 739, cols 130-132, Lord Wallace of Tankerness (L.Dem).

secrecy to the extent that the necessity test is significantly weakened. Moreover, these rules only apply to the General Court, not the Court of Justice. So, there is still room for fully open proceedings in a court of final appeal.

CONCLUSION

This chapter assessed the extent to which courts have been able to impose legal constraints upon pre-emptive risk-based sanctions created with diplomatic relations and secret intelligence as opposed to procedural fairness in mind. There is no doubt that the initial intelligence-led culture of creating a regime based upon 'evidence that might not stand up in court' has been largely thwarted (at least in principle) by courts seeking to impose standards of fairness from a variety of sources (i.e. the ECtHR, EU law, and even the common law). However, tensions are evident in the differing standards of protection available in relation to both the different regimes. Currently, the most intense review of financial sanctions has been conducted in the context not of the individual, but of financial institutions. On the other hand, it has been shown that individuals cannot use domestic courts to compel Ministers to act on their behalf on the international stage. The international dimension of the 1267 Regime in particular appears to have made infusing what are essentially closed *international* executive decisions with some form of judicial oversight particularly difficult. The diplomatic and international influence upon the regimes also presents difficulty (save in some ex post facto cases) for any form of confluence between pre-emptive sanctions and criminal prosecution.

These factors combined with what appears to be the discretionary spread of closed procedures to appellate courts are a cause for concern. The absence of a necessity test being applied before the UK Supreme Court, and the broad category of interests (international relations and national security) which might be used to trigger future closed proceedings in the EU General Court could ultimately lead to broader categories of non-disclosure than other similar areas such

as control orders and TPIMs. Whilst the safety of the people may not quite be the supreme law in this context, claims to confidentiality of intelligence material and sources may continue to cast a long shadow over procedural fairness.

CHAPTER EIGHT:

THE JUSTICE AND SECURITY ACT 2013

INTRODUCTION

The Justice and Security Act 2013 (JSA) represents the most contentious extension of the scope of the Closed Material Procedure into erstwhile uncharted territory. The JSA received Royal Assent on 25 April 2013 and the rules relating to the CMP came into force on 27 June 2013.[1] The Bill which preceded it was laid before the House of Lords on 28 May 2012 following the publication of a controversial Green Paper in October 2011.[2] The JSA has two substantive parts; the first relates to enhanced oversight of the conduct of intelligence and security activities and seeks to strengthen the functions of the Intelligence and Security Committee (ISC), a committee which exists to make the intelligence agencies (MI5, MI6, and GCHQ) accountable to parliament.[3] The second part regulates 'disclosure of sensitive material' in court proceedings and makes the CMP available in 'relevant civil proceedings'[4] which are any civil proceedings in which sensitive material is required to be disclosed.[5] The JSA applies to the whole spectrum of civil law (including for

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[1] The Civil Procedure (Amendment No. 5) Rules 2013, SI No. 1571/2013.

[2] HM Government, *Justice and Security: Green Paper* (Cm 8194, 2011).

[3] On the ISC, see: Peter Gill, 'Evaluating intelligence oversight committees: The UK Intelligence and Security Committee and the "war on terror"' (2007) 22(1) Intelligence and National Security 14-37, Anthony Glees, Philip H.J. Davies, and John N.L. Morrison (eds) , *The Open Side of Secrecy: Britain's Intelligence and Security Committee*, (Social Affairs Unit 2006).

The most recent report of the Intelligence and Security Committee devoted considerable attention to the modification of the Committee's role ([93]-[97] and [126]-[135]): 'The Justice and Security Act 2013 strengthens the powers and independence of the ISC. The ISC becomes a statutory committee of Parliament, with greater authority to consider intelligence and security activities in the Agencies and across wider Government.' Intelligence and Security Committee of Parliament, *Annual Report* (2012-2013, HC 547).

[4] 'Relevant civil proceedings' in section 6 means 'proceedings (other than those in a criminal cause or matter) before the High Court, the Court of Session, the Court of Appeal or the Supreme Court.' The Stationary Office, 'Explanatory Notes Justice and Security Act, Chapter 18' (April 2013), [5].

[5] Justice and Security Act 2013, ss 6(4)-(5).

example, judicial review, contracts, the Investigatory Powers Tribunal[6], and so on) and it extends the province of CMPs to damages actions against the executive.

This chapter argues that the Act represents a misguided attempt at strengthening the political controls on secrecy whilst simultaneously weakening legal controls inherent in 'ordinary civil proceedings'. This is not to suggest that the JSA may not serve a necessary function in respect of some areas of civil law (such as judicial review of denaturalisation proceedings, or the application to future statutory regimes as yet uncrystallised). Instead, the overriding claim is merely that any perceived strengthening of the political accountability via the ISC is insufficient to mitigate the the dilution of legal accountability caused by permitting the CMP in tort actions. This is because actions of the type raised by Binyam Mohamed, Bisher Al-Rawi, and Mohamed Ahmed Mohamed *et al* alleging extraordinary rendition and/or complicity in torture do not concern review of the management of 'first order risks', but instead are initiatives by alleged victims of executive wrong-doing aimed at securing accountability. In short: 'A strong link exists…between the due process owed to individuals and the wider accountability of public bodies and officials' and the JSA represents a threat to this link.[7]

This Chapter unpacks in detail the rules of Part I and Part II of the JSA and explains how it interacts with existing law on CMPs and the disclosure of sensitive information, as well as parliamentary scrutiny of intelligence issues, generally. It also relates to the broader conceptual framework of this thesis. The analysis seeks to discover the *essential wrong* in the JSA (i.e. what is particularly counterintuitive about extending CMPs from the realm of judicial review to include torts and any other aspect of civil law); and, in view of this it argues that extending CMPs into the whole realm of 'ordinary civil procedure' is wrong because it blurs the important lines between

[6] *Abdel Hakim Belhadj and Others v Security Service and Others* [2014] Ref: IPT/13/132-9H (07 February 2014) [17]-[32], Investigatory Powers Tribunal Rules 2000, SI 2000/2665, Rule 9(4).

[7] Carol Harlow, 'Composite Decision-Making and Accountability Networks: Some Deductions from a Saga' (2013) Yearbook of European Law 1, 9.

risk-management (the appropriate province of the CMP) and legal accountability (the province of damages actions which form part of 'ordinary civil proceedings').[8]

THE MOTIVATION FOR THE JUSTICE AND SECURITY ACT

The JSA makes a CMP available in any 'relevant civil proceeding' which engages information sensitive to national security. The other major innovations the Act makes are reform of the Intelligence and Security Committee in Part I with a view to strengthening its powers and utility as an accountability mechanism for the intelligence services. Section 15 of the Justice and Security Act 2013 allows the Secretary of State to sign a certificate transferring judicial review of proceedings involving deprivation of citizenship from the High Court to the SIAC.[9] Finally, section 16 provides for the admissibility of intercept evidence in the context of employment tribunal CMPs. This type of evidence was previously excluded by the Regulation of Investigatory Powers Act 2000.

The government's motivation for the innovations in the Justice and Security Green Paper are complex and varied. The four justifications offered were: (1) the need to have a mechanism to effectively accommodate the increased volume of civil litigation involving the security and intelligence services which had occurred post-9/11,[10] (2) the lack of an effective legal framework 'in which the courts can securely consider sensitive material',[11] (3) the fact that the result of the

[8] For example a report of the Bingham Centre for the Rule of Law stated that 'Our core concern are the proposals in clauses 6 and 7 that closed material procedure (CMP) be made available in *ordinary civil litigation*.' (Emphasis added). Tom Hickman and Adam Tomkins, 'Bingham Centre for the Rule of Law: Justice and Security Bill Briefing for the House of Commons' <www.biicl.org/files/6239_binghamcentre_justice_&_security_hc_briefing_17_dec_12.pdf> Accessed 01 July 2014, 1.

[9] *L1 v Home Secretary* [2013] EWCA Civ 906 [25].

[10] HM Government, n 2, [1.17].

[11] ibid, [1.18].

Binyam Mohamed[12] litigation meant that '[t]he Government has strained key international relationships and risked compromise of vital [intelligence] sources and techniques in no fewer than seven court cases',[13] and (4) that the absence of CMPs 'may make the defence of the decision extremely difficult, particularly in cases where the majority of the case consists of sensitive material.'[14] The fourth reason was to 'prevent the risk of unjust damages claims against the State.'[15]

In respect of the first justification it is undoubtedly correct that the volume of litigation involving material sensitive to national security post-9/11 has increased exponentially. It will be recalled from the exploration of the historical context in Chapter 1 that we have moved from a situation whereby national security was regarded as 'par excellence a non-justiciable question'[16] to one where the volume of litigation is high and the judicial engagement with sensitive material is often willing. In this respect, the first and second justifications for the JSA are closely related. It might be objected that as the CMP applies in some eight separate contexts, including the determination of certain Public Interest Immunity (PII) applications,[17] the need for an additional general power seems spurious. However, the situation is not so cut and dried. In the Commons Second Reading debate on the Justice and Security Bill Kenneth Clarke MP pointed out that during judicial review of detentions in Afghanistan by the British armed forces[18] delays caused by the need to consider alternatives to the CMP meant that 'more individuals were exposed abroad to a policy that the court ultimately concluded was unlawful.'[19]In those particular cases, all parties consented

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[12] *Binyam Mohamed v Foreign Secretary* [2010] EWCA Civ 65.

[13] HM Government, n 2, [1.18].

[14] ibid, [1.19].

[15] *Mohamed Ahmed Mohamed v Foreign Secretary and Others* [2013] EWHC 3402 (QB) [23].

[16] *GCHQ* [1985] A.C. 374 HL, 412 (Lord Diplock).

[17] House of Commons Constitutional Affairs Committee, *'The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, Vol II Evidence (7th Report), (2004-2005, HC 323-II), [50]-[51].

[18] R *(Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

[19] HC Deb 18 December 2012, vol 555, col 724, Kenneth Clarke MP (Con, Rushcliffe).

to a CMP.[20] Given the unpredictable nature of the demand for closed proceedings (military policy overseas is constantly evolving) having a readily available 'catch-all' statutory provision such as section 6 of the JSA is practicable. This would prevent Parliament from the onerous (not to mention absurd) task of considering the possibility that information sensitive to national security might feature in judicial review in every new piece of legislation.

The second justification, namely the absence of an 'effective legal framework' for dealing with civil disputes involving the intelligence agencies relates directly to the government's claims that the existing framework of Public Interest Immunity (PII) was an unsuitable mechanism for dealing with disputes where the majority of information involved was sensitive to national security. It will be recalled that when a PII certificate is upheld by the Court, the information is completely excluded from the ensuing proceedings.

The argument that PII was unsuitable the context a claim for damages, was raised by the government in *Al Rawi* (a co-litigant of Binyam Mohamed) on the basis that the volume of relevant documents rendered the existing PII process impractical and unworkable.[21] The claimants in *Al Rawi* objected to the request for a CMP, and the Supreme Court held that it would be in violation of the rule of law to institute a CMP without the express authorisation of primary legislation. The Court acknowledged that:

> The evidence filed on behalf of the appellants suggested that there might be as many as 250,000 potentially relevant documents, and that PII might have to be considered in respect of as many as 140,000 of them. It might take three years to complete the exercise

[20] R *(Maya Evans),* n 18 [8].

[21] *Al Rawi v Security Services* [2011] UKSC 34.

> of deciding in respect of which documents PII could properly be claimed.[22]

However, in his evidence to the JCHR Special Advocate Angus McCullough QC acknowledged that, 'it would have taken a long time to have gone through a PII procedure in *Al Rawi*. I do not think it would have taken any less time to go through a closed material procedure.'[23] Although the time constraints may be somewhat similar, there may be other legitimate justifications for replacing PII. This is especially true when a well-conducted PII process would risk the exclusion of information *central to* either side's case. So, it may be the case that after a PII process, material inculpating or exculpating the executive in a judicial review claim or a damages claim would simply be on balance too sensitive to disclose. This claim is further supported by the ruling in *Tinnelly and Sons v United Kingdom*[24] (discussed in Chapter Two) in which the ECtHR held that the granting of a PII certificate for the majority of relevant information disproportionately interfered with the applicant's right to access to a court under Article 6(1) ECHR.

Whilst the first and second justifications for enacting the JSA are reasonably meritorious, the third and fourth are ultimately more questionable. The third justification found in the Green Paper, related to the alleged damage to international intelligence sharing relationships caused by the *Binyam Mohamed* litigation. A group of former Guantanamo Bay detainees led by Binyam Mohamed and Bisher Al-Rawi, sued the British government in tort for complicity in their alleged torture at the hands of the United States administration. After protracted litigation[25] Binyam Mohamed successfully contested an application for PII relating to seven paragraphs of information

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[22] ibid, Lord Dyson [5].

[23] Joint Committee on Human Rights, *The Justice and Security Green Paper (24th Report)* (2010-2012, HL 180/HC 1432), Angus McCullough QC, Oral Evidence, answer to Q67.

[24] *Tinnelly and Sons v United Kingdom* [1998] ECHR 56.

[25] Adam Tomkins, 'National Security and the Due Process of Law' (2011) Current Legal Problems 1 provides the most clear explanation of this highly curious and protracted litigation.

relating to his treatment in Guantanamo Bay, made by the Foreign Secretary.[26] The basis of the Foreign Secretary's claim, somewhat absurdly, was that despite the paragraphs already having been disclosed in open court in the United States[27] PII was justified on the basis of the protection of the erstwhile (legally) unheard of 'control principle'. The essence of the control principle is that 'confidentiality is vested in the country of the services which provides the information: it *never* vests in the country which receives the information.'[28] The Green Paper stated that:

> Since *Binyam Mohamed*, the Government and its foreign government partners have less confidence than before that the courts will accept the view of Ministers on the harm to national security that would result from disclosure…There is no suggestion that key 'threat to life' information would not be shared, but there is already evidence that the flow of sensitive material has been affected.[29]

Whilst the veracity (or otherwise) of the assertion that there has been reduction in international intelligence cooperation is impossible to verify, it seems illogical that the *Binyam Mohamed* ruling would have a *negative* impact on mutual intelligence cooperation. Despite dismissing the Foreign Secretary's appeal, the Lord Chief Justice stated that 'the control principle must be upheld in its full rigour.'[30] In the same day in an address to Parliament, Foreign Secretary David Milliband MP

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[26] *Binyam Mohamed*, n 12.

[27] *Farhi Saeed Bin Mohamed v Barack Obama* Civil Action No. 05–1347 (GK) (10 June 10 2010), unreported.

[28] *Binyam Mohamed*, n 12 [5].

[29] HM Government, n 2, [1.43], [1.22].

[30] *Binyam Mohamed*, n 12 [12].

(Labour) remarked that the Court of Appeal's judgment had: 'Crucially…upheld the control principle. The judgment describes that principle as integral to intelligence sharing.'[31]

Commentators' opinions differ on the *de facto* status of this principle. Born and Leigh describe the 'third party rule' or the 'originator control' as: 'the most jealously protected national security privilege of all…Historically this practice has been protected in a nearly impenetrable wall of statutory exemptions…Increasingly courts are being faced with claims based upon the threat of loss or withdrawal of intelligence cooperation unless they accede to demands for total secrecy.'[32] In contrast, Tomkins is more sceptical of the principle's status, counterclaiming that: '[u]ntil Binyam Mohamed there was no authority for the proposition that the control principle was recognized (let alone enforceable) at law.'[33] This is at least true of English law. As scholars, as opposed to intelligence insiders, we cannot truly gauge the effects of *Binyam Mohamed* on transatlantic intelligence cooperation. However, there is little doubt that the perceived threat to intelligence sharing relationships caused by the ruling catalysed this new legislation.[34] Despite this some commentators describe intelligence cooperation, particularly with the United States in the wake of 9/11 as both 'bilateral' and 'firmly on the ascendancy' because 'the United Kingdom and the United States were key driving partners behind UNSCR 1373.'[35] In fact Signals Intelligence (SIGINT) is shared freely among the 'Five Eyes Community' which consists of the UK, US, Canadian, Australian, and New Zealand governments' security represenatives. Sir Stephen Lander, the Former Director General of the British Security Service, comments that this sharing 'works

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[31] HC Deb 10 February 2011, vol 523, col 913.

[32] Hans Born and Ian Leigh, *International Intelligence Cooperation and Accountability (Studies in Intelligence),* (Routledge 2012), 5.

[33] Adam Tomkins, n 25, 28.

[34] Ingber refers to such an event as an 'interpretation catalyst': An interpretation catalyst is a " '…triggering [event] that impel[s] the executive - or any institution – to consider, determine, and assert, whether publicly or not, a position on a matter of legal interpretation.' Rebecca Ingber, 'Interpretation Catalysts and Executive Branch Legal Decisionmaking' (2013) 38 The Yale Journal of International Law 359, 367.

[35] Adam D.M. Svendsen, *Intelligence Cooperation in the War on Terror: Anglo-American Security Relations After 9/11* (Routledge, London 2010), 40-41.

well. [T]here are some subjects on which national sensitivities preclude sharing, but the volume of exchange remains high'[36] In any event, we might reasonably consider that litigation of this type posed a real risk of alteration of the *structure* of secrecy, inasmuch as formerly deep secrets may become shallow through litigation. To return to Pozen's rubric: 'Deep secrets can open up black holes into which the…the rule of law disappear[s].'[37]

In respect of the fourth justification, the Government sponsor of the Justice and Security Bill, Lord Wallace of Tankerness (Liberal Democrat), sought to justify the Bill as being the most appropriate way to ensure that civil damages claims against the government containing sensitive information could be heard fairly. According to Lord Wallace these claims:[38]

> [O]ften contain extremely significant allegations about the actions of the Government and the security and intelligence agencies. There is a real public interest in being able to get to the truth of such allegations. Indeed, I think it is arguable to say that the rule of law is supported by courts being able to reach determinations on such matters. Although such settlements are often made without any admission of liability being made, as we all know, mud sticks. Allegations have been made in public that have never been examined or rebutted, and many people choose to believe that they are true. The damage to the reputation of this country can be immense and those unrebutted allegations can be used by

[36] Sir Stephen Lander, 'International Intelligence Cooperation: An Inside Perspective' (2004) 17(3) Cambridge Review of International Affairs 481, 491-492.

[37] David E. Pozen, 'Deep Secrecy' (2010) 62 Stanford Law Review 257, 316.

[38] HL Deb 19 June 2013, vol 746, col 1663.

> individuals seeking to garner support for terrorism in retaliation for perceived wrongdoing by this country.
>
> This is the backdrop against which our plans to allow material to be heard in court via CMPs should be seen.[39]

The above Ministerial statement taken alone carries some force. It would undoubtedly be difficult to hear a claim based entirely on sensitive material in open court, and PII may result in much of the relevant information being excluded from use by either party. However, when taken together with section 17 of the JSA, which provides for a statutory exclusion of the *Norwich Pharmacal*[40] jurisdiction, it may seem that rationale for the JSA is not strictly concerned with facilitating the defence of allegations against the intelligence agencies.

The basis of the *Norwich Pharmacal* jurisdiction stems from a tort action for misuse of intellectual property rights. The House of Lords held that a party (A) could obtain disclosure of information from (B) as the basis for an action against (C) if (B) is somehow 'mixed up' in the wrongdoings which form the basis of (A)'s claim against (C).[41] This exclusion was described as necessary in the Green Paper in order to limit 'potentially harmful impact of such court-ordered disclosure…particularly into foreign legal proceedings over which we have no control'.[42] Prior to the enactment of the JSA, and in the wake of the *Binyam Mohamed* case, several litigants sought unsuccessfully before the Court of Appeal to invoke the *Norwich Pharmacal* jurisdiction against the British government to secure disclosure of information for use in litigation before the Constitutional Court of Uganda.[43] The litigants were facing criminal charges relating to a terrorist

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[39] ibid.

[40] *Norwich Pharmacal Company and Others v Customs and Excise* [1973] UKHL 6.

[41] Tom Hickman and Adam Tomkins, 'National Security Law and the Creep of Secrecy: A Transatlantic Tale' in L. Lazarus *et al.* (Eds.) *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014), 1.

[42] HM Government, n 2 [21].

[43] *R (On the Application of Omar and Others) v Foreign Secretary* [2013] EWCA Civ 118.

incident in Kampala, Uganda in July 2010. They faced the death penalty if convicted and sought information from the Foreign Secretary which they claimed may assist them in the Ugandan proceedings, regarding their alleged torture and mistreatment. They argued that because Binyam Mohamed had successfully obtained *Norwich Pharmacal* relief they should be entitled to similar relief. The Court of Appeal unanimously rejected the application for *Norwich Pharmacal* relief because it was excluded by the statutory provisions in the Crime Cooperation Act 2003 which prohibited disclosure of information sensitive to national security.[44] Moreover, *Binyam Mohamed* was considered to be 'truly exceptional case'[45] and the present case was distinct principally because parallel disclosure had not been sought from the Ugandan authorities.[46]

The Court of Appeal made some interesting reflections regarding the necessity of the proposed exclusion of *Norwich Pharmacal* in the (then) Justice and Security Bill:

> It is predicated on the hypothesis that *Binyam Mohamed* has exposed a governmental vulnerability to *Norwich Pharmacal* which calls for statutory correction. [The] Bill assumes that there is a problem which requires resolution. If the problem does not exist, the Parliamentary assumption that it does is equally erroneous.[47]

Hickman and Tomkins describe the decision in *Omar* as a 'volte-face' by the Court of Appeal which 'fed directly into the provisions of the Justice and Security Act introducing closed material procedure into ordinary civil proceedings.'[48] Even if these conclusions overstate the issue (it may be that *Binyam Mohamed* stands out as an aberration set against an otherwise well-catered statutory

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[44] Crime Cooperation Act 2003, ss 13-19, Schedule 1, para 5.

[45] *R (On the Application of Omar and Others)*, n 43 [31].

[46] ibid [31].

[47] ibid [26].

[48] Tom Hickman and Adam Tomkins, n 41, 32-33.

regime), the explicit statutory exclusion of the *Norwich Pharmacal* jurisdiction, which does not require the court to conduct any form of balancing exercise (information simply 'held by' a relevant agency is deemed to be 'sensitive information' regardless of its actual content) sends a categorical signal that intelligence confidentiality in the broadest sense is capable of superseding the rule of law. In short, section 17 of the Justice and Security Act 2013 'took…powers away from judges and gave them back to the Government.'[49] Although section 18 of the JSA permits judicial review of a Ministerial decision to refuse disclosure of information withheld on *Norwich Pharmacal* grounds, this is of little comfort. If the government had genuine concerns about the accuracy and veracity of accusations against its agencies then it might have been appropriate to permit *Norwich Pharmacal* disclosure following a judicial balancing exercise. This would have allowed the risk to foreign relations and intelligence sharing relationships to be weighed against the value of proceeding with the civil case.

THE OPERATION OF THE CLOSED MATERIAL PROCEDURE

For those staunchly committed to the principles of open justice, equality of arms, and natural justice in respect of ordinary civil proceedings, the Supreme Court ruling in *Al Rawi*, which undoubtedly fuelled the enactment of the JSA, is problematic. The issue in *Al Rawi and Others (Respondents) v The Security Service and Others (Appellants)*[50] was whether the common law right to a fair trial permitted use of a CMP to a civil claim for damages in tort. The Supreme Court answered this question in the negative concluding unanimously that although the Court possessed the inherent power to design and vary its own procedure, instituting a CMP would contradict the fundamental principles of the common law.

[49] ibid, 31.

[50] *Al Rawi,* n 21.

Although the ratio in *Al Rawi* is therefore extremely narrow there were a variety of 'confused and convoluted'[51] judicial stances concerning fairness which undoubtedly impacted on the present structure of Part II of the Act. For example, whilst the majority agreed with Lord Dyson's principled assertion that 'the emasculation of...common law principle must not only be halted but reversed'[52] there was little in the way of commitment to any practical course of action. Lord Clarke, suggested that 'there should be some form of closed procedure, involving special advocates, along the lines suggested by the appellants, but subject to the exigencies of the particular case.'[53] This viewpoint was shared by Lord Mance (with whom Lady Hale agreed). Although Lord Brown agreed with the majority that any solution to the tension between national security and open justice in civil proceedings was for Parliament, he suggested that claims of the type made in *Al Rawi* should be referred to 'the Investigatory Powers Tribunal which does not pretend to be deciding such claims on a remotely conventional basis'. His second suggestion was that they must simply be regarded as untriable and struck out on the basis that: '[They] cannot, in truth, be justly tried at all.'[54] Thereafter, he took issue with the Joint Committee on Human Rights' (JCHR) characterisation of closed material proceedings in the context of control orders as 'Kafkaesque' or similar to the Star Chamber. The JCHR reported that CMPs have 'absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.'[55] Lord Brown dismissed this viewpoint as 'extreme'.[56] Therefore, the variance with which the Supreme Court approached the issue in *Al Rawi* left little guidance for parliamentarians as to the acceptable baseline of fairness in national security cases.

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[51] Adam Tomkins, 'Justice and Security in the United Kingdom' (2013) SSRN (Working Paper Series), 20.

[52] *Al Rawi,* n 21, Lord Dyson [31].

[53] ibid, Lord Clarke [159].

[54] ibid, Lord Brown [86].

[55] Joint Committee on Human Rights, *16th Report: Annual Renewal of Control Orders Legislation (16th Report),* (2009-2010, HL 64/HC 395).

[56] *Al Rawi,* n 21, Lord Brown [83].

Section 6(1) states that a court seized of 'relevant civil proceedings' (a phrase without further definition)[57] may make a declaration that an application for a CMP can be made, subject to two conditions. These conditions are, that (i) one of the parties to the proceedings would be required to disclose 'sensitive material'. The CMP serves to protect 'sensitive material' if disclosure could not otherwise be prevented by one of four possible routes:

(i) the possibility of a claim for public interest immunity in relation to the material,

(ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,

(iii) section 17(1) of the Regulation of Investigatory Powers Act 2000 (exclusion for intercept material),

(iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section.[58]

The second, related, condition is that it is in the 'interests of the fair and effective administration of justice in the proceedings to make a declaration.'[59] There is no hierarchy of considerations explicit in the statutory test for imposing a CMP. The initial Bill allowed only the government to initiate these proceedings, but after parliamentary scrutiny and subsequent amendment, the JSA

[57] Initially, it was proposed that 'relevant civil proceedings' would include inquests, but this proposal was abandoned. See HM Government, 'Justice and Security Green Paper' Cm 8194, October 2011 [14]. See also *R (On the Application of Home Secretary) v The Assistant Deputy Coroner for West London* [2010] EWHC 3098 (Admin) [10]: ' "the principal hallmark of an … inquiry is that it is 'effective'"; per Lord Rodger in *R(L) v Secretary of State for Justice* [2009] 1 AC 588, [2008] UKHL 68. The criteria set out in these passages - transparency, participation, effectiveness – may not all pull in the same direction in a particular case, as the present application demonstrates. At least since *Scott v Scott* [1913] 1 AC 417, open justice has been established as a fundamental principle applicable to judicial proceedings.'

[58] Justice and Security Act 2013, s 6(4)(b).

[59] ibid, s 6(5).

allows any party to the litigation to request a CMP. The need for such 'reversed closed evidence' in certain (limited) circumstances had already been approved by the Supreme Court some two years prior.[60] Pursuant to section 7(2) the court must keep any CMP declaration under review and may revoke the declaration at any time if 'it considers that [it] is no longer in the interests of the fair and effective administration of justice.' Hickman and Tomkins are of the view that the operation of section 6 'precludes disclosure of information even where the harm to national security…is clearly outweighed by the interests of justice: perhaps, for example, where it is necessary to make a finding of gross wrongdoing.'[61] As of 24 June 2014 there have been three applications where a CMP was applied for under section 6 and granted[62], and two further cases with outstanding applications. McNamara and Lock have reached the view that 'we are a long way from the archetypal case that was the impetus for the legislation, which was an action against the government by returning Guantanamo detainees.'[63] The cases to date have concerned alleged security services misconduct, alleged failure to protect an undercover agent in Northern Ireland, and diplomatic communications between the UN Security Council and the Foreign Office in the context of terrorist asset-freezing.

Several interesting aspects of the section 6 procedure have come to light in the course of the three applications which are not immediately apparent on the face of the statute. In *Sarkani*[64] – a combined action for judicial review and damages relating to alleged Foreign Office conduct in respect of nominating persons to be included on the UNSC 1267 (1997) terrorist list (see Chapter 7) – the court made several observations relating to requests for a CMP, and the suitability of PII

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[60] *W (Algeria) and Others v Home Secretary* [2012] UKSC 8, [2012] 2 AC 115.

[61] Tom Hickman and Adam Tomkins, n 41, 33.

[62] *Mohamed Ahmed Mohamed v Foreign Secretary and Others* [2013] EWHC 3402 (QB*), R (Sarkani and Others) v Foreign Secretary* [2014] EWHC 2359 (Admin), and *McGartland and Others v Attorney General* [2014] EWHC 2248 (QB).

[63] Lawrence McNamara and Daniella Lock, *Closed Material Procedures under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State (Bingham Centre Working Paper 2014/03)* (Bingham Centre for the Rule of Law 2014), 8.

[64] *R (Sarkani and Others)*, n 62.

in relation to judicial review in general. In respect of the application for a CMP under section 6, the court confirmed that section 6(6) of the JSA 2013 meant that the executive did *not* need to declare the full extent of closed material to the judge before an application would be considered or granted. This finding was made despite concerns raised in the instant case by the Special Advocates about the closed material (which was allegedly used to justify recommending the claimant to be included on the UNSC list):

> On examination of the materials in closed, however, it is plain that they afford no basis for such a decision by the [Foreign Secretary] at all…The [Special Advocates] maintain that the closed documents demonstrate that the [Foreign Secretary] proposed the claimants on [a] basis …….which was never properly analysed, assessed, or considered against the wider canvas of 'open' evidence which might have been obtained following reasonable or proportionate enquiries had they been conducted.'[65]

Despite this forceful criticism, the request for a CMP was granted. It should be borne in mind that the procedure in section 6(6) allows the introduction of more closed evidence which has not been judicially vetted or challenged by a Special Advocate appointed to oppose the motion for a hearing.

The second aspect relating to the nature of information required for a successful section 6 declaration relates to the intelligence services' policy of Neither Confirm Nor Deny (NCND). It will be recalled that this policy was subject to strong judicial criticism in the context of TPIMs (see Chapter 6). However, it has received more favourable treatment in respect of section 6 applications. In *McGartland*, the claimant alleged he was a former informant against the IRA, and sought damages from the British state on the grounds that he had been insufficiently protected

[65] ibid [24].

from harm.[66] Before Mitting J, the Secretary of State sought a CMP under section 6, and also wished to maintain an NCND policy regarding the issue of the claimant's allegations. The claimant asked for the issue to be determined on open evidence before the application for a CMP was considered. Mitting J refused this request on the basis that (1) there was no statutory mandate to take such a step and (2) it could not be determined fairly without taking the closed material into account.[67] Therefore, the practical application of section 6 has raised a curious imbalance: the government may be granted a CMP on the basis of incomplete information on the wording of the statute, but the claimant cannot require the government to disclose a defence – even in outline – before the determination of the application for a CMP. As such, the claimant and his or her counsel may be left in the position whereby a CMP is being applied for, but even the vaguest reasons as to why this is necessary are not clear.

It will be recalled from Chapter 2 that over and above the Civil Procedure Rules, and various landmark cases relating to fairness in specific contexts, Lord Neuberger attempted to provide seven principles of guidance on the future use of CMPs. The guidance has been considered in only one of the section 6 applications made to date, and it was deemed inapplicable. The case in question was *Mohamed Ahmed Mohamed*[68] in which claimants were suing the Security Service, the Secret Intelligence Service, the Foreign and Commonwealth Office, the Home Office, and the Ministry of Defence in tort at common law, and under the Human Rights Act 1998 for alleged complicity in their detention, ill-treatment, and illegal deportation from Somaliland. One claimant CF, has also been the subject of control order and TPIM proceedings (discussed in Chapter 6).

What is particularly objectionable about the statutory construction of section 6 is that it circumvents any judicial discretion to conduct a balancing exercise between the need to satisfy the

[66] *McGartland and Others v Attorney General* [2014] EWHC 2248 (QB).

[67] ibid, [4].

[68] *Mohamed Ahmed Mohamed v Foreign Secretary and Others* [2013] EWHC 3402 (QB) [63].

four-part statutory test, above, and whether the conduct of a CMP is in the 'interests of the fair and effective administration of justice.' Such a balancing exercise is characteristic of the process of PII, which requires a judicial assessment of 'two types of damage to the public interest: the damage entailed by disclosing sensitive evidence and the damage to the administration of justice entailed by determining the proceedings in the absence of relevant evidence.'[69] Although the claimants had begun their litigation with a request for PII, this was held not to affect the statutory construction of section 6. Instead, 'the interests of the fair and effective administration of justice…must turn on the specific circumstances of the case in hand, and cannot properly turn on objections which would arise in every case'.[70] In *Mohamed Ahmed Mohamed* two factors seemed to have driven the granting of permission to apply for a closed material procedure; first, much of the relevant information had already been part of 'closed' material in respect of control order and TPIM hearings, and secondly, without recourse to a CMP it was 'a case which would in other circumstances be likely to be untriable, in the *Carnduff* sense. In the absence of disclosure, one side would win and the other lose by default.'[71]

So, any critique of the application of the CMP in this particular case is obviously complicated by the fact that '[t]he material advanced here was withheld in the control order proceedings pursuant to the Prevention of Terrorism Act 2005.'[72] It seems prima facie illogical to argue that a CMP is proper in one context (the control order) but improper in another (the damages action governed by the JSA). There may be sensitive information which is central to both proceedings (the necessity of the control order and the veracity of the claim for damages). In such a situation the consequences of legislative risk-management and ex post facto accountability via tort do not necessarily present as a dichotomy. However, the extent to which there is overlapping

[69] Martin Chamberlain, 'Legislative Comment: The Justice and Security Bill' (2012) 31(4) *Civil Justice Quarterly* 424, 425.

[70] *Mohamed Ahmed Mohamed*, n 15 [36].

[71] ibid [43].

[72] ibid [37].

material requires careful judicial consideration, particularly when the aims of the court procedures are so divergent: checking that the executive has rationally managed risk in the case of the control order versus testing allegations of alleged wrongdoing (in the action for damages). Initially a PII application was made in respect of the material in the context of the damages action, but the enactment of the JSA meant that this application was 'in effect superseded by the application for a CMP.'[73] There may be certain cases in which the principle of accountability might have to yield to the need to protect sensitive information via a CMP. *Mohamed Ahmed Mohamed* may be such a case. However, such realities and practicalities do not derail the criticisms related to the mechanics of section 6. The absence of requirement of balancing the sensitivity of the information against the 'interests of the fair and effective administration of justice' still damage public confidence in any declaration in favour of a CMP. It may well be that the status of the overlapping sensitive information changes when balanced against the need to do justice in a damages claim, as opposed to the need to explain the national security case for imposing a control order or TPIM. Or it may not. At present, section 6 is structured in favour of secrecy.

Although the sensitivity of information in the context of a civil claim for damages may be forceful enough to outweigh the pursuit of accountability, it is unclear that *Carnduff v Rock*[74] stands for any particular principle. Tomkins and Hickman note that '*Carnduff v Rock* appears to have passed under the radar of legal writers and practitioners; until *Al-Rawi*, it had been cited only in a tiny number of cases, all of them concerned with the police.'[75] Carnduff was a police informer who brought contractual proceedings against Police Inspector Rock seeking payment for information supplied to the West Midlands Police, in circumstances where a fixed price for the information had not been agreed. The claim was struck out on the grounds that progressing with the claim

[73] ibid [37].

[74] *Carnduff v Rock* [2001] 1 WLR 1786.

[75] Tom Hickman and Adam Tomkins, 'State Secrets, Civil Proceedings and the Rule of Law' Rule of Law Meeting, All Souls College, Oxford (23-24 September 2011), 19.

would require the police to disclose highly sensitive information for which they may not wish to (or be able to) claim PII. Whilst the statutory wording of section 6 does not require a prior consideration of PII before an application for a CMP, *Carnduff* may be of significance in future applications where important evidence needs to be led in respect of some other sensitive aspect of governance such as diplomacy or international relations. Moreover, the absence of room for judicial balancing in the section 6 decision may reflect, to some extent, the apparent lower status of procedural rights in the realm of civil law when compared with criminal law. What *Mohamed Ahmed Mohamed* starkly illustrates is the extent to which the present section 6 system struggles with the gradation of appropriate secrecy (despite the several stage refinement of the definition of 'sensitive material' to mean only 'material damaging to national security').[76] The somewhat cryptic statement by Irwin J to the effect that '[f]or a reason which I can only explain in the closed judgment, the very fact of a confidentiality ring might cause damage to international relations'[77] brings to mind the following somewhat glib (but perhaps justified) characterisation of executive claims to confidentiality:

> As one lawyer noted "sometimes it seems to us that national security is such an elastic concept that if someone were to sneeze in the Horn of Africa, the government would argue that it couldn't be disclosed on grounds of national security".[78]

[76] Justice and Security Act 2013, s 6(11)(1): 'The proposals would have applied to the disclosure of any "sensitive material" the disclosure of which may harm "the public interest", both of which terms were defined very broadly in the Green Paper' Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill (4th Report)*, (2012-2013, HL Paper 59/HC 370) [20]. An amendment to the (then) Clause 6 of the Justice and Security Bill to include a statutory definition of 'national security' as 'an operation of the intelligence or military services' was proposed by Lord Hodgson of Astley Abbots (Con) but was rejected. HL Deb 17 July 2012, vol 739, col 120.

[77] *Mohamed Ahmed Mohamed,* n 15 [63].

[78] Gareth Peirce, meeting of Amnesty International (3 August 2011) in Amnesty International, 'Left in the Dark: The Use of Secret Evidence in the United Kingdom' (Amnesty International Publications 2012), 15.

In short, the uneasy co-existence of PII and the CMP (created by the statutory silences in section 6) lacks nuance. In *Sarkani* the suitability of PII in the context of judicial review was all but dismissed: '[this] claim challenges the rationality of the Secretary of State's decision. The detail of the material available to the decision-maker is essential to an evaluation of the substantive case. *An application for PII would exclude it from consideration.*'[79] But systems facing similar issues have not been so quick to adopt an all-or-nothing approach to the management of sensitive information. For example, the hearing system in Guantanamo Bay (hardly lauded for its fairness) has developed a system of graded classification of information which impacts directly upon the ability of cleared counsel to make use of the information, and to communicate it to the detainee.[80] Furthermore, the abject dismissal of the possibility of making use of a confidentiality ring in respect of international relations failed to take full account of the fact that the use of a PII process in respect of information sensitive to international relations meant that it was effectively 'struck out' of any future elements of the litigation. This occurred even though it was theoretically possible for it to become relevant to the national security case at a later stage. These observations, when coupled with the fact that confidentiality rings have already been used (to a limited extent) in national security cases, suggests the option was dismissed too readily. The Justice and Security Green Paper noted that confidentiality rings:

> …exist and operate effectively for less sensitive material, where the information can be shared safely between the parties and the problems caused by mishandling of information or leaking can be

[79] R *(Sarkani and Others) v Foreign Secretary* [2014] EWHC 2359 (Admin) [37], emphasis added.

[80] *Bismullah v Gates*, 501 F.3d 178, 187–88 (D.C. Cir. 2007) (United States); see also *In re Guantanamo Bay Detainee Litigation*, 787 F. Supp. 2d 5 (D.D.C. 2011) (United States) in David Cole and Stephen I. Vladeck, 'Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and "Cleared Counsel" in the United States, the United Kingdom, and Canada' in Liora Lazarus, Christopher McCrudden, Christopher and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014), Lazarus, Liora, McCrudden, Christopher & Bowles, Nigel, (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014), 9-10.

> managed and contained. However, where national security is at stake, these mechanisms cannot give the required degree of assurance and there may be no way to manage or contain the harmful impact of making sensitive information public.[81]

In a confidentiality ring full disclosure is made in camera to the lawyer acting for the client, and sometimes to the client themselves subject to an appropriate undertaking of confidentiality, although this appears to be a less common occurrence. Irwin J relied upon *AHK*[82], a deprivation of citizenship case, where the possibility of a confidentiality ring was dismissed due to *inter alia*:

> [the] obvious risk of inadvertent disclosure, by the representative…in discussions with other representatives or clients, or to others, or in paper management. It is self-evident that the more who have the material, the greater the risk of inadvertent disclosure. The difficulties in managing the separation between open and closed material in terms of questions of witnesses, discussions with advocates in submissions, indeed judgment writing including technical support and publication, would all be greatly increased. All this increases the risk of accidental disclosure.[83]

[81] HM Government, n 2, [1.55].

[82] *AHK and Others v Home Secretary* [2013] EWHC 1426 (Admin).

[83] Ibid, n 82, [23].

However, it would be entirely mistaken to assume that national security and international relations are the only areas in which the law is forced to grapple with high stakes confidentiality. In fact, it is one of the core arguments of this thesis that such areas are not *sui generis* in this respect. Confidentiality rings are used across competition law and patent law to protect 'highly confidential, technical information which would be of enormous value to a competitor.'[84]

As discussed in Chapter 5, confidentiality rings have already been used in counterterrorism cases, including *Serdar Mohamed*[85] and *Home Secretary v AM*.[86] In *AM*, security sensitive information was released to a controlee and his lawyer in order to satisfy post-*AF (No. 3)* disclosure requirements. In *Serdar Mohamed* confidential information was provided in camera to the claimant's lawyers but not the claimant himself. The decision to confine disclosure to SM's lawyers (in the context of allegations of alleged breaches of the ECHR relating to the transfer of detainees between British and Afghan custody in Afghanistan) was deemed appropriate to 'avoid some, although…not all, of the evils…of a closed hearing. Inequality of arms is brought back to a point nearer equilibrium.'[87] The use of a confidentiality ring in this case may have partly been motivated by the fact that SM was both illiterate and imprisoned in Afghanistan (both factors presumably reducing the risk of inadvertent disclosure).[88] However, the court held that executive worries regarding inadvertent disclosure:

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[84] *Smith & Nephew Plc v Convatec Technologies Inc.* [2014] EWHC 146 (Pat) [3]. See also Tom Richards, 'Cats, Bags, Rings and Rooms: the Problem of Confidentiality' (*Blackstone Chambers Competition Bulletin*, 11 October 2013) <http://competitionbulletin.com/2013/10/11/cats-bags-rings-and-rooms-the-problem-of-confidentiality/> accessed 01 July 2014.

[85] R *(On the Application of Serdar Mohamed) v Secretary of State for Defence* [2012] EWHC 3454 (Admin).

[86] *Home Secretary v AM* [2009] EWHC 425 (Admin).

[87] R *(On the Application of Serdar Mohamed)*, n 85, [20].

[88] ibid [21].

> relate not to matters of principle but to the circumstances of any particular case…I see no reason why the nature and description of that which must be confined to the ring should not be carefully prescribed…There are, as it seems to me, powerful precedents for a confidentiality ring. [It] does seem to me of significance that *confidentiality rings are used in competition cases without the suggestion that it is contrary to the fundamental principles inherent in a fair trial.*[89]

The operation of section 6 is fraught with difficulty, and given the subject matter, the claim by Irwin J that 'in a closed material procedure, justice is not seen to be done, even when it is done'[90] is easy to doubt. Procedural fairness is impacted upon by both the lack of judicial discretion in section 6, and its uncertain boundaries (CMPs are mandatory only where information is damaging to national security, but there may be other categories of legitimately 'sensitive' information in play, or it may be difficult for courts to determine whether or not information is truly 'national security' information). The effect of this complex and potentially incoherent procedural structure clearly compromises equality of arms. Technical procedural difficulties aside, however, the true wrong in the Justice and Security Act is its potential for unjustified incursion into the principles of legal equality and accountability for executive wrong-doing via its application to civil damages actions.

THE 'ESSENTIAL WRONG' IN THE EXTENSION OF THE CLOSED MATERIAL PROCEDURE TO DAMAGES ACTIONS

[89] ibid [24]-[26], emphasis added.

[90] ibid [21].

There have been numerous adverse reactions from politicians, newspapers, and civil society groups regarding the extension of CMPs from statutory judicial review proceedings into 'ordinary civil litigation'.[91] However, this Chapter has sought to demonstrate that there may well be good reasons for making a CMP available in general judicial review, as the intersection of present and future statutes and decisions which engage national security cannot be readily predicted. In view of this, having a CMP available as a matter of principle in this context is prudent, notwithstanding the criticisms made of the present mechanism, above. The Lords' Constitution Committee pointed out a central difference between the existing uses of the CMP, and the proposed extension of the (then) Justice and Security Bill to the province of damages claims:

> '[It] would be inappropriate, however, to assume that there ought to be a direct read-across from the control orders / TPIMs context into the altogether different context of ordinary civil actions. The point of control orders was, and the point of TPIMs is, not to maximise fairness to litigants but to maximise security in the small number of terrorist cases that, for one reason or another, cannot be handled through the regular criminal justice system.'[92]

[91] Examples include: Liberty, 'Liberty's response to the Ministry of Justice's Green Paper – Justice and Security', Liberty, 'Liberty's response to the Ministry of Justice's Green Paper – Justice and Security' (*Liberty,* January 2012) www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-response-to-the-ministry-of-justice-consultati.pdf accessed 01 July 2014 [26]: 'This option would also institutionalise a further departure from the principle that in ordinary civil litigation the Government should come to court as an equal party.' The Law Society, 'Secret courts plans: British justice should not be seen to stoop to the level of repressive regimes, warns Law Society' (*The Law Society*, 24 January 2014) www.lawsociety.org.uk/news/press-releases/secret-courts-plans--british-justice-should-not-be-seen-to-stoop-to-the-of-repressive-regimes,-warns-law-society/> accessed 01 July 2014, and Joint Committee on Human Rights, n 76, [50].

[92] House of Lords Select Committee on the Constitution, *Justice and Security Bill [HL] Report (3rd Report),* (2012-2013, HL Paper 18) [23].

Moreover, the CMPs examined in the foregoing chapters have been aimed at controlling executive arbitrariness by imposing procedural fairness to a greater or lesser degree of success.[93] The JSA is a significant departure, however, as it represents an interference with the *principle of legal equality.* According to Dicey the principle of legality equality embraces '*the universal subjection of all classes to one law administered by the ordinary Courts, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.*'[94] Whilst this principle was revealed as somewhat arcane and even naïve in the context of discretionary power in the administrative state (the effect of the absence of an effective public law oversight regime for covert surveillance providing the most notable example);[95] the idea of state and citizen remaining on a firmly equal footing is central to the 'important political functions in protecting the political rights of individuals and promoting good administration and the rule of law.'[96] The concept of accountability fits comfortably within the law of tort, one of the purposes of accountability being to render officials '…answerable to authority that can mandate desirable conduct and sanction conduct that breaches identifiable obligations.'[97]

Still, one might argue that judicial review using the CMP in ex ante proceedings (such as review of the making of a direction to impose a control order) could also be characterised as a mechanism for the control of potential misuse of power. However, this misses the key distinction between damages actions alleging (inter alia) misfeasance in public office under the JSA, and other non-discretionary CMPs in *ex ante* proceedings. This is not to say that misuses of power are never

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[93] Timothy Endicott, 'Arbitrariness' (2014) Canadian Journal of Law and Jurisprudence (January) 49, 49: 'Arbitrary government is a distinctive form of unreasonable government; it is a departure from the rule of law, in favour of rule by the mere will of the rulers.'

[94] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution,* E.C.S. Wade (ed) (MacMillan 1959), 187-196, extracted in Carol Harlow and Richard Rawlings, *Law and Administration (3rd Edn),* (CUP, 2009), 6, emphasis added.

[95] Compare *Malone v. Metropolitan Police Commissioner* [1979] Ch 344 with *Malone v United Kingdom* [1984] ECHR 10.

[96] Dawn Oliver, *Commons Values and the Public-Private Divide,* (Butterworths 1999), 176.

[97] Martha Minow, 'Public and Private Partnerships: Accounting for the New Religion' (2003) 116 *Harvard Law Review* 1229, 1260.

a feature of the operation of pre-emptive civil sanctions. However, *ex ante* judicial review using the CMP has the potential to prevent such misuses of power from proceeding beyond their infancy. But at the point a damages action is brought and section 6 of the JSA 2013 is invoked the (alleged) damage has already been done. The section 6 application in this context prevents light from being shed on wrong-doing. For the principles of good governance and legal equality to be respected as fully as possible, the alleged victim and the government must proceed on an equal footing, because the ramifications of the case are potentially wider than the compensation sought, or the risks to confidentiality engaged by the hearing of evidence in the action: an action of this type goes to the heart of government in good faith and according to law. To echo Dinah Rose QC: 'you cannot simply take the closed material procedure, developed for very specific statutory purposes, and apply it wholesale to a civil common law trial. A common law trial is designed to enable facts to be found on the balance of probabilities through an open adversarial process.'[98] Therefore, the compromises to the principles of open justice, equality of arms, and natural justice are greater in normative terms than those which take place in proceedings under the pre-emptive civil sanctions.

Before the release of the Green Paper a Private Members' Bill entitled the Torture (Damages) Bill was introduced to Parliament by Lord Archer of Sandwell on 24 November 2010. At the centre of the Bill (which never progressed beyond its first reading) was the exclusion of state immunity for acts of torture[99], and the provision of a litigation forum, even where acts of torture had occurred abroad.[100] The attempt to exclude state immunity was particularly poignant, given the 2013 decision of the Administrative Court in *Belhaj* which ruled that:

[98] Dinah Rose QC, "Beef and Liberty: Fundamental Rights and the Common Law' (Atkin Memorial Lecture, London 2011) www.reprieve.org.uk/media/downloads/Atkin_Memorial_Lecture_Final_version.pdf accessed 12 July 2014 [87].

[99] Torture (Damages) Bill [HL] Clause 3.

[100] ibid, Clause 5.

> the doctrine of state immunity is an absolute jurisdictional bar which…admits of no exceptions: even crimes against humanity and the most extreme breaches of human rights…[101]

Belhaj's claim in tort alleging misfeasance in public office was accordingly dismissed. Further doubt is shed upon the relationship between genuine risk-management and fairness concerns by the *Litvinenko* case, in which the Administrative Court held *inter alia* that the potential delays (and subsequent non-disclosure) caused by scrutiny of closed material were unreasonable grounds upon which to refuse a statutory inquiry into the death of the former Russian spy on British soil.[102]

More specifically, in the context of alleged torture and extraordinary rendition in the 'war on terror' before the United States' courts tort actions ideally function as symbolic challenges to 'high profile policy'.[103] Civil suits before the English courts appear to have been motivated by similar symbolic value; former Libyan fighter Abdul Hakim Belhaj offered to settle his suit against the British government for '£3 and an apology'.[104] In the United States context Jose Padilla sued Bush Administration legal advisor John Yoo for $1 USD in tort over alleged mistreatment resulting from the former's legal advice.[105] However, just as in the United Kingdom (in the context of *Belhaj*, above) the defences asserted thus far by the United States' executive have been of the 'non-merits' variety, i.e. state immunity, or the state secrets privilege.[106] One of the central controversies

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[101] *Belhaj v Security Service and Others* [2013] EWHC 4111 (QB) [62].

[102] *R (On the application of Marina Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin).

[103] David Zaring, *Personal Liability as Administrative Law,* (2009) 66 WASH. & LEE L. Rev. 313, 339 in George D. Brown, 'Accountability, Liability and the "War on Terror": Constitutional Tort Suits as Truth and Reconciliation Vehicles' (2011) 63 *Florida Law Review* 193, 203.

[104] Jerome Taylor, 'Libyan "rendition victim" Abdul Hakim Belhaj offers to settle UK lawsuit for £3 and apology' *The Independent* (London 04 March 2013) http://www.independent.co.uk/news/uk/home-news/libyan-rendition-victim-abdul-hakim-belhaj-offers-to-settle-uk-lawsuit-for-3-and-apology-8519408.html> accessed 05 July 2014.

[105] George D. Brown, n 103, 203.

[106] ibid, 204.

surrounding any doctrine of immunity is that of finality: '[i]f the defendant invokes it successfully, the suit is over.'[107] It is no intellectual challenge to see the potential discord caused by the use of the CMP in the context of an action centred on securing accountability. Whilst the closed material procedure is not a substantive immunity it does clearly damage the necessary transparency for effective accountability. In short, it is the intersection of secrecy and accountability in this context which is the 'essential wrong' in the JSA. It underpins the very core of the Act's existence.

REFORMING THE INTELLIGENCE AND SECURITY COMMITTEE

The JSA attempts to counteract the dilution of legal accountability caused by the extension of the CMP in the context of civil damages claims by increasing the level of *political* accountability available through the reformed ISC. The argument made here is that this not only are the reforms of the ISC insufficient, the approach to rebalancing proceeds according to the erroneous assumption that political and legal accountability are somehow interchangeable.

When the Justice and Security Green Paper was initially released, the former ISC issued an open letter to Peter Rickets, the Cabinet Office National Security Advisor. The position of the Committee was that any Bill put forward should contain a statutory presumption *against* disclosure of intelligence material and a doctrine 'practice similar to the State Secrets Privilege, used in the US. The Committee considers that such an executive veto would also offer the additional layer of protection necessary.'[108] The US state secrets privilege allows the government to apply to a court seized of civil litigation with a national security dimension to have that litigation struck out entirely[109] where there is a 'reasonable danger' that disclosure of information 'will expose military

[107] ibid, 217.

[108] Rt. Hon. Sir Malcolm Rifkind, 'Green Paper on Justice and Security: ISC Response (Unclassified)' ISC 4/1/023 (7 December 2011).

[109] See generally, Amanda Frost, 'The State Secrets Privilege and Separation of Powers' (2006-2007) 75 Fordham Law Review 1931.

matters which, in the interests of national security, should not be divulged.'[110] Thankfully, such a mechanism did not become a feature of the JSA. However, the eventual text of the JSA does illustrate a stark rebalancing between political and legal forms of accountability.

Much ink has been spilled over the appropriate manner of constitutional oversight of intelligence and national security operations and events across many jurisdictions.[111] The Justice and Security Act 2013 was designed to strengthen the parliamentary accountability of M15, MI6, and GCHQ by reform of the Intelligence and Security Committee. This section argues that not only is this reform minimal, it is a fundamentally unsuitable way of compensating for the reduction in *legal accountability* caused by the extension of the CMP to civil damages actions in Part II of the Act. It remains a constitutional convention (or at least the practice of successive governments) that intelligence matters are not discussed on the floor of either House of Parliament.[112] Born and Leigh argue that parliamentary oversight of intelligence agencies is a poor substitute for effective executive oversight. They assert that 'a parliamentary body…is a poor substitute because, while legislative bodies can effectively review the use of powers and expenditure ex post facto, they are not equipped to direct and manage matters in real time…'.[113] Beyond this cogent criticism there are a number of additional criticisms to be levied at any perceived attempt to *strengthen* ex post facto political accountability in conjunction with *weakening* legal accountability.

It should be recalled that the Intelligence and Security Committee (ISC) and its successor created by the JSA, the Parliamentary Intelligence and Security Committee (PISC) are separate and

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[110] *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)) in George D. Brown, n 103, 227.

[111] There are several respected academic constitutional lawyers who have argued for the suspension of legal controls in respect of on-going national security matters. See the discussion in Ch 1.

[112] Theresa May MP: 'As has been the practice of successive Governments, we do not comment on intelligence matters.' HC Deb 14 January 2014, vol 573, col 464W. See also, Christopher Andrew, 'Whitehall, Washington, and the Intelligence Services' (1977) 53(3) International Affairs 390-404, 390.

[113] Hans Born and Iain Leigh, 'Democratic Accountability of Intelligence Services' (2007) Geneva Centre for the Democratic Control of Armed Forces, (Policy Paper No. 19) <www.dcaf.ch/content/download/35401/526019/.../pp19_born_leigh.pdf> accessed 01 July 2014, 6.

distinct from the Joint Intelligence Committee (JIC). The JIC, mentioned briefly in Chapter 6, is part of the Cabinet Office and is concerned with processing 'raw intelligence' related to 'events and situations relating to external affairs' and then passing such intelligence to the government.[114] By contrast, both the ISC and PISC are part of the accountability network of the intelligence services. Rodgers and Walters caution that the ISC was 'often referred to by the media as a "select committee" or a "parliamentary committee" but in fact is neither.'[115] Leigh explains that the changes made by the new ISC are 'minor', when discussing the original Green Paper proposals.[116] The PISC still differs from a regular parliamentary committee (despite its name) because its power is sourced in legislation, as opposed to the standing orders of Parliament. This affects 'the appointment of its members, the procedure it adopts, its powers over witnesses and hearings, and the publication of its reports.'[117] Under the new slightly adjusted PISC regime, Parliament appoints its membership, subject to the approval of the Prime Minister and the Leader of the Opposition. Also, Select Committees are usually staffed by back benchers, whereas the ISC and the PISC have been dominated by former government Ministers. Therefore, Leigh comments that Parliament has 'Assume[d] formal ownership – but certainly not full control – of the oversight arrangements.'[118]

Moreover, Leigh explains that the *standard* of ISC scrutiny was not specified by the Intelligence Services Act 1994. This remains true of the PISC under the JSA. Leigh comments that '[t]his appears odd when compared with oversight committees in other countries and invites somewhat unfocused scrutiny by the ISC. An emphasis on legality and propriety would make

[114] Anthony Glees, 'Evidence-Based Police or Policy-Based Evidence? Hutton and the Government's use of Secret Intelligence' (2005) 58 (1) Parliamentary Affairs 138-155, 141.

[115] Robert Rogers and Rhodri Walters, *How Parliament Works* (6th edn, Pearson Longman 2006), 356.

[116] Ian Leigh, 'Rebalancing Rights and National Security: Reforming UK Intelligence Oversight a Decade After 9/11' (2012) 27(5) Intelligence and National Security 722, 725.

[117] ibid, 725.

[118] ibid, 726.

human rights much more central to the oversight endeavour.'[119] In his study of the former ISC, Gill also echoes similar criticisms, and criticises the ISC both structurally and operationally. He writes that the former ISC's 'structure seeks to maintain the idea that the intelligence agencies are different from other government departments.'[120]In terms of its operations (i.e. the reports produced by the erstwhile committee), Gill is critical of the fact that in all the ISC reports published prior to 2005 there is a 'complete absence of any explicit reference to human rights.'[121] Moreover, the weakened status of the ISC compared with other parliamentary committees has attracted widespread attention. The JCHR has openly criticised the ISC, calling for it to be turned into a 'proper' parliamentary committee with its own independent secretariat, legal advice, and investigatory mechanisms.[122] The absence of these 'proper' features continues to dog the new PISC. However, Hunt has acknowledged problems with Select Committee scrutiny generally in the field of national security. He points out that the government 'frequently rejects' the recommendations of the JCHR in this field.[123] The Green Paper considered reforming the ISC to make it a full Select Committee but rejected this option because 'under such arrangements the Government would clearly have no veto on publication of sensitive material. There would be a real risk that…Agency Heads would find it hard to reconcile their statutory duty to protect information with their statutory duty to facilitate parliamentary oversight.'[124] For this reason, it may well be right and proper that the PISC is not a full parliamentary committee. However, this is a

[119] ibid, 727.

[120] Peter Gill, n 3, 21.

[121] ibid, n 3, 26.

[122] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Bringing Human Rights Back In (16th Report),* (2009-2010 HL 86/HC 111) [108]-[112]. See also, Nicholas Bamforth, 'Accountability of and to the Legislature' in Peter Leyland and Nicholas Bamforth (eds), *Accountability in the Contemporary Constitution* (OUP 2013), 286.

[123] .Murray Hunt, 'The Impact of the Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice in Parliament?' (2010) European Human Rights Law Review 601, 607.
[124] HM Government, n 2, [3.19].

discrete issue which does not dilute concerns regarding the inappropriate recalibration of accountability taking place within the overall framework of the JSA.

The major change effected to the structure and operation of parliamentary oversight by the JSA is the broadening of the (former) ISC remit from jurisdiction to 'examine the expenditure, administration and policy'[125] to jurisdiction to examine the 'expenditure, administration, policy *and operations*' of the various intelligence services.[126] The addition of 'operations' appears significant, but the PISC is prohibited from examining matters which the Prime Minister considers to be part of 'ongoing intelligence or security operation[s]'.[127] Moreover, the PISC can only consider operation matters which the Prime Minister deems to be of 'significant national interest'[128] and its consideration is limited to information provided voluntarily by the intelligence services or relevant government departments. This statutory limitation on compulsion differentiates the PISC from a full parliamentary select committee insofar as one of the central powers of a full select committee is the PPR power; the power 'to send for persons, papers and records'.[129] However, recent events have cast serious doubt upon the ability of fully fledged parliamentary select committees to compel the attendance of (or evidence giving) of witnesses. In the counter-terrorism context this is best illustrated by the refusal of the (then) Director General of MI5 Dame Eliza Manningham-Buller to attend the Joint Committee on Human Rights.[130] Moreover, Street and Gordon are of the view that: 'Properly analysed, no Select Committee has any direct power to enforce any of its existing powers. [It] is notable that no compulsory powers have been sought to be used by either the House

[125] Intelligence Services Act 1994, s 10(1).

[126] Justice and Security Act 2013, s 2(1), emphasis added.

[127] ibid, s 2(3)(a)(i).

[128] ibid, s 2(3)(a)(ii).

[129] Robert Rogers and Rhordri Walters, n 115, 358.

[130] Joint Committee on Human Rights, *Counterterrorism Policy: Prosecution and Pre-Charge Detention (24th Report)*, (2005-2006, HL 240/HC 1576), Appendix 7 'Correspondence between the Chairman, the Director General of the Security Service and the Chairman of the Intelligence and Security Committee', 93.

of Commons or the House of Lords in modern times.'[131] The the last levy of a fine on a non-member of parliament by parliament occurred in 1666, and the last time parliament committed someone to prison was 1880.[132] In view of this, section 16 of the JSA may appear prima facie restrictive of accountability but in reality serves only to reinforce the status quo.

The other source of Select Committee power comes from their use of publicity in the form of public evidence sessions, and publicly available reports. In a Westminster Hall debate following the unauthorised disclosures by Edwards Snowden, the Parliamentary Intelligence and Security Committee was heavily criticised. Dr Huppert MP (Liberal Democrat, Cambridge) characterised the PISC as working:

> …extremely hard, but its reports are redacted by the security services and the Prime Minister, and it is hard to know whether that is done in the interests of national security and not just to avoid embarrassment. [The] [P]ISC is under-resourced and not properly accountable to Parliament. There is a real issue to understanding the detailed technological components of much of [intelligence work]. We need better scrutiny generally and not just of the Intelligence and Security Committee.[133]

However, the former ISC never held public evidence sessions. The first ever open evidence session regarding intelligence and security matters was held by the PISC on 7 November 2013 with the heads of MI5, MI6 and GCHQ appearing voluntarily as witnesses. The ninety minute session was

[131] Richard Gordon QC and Amy Street, 'Select Committees and Coercive Powers – Clarity or Confusion?' (2012) The Constitution Society, www.consoc.org.uk/wp-content/uploads/2012/06/Select-Committees-and-Coercive-Powers-Clarity-or-Confusion.pdf, 33-37.

[132] ibid, 35.

[133] HC Deb 31 October 2013, vol 569, Col 339WH, Dr Julian Huppert MP (Lib Dem, Cambridge).

broadcast on live television and via internet stream with a two minute delay (to prevent the accidental publication of sensitive information). The overly general nature of the evidence session was peppered with promises by all three witnesses agreeing to provide specific details in a private session before the Committee.[134]

Moreover, the recent history of the former ISC also suggests that MI5 misled the Committee. The removal of paragraph 168 from the draft court of Appeal Judgment in *Binyam Mohamed* at the request of (then) government counsel Jonathan Sumption QC (now Lord Sumption of the UK Supreme Court) suggests that the ISC had been misled in a closed session regarding MI5's knowledge of the treatment of detainees in Guantanamo Bay.[135] The final published paragraph 168 (which the Court of Appeal reconvened to re-issue) read as follows:

> the security services had made it clear in March 2005, through a report from the Intelligence and Security Committee, that "they operated in a culture that respected human rights and that coercive interrogation techniques were alien to the services' general ethics, methodology and training" …indeed they "denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the US Government" [Yet] in this case that does not seem to have been true: as the evidence showed, some security services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was

[134] The Intelligence and Security Committee of Parliament 'News Archive, 7 November 2013'http://isc.independent.gov.uk/news-archive/7november2013 accessed 5 February 2013.

[135] Adam Tomkins, n 25, 20-21 reproduces both the original and revised paragraph 168 in the Court of Appeal judgment in *Binyam Mohamed*. The letter by Jonathan Sumption QC is available at: http://www.theguardian.com/world/2010/feb/10/binyam-mohamed-torture-letter accessed 08 March 2013.

> held at the behest of US officials…Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on . . . . Not only is there some reason for distrusting such a statement, given that it is based on security services' advice and information, because of previous, albeit general assurances in 2005, but also the security services have an interest in the suppression of such information.[136]

In short, decisions relating to intelligence, security, and counterterrorism seem to be ill-suited to being the subject of a system heavily restricted towards accountability of a political nature. This is so for a number of reasons. For example, Cole makes clear that in the context of counterterrorism and national security more broadly it is unwise to assume that political mechanisms can be directly (or effectively) substituted for judicial mechanisms of control and accountability.[137] In addition to these concerns, a 2014 report of the Home Affairs Select Committee stated that:

> We do not believe the current system of oversight is effective and we have concerns that the *weak nature* of…accountability…The scrutiny work of the security and intelligence agencies should not be the exclusive preserve of the Intelligence and Security Committee.[138]

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[136] *R (Binyam Mohamed)* v Foreign Secretary [2010] EWCA Civ 158.

[137] David Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113(8) Yale Law Journal 1753, 1764-1767.

[138] House of Commons Home Affairs Committee, *Counter-Terrorism* (17th Report), (2013-2014, HC 231) [157], emphasis added.

Legal accountability has a value of its own, and this value is demonstrably present in public law torts. Unlike its political counterpart, legal accountability is above all 'unambiguous'.[139] An individual right of petition, in the presence of independent adjudicators, leading to a final and coercive remedy[140] are all features which parliamentary accountability lacks. And, in respect of the claims which the JSA seeks to address (allegations of extraordinary rendition, and mistreatment amounting to torture), the compromise of legal accountability caused by the CMP cannot be mitigated by the substitution of the political mechanisms provided by the JSA.

CONCLUSION

The Justice and Security Act 2013 compromises important principles to address difficult (if not intractable) problems. Not all of these compromises are unwarranted. There is no doubt that making the CMP generally available in the context of judicial review has been shown to be warranted by recent trends in litigation. Moreover, the existing PII process may well be ill-suited to certain civil suits where the majority of information, or the information most central to the dispute is too sensitive to be disclosed in open proceedings. However, this does not mean that the statute as enacted is unproblematic. The lack of room for judicial discretion in section 6, and the exclusion of the *Norwich Pharmacal* jurisdiction stand out as examples of a drive to protect secrecy and security that lacks nuance. Moreover, it seems clear that the damage to international intelligence sharing relationships caused by existing litigation may well have been over-claimed in the Green Paper.

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[139] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) European Law Journal 447, 456.

[140] Jeff A. King, 'The Instrumental Value of Legal Accountability' in Nicholas Bamforth and Peter Leyland (eds), n 122, 127.

But unlike the other statutory frameworks examined in this thesis the JSA compromises of the principle of legal equality which is central to the public law of torts by extending the availability of the CMP. In technical terms, this has led to the CMP sitting uneasily with the existing law of PII in this context. In more global terms, it has been argued that Parts I and II of the Act attempt to unsuccessfully recalibrate the relationship between political and legal accountability. Perhaps the most caustic effect of this aspect of the Justice and Security Act is captured by Sir David Williams, writing as long ago as 1965:

> The ultimate danger of executive secrecy in a much governed country is that it denies the knowledge essential for an informed public opinion, and that it inhibits effective scrutiny and criticism of the government and the administration.[141]

Or, finally, as Lord Neuberger pointed out that 'unless justice is carried out publicly, there is a real risk that the public will lose confidence in the justice system… "sunlight is said to be the best of disinfectants"…'[142] Nowhere is this concern greater than where accountability is sought in the face of accusations of executive wrong-doing.

[141] Sir David Williams, *Not in the Public Interest: The Problem of Security in Democracy* (Hutchinson 1965), 11.

[142] Lord Neuberger, 'Justice and Security' (Lecture to the Northern Ireland Judicial Studies Board, Belfast, 27 February 2014) <http://supremecourt.uk/docs/speech-140227.pdf> accessed 01 July 2014.

CONCLUSION

Part II of this thesis painted a picture of administrative and legal procedures which are largely disconnected from the shift towards the risk paradigm that is clearly evident in the over-arching themes of British national security policy, described at the outset of this thesis. It was argued that this disconnect ultimately was to the detriment of procedural fairness. Overall this detriment can be attributed to the failure to take either risk or secrecy seriously in the context of the CMP, and to the implicit classification of these counterterrorism processes as a *sui generis* or exceptional feature of law and governance. By conceiving of the subject matter explored herein as part of the general risk-management functions of the administrative state, it is hoped that progress can be made towards developing a substantive theory of necessary secrecy permitting more tailored justifications of the measures used to mitigate first and second order risks. There have already been attempts by public lawyers to theorise transparency[1], and it is respectfully submitted that public law scholarship must take secrecy seriously as its intellectual and practical counterpart. This is of course a large and interdisciplinary project which would require collaboration by various stakeholders in government, the intelligence community, and by scholars. However, it is still possible to make recommendations which flow from the analysis already undertaken.

This conclusion makes two recommendations, one administrative and one legal. The nature and scope of these recommendations are driven by the expansive definition of procedural fairness adopted herein. The aim is to improve bureaucratic rationality, and reduce the depth of secrecy to enhance fairness and maintain security. The first recommendation relates to 'first order risks', and the second relates to 'second order risks'. The gap between 'high level' national security policy on the one hand, and criminal justice on the other, which the CMP and its subject matter

[1] See *inter alia* Elizabeth Fisher, 'Transparency and Administrative Law: A Critical Evaluation' (2010) *Current Legal Problems* 272.

have slipped through must be bridged. Both high level national security policy and criminal justice (in general, and with specific respect to terrorism-related offences) have deliberately and openly embraced the risk paradigm.[2] Presently, however, it is impossible to tell if both the executive and courts seized of the statutory powers explored herein also employ the language and techniques of risk-management beyond the realm of rhetoric. In view of this it is recommended that the security and intelligence services (the Security Service, the Secret Intelligence Service, and GCHQ) and the relevant government departments (the Home Office, the Treasury, and the Foreign and Commonwealth Office) coordinate to establish a framework of risk-management guidelines for designating and controlling terrorism suspects unsuitable for the criminal justice process. This would potentially increase the rigour of decision-making in the area of pre-emptive sanctions, deportation, and deprivation of citizenship. It should also enhance the fairness of judicial proceedings because evidence about suspects could be tested against pre-agreed standards.

The second recommendation relates to the standard of disclosure required during the operation of the CMP. It is recommended that the requirement for a 'minimum core' of disclosure as outlined in *Home Secretary v AF (No. 3)*[3] be extended across all of the subject matters which make use of the CMP, including the SIAC. In addition to this, the language employed in the test should be strengthened from its present form of a 'core irreducible minimum'. A more searching standard of disclosure would help to reduce the depth of necessary secrecy, reduce the sense of 'disconnect' between 'open' and 'closed' proceedings which contributes to the subjective feeling that judicial review using the CMP is unfair. Also, by improving procedures in general, and disclosure in particular, it may be possible to facilitate a more searching standard of substantive judicial review.

To progress the discussion of these recommendations insights will be drawn from the Multi-Agency Public Protection Agreements in respect of administrative procedural reform, and

[2] Julian Richards, *A Guide to National Security: Threats, Responses, and Strategies* (OUP 2012), Ch 1 and Lucia Zedner, 'Securing Liberty in the face of Terror: Reflections from Criminal Justice' (2005) 32(4) Journal of Law and Society 507.

[3] *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28.

from the approach to disclosure proposed in the Rules of the EU General Court (discussed in Chapter 7) in respect of legal reform. However, it should be cautioned that this conclusion is intended to be a *critical discussion* of these approaches, not a plea for their direct transplantation into the present forum. Although there is much to be gained from a more in-depth analysis of these alternative approaches, it is important to be honest and aware about the potential limitations of any recommendations suggested in the field of this thesis. After all, super-imposing parallel standards upon the present subject matter would be a naïve solution to the administrative aspect of the problem (as the MAPPA procedures are themselves imperfect). Direct transplantation also faces several potential obstacles in the legal dimension, discussed below, particularly from rules of substantive law which impact directly upon possible alterations to the legal process.

RECOMMENDATION ONE: THE INSTITUTION OF ADMINISTRATIVE RISK ASSESSMENT FRAMEWORKS IN THE PROCESS OF SUSPECT DESIGNATION AND RESTRICTION

The main reasons for recommending the adoption of risk-assessment frameworks in the context of executive decisions concerning pre-emptive counterterrorism sanctions are to infuse the assessment of secret intelligence and other relevant information with intellectual rigour, to mitigate the risk of politicisation, and to afford transparency to the greatest extent possible. Pressman and Flockton state that 'many experts have agreed that risk assessments have a greater chance of being accurate if decisions are made using a transparent and systematic protocol with a rating system.'[4] The imposition of such frameworks are recommended in addition to the use of expert judgment, not to universally displace it. The best, though imperfect, source of guidance on how this might be carried out can be drawn from further consideration of the Guidance on the management of

[4] D Elaine Pressman and John Flockton, 'Violent Extremist Risk Assessment: Issues and Applications of the VERA-2 in a high-security correctional setting' in Andrew Silke (ed), *Prisons, Terrorism, and Extremism: Critical Issues in Management, Radicalisation, and Reform* (Political Violence: Routledge 2014), 123.

terrorist and domestic extremist offenders used issued by the Ministry of Justice in relation to Multi-Agency Public Protection Agreements and Panels, which was introduced in Chapter 3. The purpose of the MAPPA risk-management programme is to make sure that 'decisions are transparent and can be easily understood. It is intended to imbed risk assessment with rigour and risk management with robustness.'[5] The object of seeking to impose rational objective standards upon both the making of the 'national security case' and the adoption of 'specific measures' thereafter is to reduce both the subjective feeling of injustice felt by the claimant. It also aims to reduce scope for the criticism that such administrative steps amount to a form of 'kadi justice' or justice according to the personal whims of officials.[6] Recommending transparent procedures aims to achieve, insofar as possible, the optimization of 'administrative functions according to purely objective considerations [and] according to *calculable rules*.'[7]

It is obvious that some form of risk assessment takes place with respect to counterterrorism sanctions. As previously discussed, controlee BM was moved from the (arguably) least to the most invasive form of sanction (i.e. from an asset-freeze to a control order) as the risk he posed was deemed to have increased. By contrast, AM and AY, who were involved in the Transatlantic Airline Plot were immediately subject to a control order which included the severest measures, namely relocation. However, part of the problem with analysis of sensitive intelligence which underpins decisions to designate, deport, or deprive suspects of citizenship is that evaluations can be influenced subconsciously by an analyst's 'own version of "reality"…by past experience, education, cultural values, role requirements, and organizational norms, as well as by the specifics of the information received.'[8] The MAPPA Guidelines and the operation of MAPPs

[5] Ministry of Justice, *MAPPA Guidance 2012: Version 4* <www.justice.gov.uk/downloads/offenders/mappa/mappa-guidance-2012-part1.pdf> accessed 21 October 2013, [11.15].

[6] Max Weber, *Economy and Society: Volume I* (University of California Press 1978), 978.

[7] ibid, emphasis original.

[8] Richards J. Heuer Jr., *Psychology of Intelligence Analysis* (Centre for the Study of Intelligence 1999), 4.

provide one possible template from which to construct a tailored risk-management model to mitigate such external biases. Risk assessments made under these guidelines rely upon information from a variety of sources. Crucially, however, MAPPA risk assessments make use of 'clinical and actuarial tools' as part of the overall assessment of the offender. The purpose of these tools is to assist in making MAPPA risk assessments 'transparent and defensible.'[9]

Under the MAPPA Guidance offenders are allocated a level of risk (low, medium, or high). Allocation of a level requires an estimation of the risk of harm which relies upon expert judgment and clinical actuarial tools. The MAPPA Guidance *mandates* that an assessment must be made using 'the approved risk assessment tools where appropriate'.[10] The outcome of the risk assessment provides the framework for the setting of licence conditions (similar to those conditions which form part of SIAC bail, control orders, or TPIMs). Any such conditions in the context of the terrorist or extremist offender must be necessary and proportionate. This means that conditions must be 'necessary to enable the Offender Manager to manage the risks identified within the Risk Management Plan' and must include an assurance that 'no other less onerous condition will suffice'. Furthermore, restrictions must be proportionate in the sense that 'any restriction or loss of liberty arising from the imposition of the condition is proportionate to the level of risk presented by the offender [and] that no other less intrusive means of addressing the risk is available or appropriate.'[11] Moreover, additional licence conditions, as discussed in Chapter 3, must possess a *mandatory* causal link with the index offence.[12] This directly contrasts with section 2(9) of the PTA 2005 which was designed to eradicate general presumptions in favour of necessity. The imposition of risk categories and the need to produce necessary and proportionate risk management plans

[9] Ministry of Justice, n 5, [11.15].

[10] ibid, [11.4].

[11] Ministry of Justice, 'Licence Conditions' (National Offender Management Service: PI 07/2011), http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/pi_07-2011_licence_conditions_final.doc accessed 08 June 2015, [2.15].

[12] ibid, [1.5].

would encourage relevant administrators involved in advising Ministers to base their treatment of terrorism suspects upon pre-determined standards. In turn, this would improve procedural fairness by marginalising discretion or intuition which is on the one hand, difficult to judicially scrutinise, and on the other has been subject to 'taming' in parallel areas of administration.

Moreover, the availability of a risk category at this stage would give the designated person and his lawyers some indication of the purpose of designation, and would provide a benchmark for the court conducting an initial review into whether reliance upon the national security case was 'obviously flawed'. A large part of the problem in the security context is the scope for miscommunication between administrative agencies responsible for counterterrorism and legal actors. Disclosure of security service intelligence reports are often drafted in opaque or obfuscatory language for use in open proceedings. When we revisit the example in Chapter 3, it is difficult to envisage how the disclosure to the effect that 'the Security Service assesses that [AE] was a member of the Islamic Movement of Kurdistan' would assist the construction of a defence to allegations in open proceedings.[13] It is difficult to accurately reach a conclusion on how much weight should be attached to the phrase 'the security service assesses'. It is also possible that the intelligence community and lawyers and judges attach different meaning and weight to such phrases as a result of their different professional training.

One further possible option to mitigate the risk of linguistic misinterpretation is to mirror the form of probabilistic language analysis used for categorising intelligence currently in use by the Ministry of Defence (MoD). The MoD rubric assigns a numerical value (expressed in terms of a percentage) to common phrases which intelligence analysts use to describe the likelihood that a threat will materialise. Intelligence analysts are encouraged to deploy certain phrases in their assessments, i.e. 'remote/highly unlikely (<10%)', 'improbably/unlikely (15-20%)', 'realistic possibility (25-50%), 'highly/very probably/likely (75-85%)', and 'almost certain (>90%)'.[14]

[13] *Home Secretary v AE* [2008] EWHC 585 (Admin), Appendix 1 'The December Disclosure'.

[14] David Omand, *Securing the State* (C Hurst & Co Publishers Ltd 2012), 201-202.

According to Omand, a former director of GCHQ, the gaps between the percentages are intended to 'encourage analysts to be clear about what their assessments mean.'[15] It may be that a similar rubric is in use in the relevant executive committees assessed in this thesis, but no such information is available. This use of language by the intelligence community differs significantly from the manner in which lawyers would use similar phrases (especially in relation to applicable standards of proof). Therefore, this expression of numerical values (which could be disclosed under the test proposed in Recommendation Two) may assist in rendering the initial national security case more intelligible in open proceedings. It may be that the principles of judicial review could be developed in order to demand a certain percentage threshold required to satisfy the admittedly low hurdle of not being an 'obviously flawed' decision.

In spite of the perceived benefits of such a system, it cannot be transplanted wholesale into the counterterrorism sphere, as the operation of MAPPs and the application of MAPPA guidance cannot be considered directly analogous to counterterrorism sanction decision-making. Nor is the MAPPA system flawlessly executed. In respect of the pre-emptive sanctions, such as TPIMs, deprivation of citizenship, or deportation, risk management will undoubtedly involve a two-tier process. The first stage, identification and designation of a suspect or deportee, will necessarily be more intelligence led, as opposed to reliant on a structured 'after the fact' assessment of information from a variety of sources. Depending on the nature of the suspicion it may also be highly time sensitive. Given that the number of individuals monitored vastly exceeds those subject to the sanctions discussed herein, it is likely that the initial decision for selecting candidates involves a complex calculus involving intelligence and available economic resources.[16] By contrast, MAPPA assessments often begin up to six months before a prisoner is released on licence.[17] However, there

[15] ibid, 202.

[16] Julian Richards, n 2, 20-25.

[17] Ministry of Justice, n 5, [1.20].

is room for lending some form of MAPPA-inspired framework to this initial stage. Under the MAPPA guidance all relevant offenders including terrorists and domestic extremists are the subject of a risk assessment. This risk assessment involves the 'systematic collection of information to help determine the degree to which an offender poses an identified risk of serious harm to the public.'[18] The Guidance acknowledges that risk assessment is an ongoing and dynamic process, and that any such risk assessment should be reviewed regularly.[19]

The real impact of a risk assessment framework would most likely be felt at the subsequent stage of decision-making, i.e. when specific measures are decided upon and imposed on a suspect. As stated above, decision -making under MAPPA involves the use of clinical actuarial tools. These are used to help determine the level of risk, and in determining licence conditions. The main tool for violent offenders (including those convicted of terrorism offences which fall within the purview of MAPPA) is the Offender Assessment System (OASys). The OASys tool, which was used in respect of the *Gunn*[20] and *Hasan Tabak*[21] cases considered in this thesis, is a critical evidence based tool which is intended to 'help practitioners make sound and defensible decisions about offender risk and need in order to take action accordingly.'[22] It is designed to assist users by collating and organising information relevant to the offender. The tool itself consists of a long list of boxes to be checked in order to produce numerical scores which guide decision making. Whilst being acknowledged to be generally useful, OASys has been criticised by its users (primarily

[18] ibid, [11.1].

[19] ibid, [11.3].

[20] R *(On the Application of David Gunn) v Secretary State for Justice and the Nottinghamshire Multi Agency Public Protection Arrangements Board* [2009] EWHC 1812 (Admin).

[21] R *(Hassan Tabak) v Justice Secretary and Others* [2013] EWHC 2492 (Admin).

[22] Home Office, 'A New Choreography: An Integrated Strategy for the National Probation Service for England and Wales. Strategic Framework 2001 – 2004' (Home Office 2001), 9-10.

probation officers) for being burdensome, lacking in nuance, and reducing the scope for reliance on professional judgment.[23]

However, the dangers of a direct transplant between aspects of the MAPPA guidance (such as OASys) become all the more evident in light of the concerns expressed by experts that these general risk templates are unsuitable for extremist and terrorist offenders. This also suggests that they would be inadequate for terrorism suspects. Whilst the understanding of how to risk-assess terrorist and extremist offenders remains 'in its infancy', several insights about the need to apply terrorism-specific risk assessment rubrics have become clear.[24] For example, existing research suggests that general clinical actuarial tools are 'poorly designed for terrorist and extremist offenders, and in general their use should be avoided.'[25] Alternative risk matrixes have therefore been designed for terrorist offenders. These are the Extremism Risk Guidance 22+ (ERG 22+), used in England and Wales and the Violent Extremism Risk Assessment (VERA-2), which is used in Australia. One of the individuals convicted for conspiracy to murder as part of the Transatlantic Airline Plot for conducting research into bombs and detonators was the subject of an ERG 22+ assessment to determine his escape risk classification.[26] The ERG 22+ assesses offenders on twenty-two separate factors which are 'theoretically related to extremism'. The assessment is carried out by a clinical psychologist, whereas OASys is undertaken by a Probation Officer. Unlike OASys, it does not generate a specific numerical risk assessment score.[27] VERA-2 relies upon thirty-one factors, many of which overlap with the ERG 22+ and are grouped into five categories headed 'beliefs and attitudes', 'context and intent', 'history and capability', 'commitment and

[23] George Mair, Lol Burke & Stuart Taylor, "The worst tax form you've ever seen'? Probation officers' views about OASys' (2006) 53(1) Probation Journal 7-23.

[24] Andrew Silke, 'Risk Assessment of Terrorist and Extremist Prisoners' in Andrew Silke (ed), n 4, 108.

[25] ibid, 117.

[26] *R (Khatib) v Secretary of State for Justice* [2015] EWHC 606 (Admin) [32].

[27] Andrew Silke, n 4, 118.

motivation', and 'protective items'.[28] The overall purpose of these tools are twofold: to predict the risk of future violent acts and to 'use information obtained to design appropriate interventions.'[29] Research findings based upon the VERA-2 suggests that 'security…considerations are better informed by the additional empirically supported information which enhances the validity and utility of the risk assessment process.'[30]However, it is cautioned that 'intelligence gathering [remains] a crucial aspect of good offender management.'[31] So, this suggests that a template could be designed by the relevant intelligence agencies and government departments which standardises decision-making without ousting the presence of necessary discretionary professional judgment.

As stated above and in Chapter 3, any additional restrictions imposed under MAPPA must have a causal connection with the index offence and meet the thresholds of necessity and proportionality. In view of this, sex offenders released on licence under MAPPA Guidance are often restricted from occupations involving children, and subject to exclusion zones near schools. By contrast, controlee CF was granted a dispensation to study a course in international relations at a London University which included modules on terrorism. As the Home Office was of the view that CF trained with Al Qaida in Somaliland, CF expressed the view in oral testimony at his TPIM variation hearing that he was 'shocked' at the Home Office decision to allow him to study his chosen course. It is difficult to surmise what was weighed in the calculus of risk by the Home Office when authorising this request.[32]

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[28] D Elaine Pressman and John Flockton, 'Violent Extremist Risk Assessment: Issues and Applications of the VERA-2 in a high-security correctional setting' in Andrew Silke (ed), n 4, 129.

[29] ibid, 127.

[30] ibid, 129.

[31] Richard Pickering, 'Terrorism, Extremism, Radicalisation, and the Offender Management System in England and Wales' in in Andrew Silke (ed), n 4, 166.

[32] Author's personal notes from CF's oral testimony at Administrative Court hearing concerning the application to vary his TPIM Measures (05 March 2013).

However, such risk-assessment frameworks and clinical actuarial tools are only effective if they are used. Studies of the operation of MAPPs suggest that relevant actors do not always rely upon these resources. In up to 70% of cases, relevant personnel may fail to complete assessments using clinical actuarial tools such as OASys.[33] In their study of the operation of MAPPs Kemshall and Maguire observed that although the MAPPA guidance was designed to a shift effect away from previous reliance upon amorphous concepts such as 'dangerousness', reliance upon formal tools and protocols is not always adhered to in the manner prescribed by the Guidance. The authors noted that 'many discussions were unstructured, even rambling…It was not unusual for members of the panel to revise instrument-driven risk classifications…through a combination of "gut feelings" and professional experience'. The greater concern is that the use of standardised or clinical instruments featured less prominently in panels constituted ad hoc to assess the most dangerous categories of offenders.[34] In short 'the actual practice of offender risk assessment can be crude, partial and technologically unsophisticated.'[35] This vision of MAPPs can be contrasted by David Anderson QC's account of the more rigorous discussions that took place at the CORG where it appeared that 'intra-institutional challenge' and studious adherence to named criteria were observed.[36] Any change in bureaucratic culture would need to be consensual, in order to ensure that the protocols were followed.

In spite of this and for all the pitfalls and inconsistencies that risk-management arguably generates, the consequences of unchecked intuition can be much graver. The most controversial and widely reported failure of criminal justice risk-management occurred in the case of Anthony

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[33] Noel Whitty, 'Risk, Human Rights, and the Management of a Serious Sex Offender' (2007) 28 Zeitschrift für Rechtssoziologie 201, 204.

[34] Hazel Kemshall and Mike Maguire, 'Public protection, partnership, and risk penalty: the multi-agency risk management of sexual and violent offenders' (2001) 3(2) Punishment and Society 237, 248-249.

[35] Noel Whitty, n 33, 208

[36] David Pozen, 'Deep Secrecy' (2010) 62(2) Stanford Law Review 257, 324 and David Anderson QC, 'Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011' (The Stationary Office 2013), [8.11].

Rice. Rice murdered Naomi Bryant whilst released on licence from a discretionary life sentence. In the wake of the incident there was national alarm, and the (then) Prime Minister Tony Blair used Rice's conduct as part of a general attack upon human rights.[37] However, after investigation it transpired that although Rice had been categorized under MAPPA as 'high risk' he had not been the subject of clinical risk assessment using the OASys.[38] Whitty points out that such an assessment may have brought attention to Rice's dangerous behaviours (such as his alcohol use) and prompted re-evaluation of his living arrangements (he was in an unsupervised hostel at the time of the homicide).

Risk assessment is neither wholly scientific, infallible, nor free of conflict. However, the MAPPA guidance and the use of relevant clinical tools, including those tailored to terrorist extremists represents a progressive step towards control of discretion, which is ostensibly absent in the subject matter engaged by the CMP. The importance of this, in procedural fairness terms, can hardly be understated. By instituting administrative framework(s) which categorize the risk(s) posed by terrorism suspects the appearance of subjective unfairness felt by both suspects and their lawyers could be substantially mitigated. This recommendation has sought to make two points about risk assessment: (1) there is no 'one size fits all' approach, and (2) the use of risk frameworks, whilst imperfect, lends a greater degree of transparency and rigour to administrative proceedings than reliance on purely professional or intuitive decision-making. It is not designed to displace or needlessly constrain professional judgements. The adoption of tailored risk management frameworks would allow lawyers in the open session to scrutinize executive decisions against publicly available standards. It would enhance fairness by thrusting conflicts over risk into the spotlight. Such a step may also steadily undermine the 'global' approach to substantive review

[37] Noel Whitty, n 33, 202.

[38] ibid, 203-204.

endorsed by the Court of Appeal in *Shafiq Ur Rehman*[39] which continues to prevent meaningful engagement with executive decisions because of its tendency towards opacity.

Recommendation Two: Strengthening and Extending of the Availability of the Minimum Threshold of Disclosure

This recommendation is, in essence, that courts adopt a more searching standard of disclosure by abandoning the prevailing interpretation of the requirements laid down by *A and Others v United Kingdom*[40] (subsequently adopted in *AF(No.3)*) in favour of a disclosure test which expresses a demand for a more obviously searching inquiry into closed material. The recommendation made here is that it be replaced by the proposed standard in the EU General Court Rules which requires that disclosure to facilitate the other party's case to the 'greatest extent possible' takes place. This test appears on its face to go further than the Strasbourg formulation of 'sufficient information about the allegations…to enable…effective instructions to the special advocate'[41] or the House of Lords' interpretation of that test as requiring a 'core irreducible minimum' of disclosure of allegations.

It is hoped, first and foremost, that the combination of the adoption of this test in conjunction with relevant administrative risk rubrics would lead to disclosure of not only allegations, but information, and evidence as appropriate. When combined with the move towards more transparent risk-management advocated in Recommendation One, it is hoped that the depth of secrecy will be reduced to 'the narrowest possible set of claims' as advocated at the outset of Chapter 1.[42] In the same manner that the distinction between intelligence and criminal evidence

[39] *Secretary of State for the Home Department v Shafiq Ur Rehman* [2000] EWCA Civ 168.

[40] *A and Others v United Kingdom* [2009] ECHR 301, [220].

[41] ibid.

[42] Liora Lazarus, 'The Right to Security – Securing Rights or Securitising Rights' in Rob Dickinson *et al* (eds) *Examining Critical Perspectives on Human Rights* (CUP 2012), 89.

has collapsed and become artificial, a more searching test may facilitate the weakening of what must be, at times, an artificial divide between 'allegations' and 'evidence', discussed at length in Chapter 5. Moreover, the more demanding test of disclosure to the 'greatest extent possible' may well require that courts disclose a much broader range of materials, in the manner that presently happens when judicial review of MAPPs' decisions is sought. For example, when contesting his additional parole licence conditions (which amounted to an exclusion zone, relocation, and a curfew of ten hours per day) parolee David Gunn received a broad range of disclosure. It was ruled that the disclosure exceeded the common law requirement of fairness and amounted to '*substantially more* than a bare gist of allegations made against him.'[43] The content of that disclosure amounted to the following:

> He has now been provided with all the reports of the Panel and their minutes of the 17 October, 27 November, 29 January 2009, 26 February 2009, 26 March 2009 and the resulting OASys report of the 31 March 2009. He has been provided with police intelligence assessments and a witness statement from an officer supporting those assessments.[44]

When we recall the paucity of disclosure from the Home Office to AE in respect of his control order, we can see that the disparity is significant. Gunn's case was decided only a few weeks after the ruling in *AF (No. 3)*, and although Article 6 ECHR was not engaged the court was doubtless mindful of the potential broader consequences of that ruling on the law of procedural fairness. What is therefore interesting, then, is Blake J's view that the disclosure granted by the MAPP and

[43] R *(On the Application of David Gunn)*, n 20, [30], emphasis added.

[44] ibid, [30].

other relevant agencies clearly *exceeded* the 'core irreducible minimum' requirement. The broader purpose of combining a more demanding test with internal administrative fairness requirements would be to secure disclosures akin to the level experienced in Gunn's case whilst continuing to accommodate the level and depth of secrecy necessary to protect the integrity of national security.

Although first-instance judges have built up an impressive expertise in the context of the CMP, Special Advocates continue to express concerns about the reticence displayed by courts to second-guess judgements about either intelligence or the appropriateness of a strategy. Also, as discussed above, potential disparities in interpretation may persist in even the most comprehensive and expert driven risk-assessment frameworks. Such disparities may be reduced by extending the availability of independent intelligence experts across all first-instance courts seized of the CMP, and by giving first-instance judges access to intelligence training. Even with transparent risk-assessment templates, problems of interpretation may persist. For example, in the context of the SIAC, Ian MacDonald identified the failure of the executive to translate intelligence gathered into meaningful evidence suitable for adjudication:

> [Y]ou have a whole lot of mass of information and assessments without there ever being any need to make an effort to turn any of that into evidence. I think that has within it an inherent risk that you end up with quite shoddy intelligence and misleading intelligence.[45]

Although intelligence training for Special Advocates has been made available since 2009, only those adjudicating in the SIAC have access to independent intelligence experts. This may be explained by the fact that SIAC replaced a panel of experts known as the 'three wise men', or it

[45] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, Vol II Evidence (7th Report), (2004-2005, HC 323-II), Q61 Ian MacDonald.

may be a mechanism to mitigate the fact that SIAC has no formal baseline of disclosure. Training should be extended to all judges and a panel of independent intelligence experts should be an available resource judges as and when necessary. The availability of such training and resources may assist judges in standardising approaches to intelligence concepts such as the 'neither confirm nor deny' principle, or the 'control principle' or it may result in different normative reasons being found for differentiating between them. As it stands, the conflicting treatment of these principles by the courts appears to be without a clear basis.

However, recommending increased disclosure is not without its pitfalls. When taken alone, it acutely reflects the naivety of attempting to impose a legality-driven solution upon a problem which intersects with the fault-lines between law and administration. First of all, it might be objected that part of the problem with the existing disclosure test is that it represents no more than a vague abstraction, and any proposed alternative would merely amount to replacing one hopelessly vague standard with another. In addition to this general vagueness objection, there are also practical observations which shed light on the limitations of reforming legal rules on procedural fairness in this area. After all, the reaction by the British courts to the demands of the *A and Others v United Kingdom* decision have differed significantly from the interpretation reached by the EU judicature. This engenders the legitimate concern that recommending a different disclosure standard merely risks replacing one vague standard for another. However, laws of this type (which seek to control official discretion) are not alien to public law (think of 'reasonableness', 'proportionality' or 'legality'. Such rules are also *necessarily vague.*[46] This is because the imposition of categorical standards in this area (i.e. standards that mirror speed limits, or acceptable blood-alcohol ratios) run the risk of fettering legitimate judicial discretion as to what should be disclosed.[47] A categorical standard would potentially endanger national security by mandating too

[46] Timothy Endicott, 'Law is Necessarily Vague' (2001) 7(4) Legal Theory 379.

[47] ibid, 380.

broad a standard of disclosure, or alternatively, by mandating too narrow a standard it would risk circumscribing procedural fairness.

A broader disclosure standard would also remain hampered by certain other rules which inform disclosure under the CMP. Unlike the regime of PII it replaced, 'class' claims remain a feature of the CMP. The nature of a class claim is that the executive can claim that categories of documents (or other information) should not be disclosed without having the information subject to a judicial test to determine the need for secrecy as established in *Conway v Rimmer*.[48] The continuing existence of class-claims would need to be abandoned to facilitate the new disclosure standard effectively. As the case law on the operation of the CMP has continued to grow and develop the executive's commitment to the duties of candour thereunder has been questioned. The challenge alleging failure to discharge the duty of candour was considered to be unfounded,[49] but in the context of the JSA 2013 the courts created a situation whereby the executive could initiate a claim for a CMP (and thus deepen secrecy) on the basis of incomplete information.[50] In addition to this, an enhanced disclosure test would be potentially impeded by the emerging hierarchy of cases which engage claims which are more or less 'deserving' of disclosure. This issue was touched upon in Chapter 3 in the context of the *Tariq* case, and it has also occurred in relation to the operation of the JSA 2013. In CF's case Irwin J ruled that a 'core irreducible minimum' was not required in a section 6 JSA 2013 hearing which related to a 'claim for compensation' which did not 'directly affect the liberty of the subject'.[51] In order to promote the operation of a more stringent standard of disclosure the duty of candour would need to be enforced more rigorously, and the relationship between disclosure and the emerging hierarchy of rights would require re-evaluation. Set against this backdrop, it is also regrettable that the seven principles of guidance

[48] *Conway v Rimmer* [1968] A.C. 910 Lord Morris, 13.

[49] *Kamoka and Others v The Security Service and Others* [2015] EWHC 60 (QB).

[50] *CF v Ministry of Defence and Others* [2014] EWHC 3171 (QB)/

[51] ibid, [23].

offered by Lord Neuberger for using the CMP in *Bank Mellat (No. 1)*[52] have not been accorded greater weight by judges when the opportunity has arisen. This is particularly true of principles five and six. These relate to the extent of closed hearings and the depth of disclosure, respectively, and may well have been intended to enhance the impact of the existing disclosure rule in *Home Secretary v AF (No. 3)*. However, it will be recalled that the application of these principles was effectively dismissed as irrelevant in the context of the first Justice and Security Act 2013 section 6 hearing to determine the necessity of a discretionary CMP.[53]

In terms of substantive law the most obvious hurdle to this recommendation, is perhaps that there is currently no legal pressure on either the courts or Parliament to adopt this course of action. Article 6(1) ECHR obligations are *already satisfied* by the linguistically weaker existing test. It is of course theoretically possible that an Act of Parliament could be passed amending the test with the pursuit of using the ECHR as a 'floor' (as opposed to its current role as a 'ceiling' in this context). However, there is unlikely to be any political appetite for according increased procedural rights to an already marginalised group (terrorist suspects). The reception of the *F and Thomson*[54] decision in both Parliament and the media indicates this would be a fruitless exercise, as it would neither be initiated by the incumbent government, nor would it succeed as a Private Members' Bill. In *F and Thomson* the Supreme Court ruled that the permanent inclusion of sex offenders on a register without recourse to review was incompatible with the procedural fairness dimension of Article 8 ECHR, and that a hearing would be required after a fixed time period to ensure Convention compatibility. Although nothing substantive was guaranteed to individuals included on the relevant register, the decision caused an outcry. Home Office Minister Baroness Neville-Jones stated that 'The Government are appalled by this ruling, which places the rights of sex

[52] *Bank Mellat v HM Treasury (No. 1)* [2013] UKSC 38.

[53] *Mohamed Ahmed Mohamed v Foreign Secretary and Others* [2013] EWHC 3402 (QB) [27].

[54] R *(On the Application of F and Thomson) v Secretary of State for the Home Department* [2010] UKSC 17.

offenders above the right of the public to be protected from the risk of reoffending'.[55] The *Guardian* also reported that Prime Minister David Cameron assured the public he would do 'the minimum necessary' to comply with the Supreme Court's decision.[56] Therefore, in light of recent precedent, it is unlikely that change could be effected by primary legislation. In addition to this, a principle of disclosure would be legally difficult to extend to the SIAC because the jurisprudence of the ECtHR which weighs directly against this innovation, discussed in Chapter 4. On several occasions the Strasbourg Court has stated that immigration measures are firmly part of state prerogatives which do not engage Article 6 ECHR, and in turn, its requisite procedural fairness requirements.

Moreover, as discussed in relation to Recommendation One, the Court of Appeal ruling in *Shafiq Ur Rehman* casts a spectre over the operation of the CMP which may continue to haunt even the most trenchant innovations in the disclosure standard. After all, if courts are unwilling to depart from the 'global approach' to substantive review which is still good law, then, more meaningful disclosures may have little impact in fact as process and substance influence each other symbiotically.[57] In addition to this, the institutional cultures of intelligence agencies the world over suggest that legal reform would be difficult to impose externally. Commentators argue that such agencies exist in a 'legal netherworld'[58] whereby relationships are 'constrained almost exclusively by a shared professional ethos, rather than law.'[59] This hostility to the imposition of regulation by

[55] HL Deb 16 February 2011, vol 725, cols 714.

[56] Alan Travis, 'David Cameron Condemns Supreme Court ruling on Sex Offenders' *Guardian* (16 February 2011), <http://www.theguardian.com/society/2011/feb/16/david-cameron-condemns-court-sex-offenders> accessed 02 June 2015.

[57] *Secretary of State for the Home Department v Shafiq Ur Rehman* [2000] EWCA Civ 168 [44].

[58] Laurence Lustgarten & Ian Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Clarendon Press: Oxford 1994), 377.

[59] Elizabeth Sepper, 'Democracy, Human Rights, and Intelligence Sharing' (2010-2011) 46 Texas International Law Journal 153, 153

outside actors may result in legal reform aimed at securing procedural fairness being 'more symbolic than real'.[60]

CONCLUSION

In the end, the above recommendations suggest means by which we might reinvigorate the soul of justice: 'publicity'[61] by strengthening procedural fairness. They do so in cautionary terms, as there are many barriers to administrative and legal reform in this area. This thesis argued that ensuring procedural fairness is a task for both *law* and *administration*. However, the project of expanding the concept of procedural fairness and making recommendations to improve the operation of executive processes and the CMP takes us only so far. Somewhat ironically, then, the task for future scholars is to discover a legitimate substantive theory of necessary secrecy to enhance fairness in terms of both process and substance. Making secrecy shallower and processes fairer still raises pressing questions about what secrets should remain hidden. Secret courts and secret justice remain a hallmark of authoritarian regimes.[62] The metaphor of the Star Chamber may be overwrought, but scholars would do well to remember what is at stake during closed hearings: criminal sanctions often masquerade in the robes of civil justice.[63] If the present arrangement remains, and we continue to conceptualise these counterterrorism laws and the CMP as something

[60] Peter Gill & Mark Phythian, *intelligence in an Insecure World* (2nd edn, Polity 2012), 175.

[61] Jeremy Bentham, 'Draught of a New Plan for the Organization of the Judicial Establishment in France' in John Bowring (ed) *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring, 11 vols*, (Tait 1843), 316.

[62] Michael R. Pahl, 'Concealing Justices or Concealing Injustice? Colombia's Secret Courts' (1992-1993) 21 Denver Journal of International Law and Policy 431, Frank Askin, 'Secret Justice in the Adversary System' (1990-1991) 18 Hasting's Constitutional Law Review 745-777, Anthony W. Pereira, 'Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile' in Tom Ginsberg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008), 23-56.

[63] Lucia Zedner, 'Preventative Justice or Pre-Punishment: The Case of Control Orders' (2007) 60 Current Legal Problems 174, 174.

outside of the normal parameters of the administrative state, divorced from the risk paradigm which drives national security policy, then we cannot hope to improve procedural fairness.

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