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Part 2 of the Justice and Security Act 2013: the compatibility of closed material proceedings with Article 6(1) of the European Convention on Human Rights

Katy Vaughan

Submitted to Swansea University in fulfilment of the requirements for the Degree of Doctor of Philosophy

Swansea University, 2017

ABSTRACT

The use of closed material proceedings (CMPs), has proliferated since they were first introduced as an exceptional measure to deal with the use of secret evidence. This proliferation has occurred both across borders, and across contexts within the United Kingdom, in despite of the controversy that has surrounded their use. Part 2 of the Justice and Security Act 2013 (JSA) significantly extended the availability of CMPs to all civil proceedings. The introduction of the JSA provoked strong criticisms with regard to both the perceived unfairness of CMPs, and that such an extension of their use cannot be justified. This thesis provides a response to those claims. In addition, this thesis argues that the cross-border and cross-context policy transfer of CMPs to date demonstrates the need to subject these exceptional measures to a rigorous analysis before such policy transfer occurs. This thesis contends nuances can be lost in translation, with the danger of adopting a system that provides a lower level of rights protection. Consequently, this thesis undertakes a rigorous analysis of CMPs under Part 2 of the JSA, and their compatibility with the right to a fair trial guaranteed by Article 6(1) of the European Convention on Human Rights (ECHR).

The European Court of Human Rights (ECtHR)' Article 6(1) jurisprudence provides the framework for the analysis of Part 2 of the JSA, therefore this doctoral research is rooted in the ECtHR and its interpretative principles. However, this thesis will illustrate that the existence of such a framework is insufficient due to tensions that exist between the principles which constitute that framework, and how these tensions are resolved effects the outcome of the case. In this sense, there is indeterminacy in the ECtHR's case law. It is argued here that the tensions need to be reconciled in a way that ensures the level of rights-protection is enhanced rather than restricted.

This thesis will demonstrate that the use of CMPs within the scheme of the JSA is potentially incompatible with the ECHR, however, in line with the ECtHR's jurisprudence the outcome is ultimately dependent on the circumstances of each individual case. This is in itself inherently problematic given the innate secrecy of CMPs. This demonstrates the challenges posed by secrecy, and the concomitant importance of judicial control over the use of CMPs, and general oversight mechanisms.

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Acknowledgments

This PhD process has been a learning experience, with many ups and downs. The biggest lesson I have learnt is that getting to the point of submission would not have been possible without the support of my friends, family, and colleagues.

First I would like to thank my wonderful family. My parents, Sally and Steve, and my brother Toby. Thank you for all the moral support and patience. I really appreciate everything you all do for me and this would not have been the same without you and your madness.

I cannot express how grateful I am to both my supervisors: Professor Helen Quane and Professor Stuart Macdonald. I am also appreciative of all the support I have received from everyone at the College of Law and Criminology at Swansea University. A particular mention goes to David, Bola, Jens, Tabetha, Gemma and Lella. Brilliant colleagues who I now consider to be true friends.

Finally, my beautiful friends. Aled, my PhD partner in crime. We are both ridiculous, but at least we could be ridiculous together. Leanne, you are one of a kind. Thank you for putting up with both me and Aled! You never fail to make me laugh with your craziness, and pick me up when I'm down. And of course: Kayla, Nia, Scott, Emma, Celina, Rhian, Melissa and Cerys. Your unconditional support means the world to me. You guys make me believe I can do anything.

Table of abbreviations

Anti-Terrorism Crime and Security Act 2001	ATCSA
Closed material proceedings	CMPs
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
European Commission of Human Rights	EComHR
Immigration and Refugee Protection Act 2001	IRPA
Joint Committee on Human Rights	JCHR
Justice and Security Act 2013	JSA
Justice and Security Green Paper 2011	*Green Paper*
Public interest immunity	PII
Prevention of Terrorism Act 2005	PTA
Security Intelligence Review Commission	SIRC
Special Advocates Support Office	SASO
Special Immigration and Appeals Commission	SIAC

Special Immigration and Appeals Commission Act 1997	SIAC Act
Terrorism Prevention and Investigation Measures Act 2011	TPIM Act

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Chapter 1 – Introduction

Closed Material Procedures (CMPs) have been subject to controversy since they were first embedded in UK legislation by the Special Immigration and Appeals Commission Act 1997 (SIAC 1997). The use of CMPs is said to make, 'grave inroads into our fundamental principles of open justice and fair trials',[1] and that:

> anybody concerned about the dispensation of justice must regard the prospect of a closed material procedure, wherever it is mooted and however understandable the reasons it is proposed, with distaste and concern.[2]

CMPs were first categorised as an exceptional measure to deal with secret evidence in a small number of cases in the context of appeals against deportation decisions heard in the Special Immigration and Appeals Commission (SIAC). However, despite controversy, the use of CMPs subsequently proliferated in a post 9/11 era into a range of other contexts. In 2013, the Justice and Security Act (JSA) significantly extended their use, and Part 2 of the JSA makes provision for the availability of CMPs in all civil proceedings. The introduction of this legislation provoked strong criticism with regard to both the perceived unfairness of CMPs, and that such an extension of their use could not be justified. This thesis will examine the compatibility of CMPs, as provided for by Part 2 of the JSA, with the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights (ECHR). Chapter 1 serves as the introduction to this thesis. It will begin by providing a background to the topic of CMPs and the JSA, and the motivation behind the study of the compatibility with Article 6 ECHR. Section 1.2 of this chapter proceeds to outline the research statement, and the core research objectives that flow from the central hypothesis of this thesis before section 1.3 presents this thesis' claim to originality. Finally, section 1.4 outlines the methodological approach taken to this doctoral research and the structure of the thesis that is to follow.

1.1. Background and motivation

CMPs are used in cases involving sensitive material, the production of which is considered 'so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing'.[3] During a CMP a court or tribunal receives

[1] *Al Rawi v The Security Service and others* [2011] UKSC 34, at [94] per Lord Brown.

[2] *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 39, at [51] per Lord Neuberger.

[3] Ibid, at [1] *per* Lord Neuberger.

evidence and submissions which are not disclosed to one of the parties' subject to the proceedings, or their legal representation, therefore denying them the opportunity to participate fully in the proceedings. Lord Dyson illustrated the essence of a CMP in *Al Rawi v The Security Service*:

> The closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see the closed documents; he cannot hear or read the closed evidence or the submission made in the closed hearing; and finally, he cannot see the judge delivering the closed judgment nor can he read it.[4]

The innate secrecy inherent in CMPs means that they do not fit easily within the common law notion of due process, and represent a departure from the constitutional principle of open justice.[5] They are an exception to the general rule that,

> a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from in whole or in part.[6]

In order to enhance procedural fairness, a special advocate is appointed to represent the interests of the individual excluded from the CMP. Special advocates are a key feature of CMPs across the contexts and jurisdictions in which they are now utilised. However, special advocates face a number of limitations which are said to affect their ability to carry out their role effectively. Thus, it has been asserted that due to the,

> inherent frailties of the special advocate system, the challenge that the special advocate can present is, in the final analysis, of a theoretical, abstract nature only. It is self-evidently and admittedly, a distinctly second-best attempt to secure a just outcome to proceedings.[7]

CMPs and the use of special advocates were embedded in UK legislation by the Special Immigration and Appeals Commission (SIAC) Act 1997. The SIAC Act was the UK Government's response to its defeat in *Chahal v United Kingdom.*[8] CMPs were first characterised as an exceptional mechanism to deal with the use of sensitive material in

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[4] *Al Rawi* (n 1), at [35].

[5] See David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate, 2008) 276.

[6] *Official Solicitor v K* [1963] Ch 381, at 405 *per* Upjohn LJ.

[7] *Al Rawi* (n 1), at [93] *per* Lord Kerr.

[8] (App 22414/93) (1996) 23 EHRR 413. [Hereinafter, '*Chahal*'].

SIAC and, 'originally intended to be used in a handful of deportation cases'.[9] SIAC is a specialist tribunal, which was set up to deal with matters of immigration including appeals against deportation and deprivation of citizenship decisions where those decisions are taken in the interests of national security. However, the use of CMPs and special advocates subsequently expanded into a range of contexts and became a common feature of cases involving national security.[10] In 2010 the Joint Committee on Human Rights (JCHR) reported that at that time there were twenty-one contexts in which special advocates may be used in the UK, and they had been used in fourteen of these.[11] The contexts where CMPs and/or special advocates are goes far beyond the original immigration context, into areas such as counterterrorism and employment law.[12] Significantly, the use of CMPs and/or special advocates went beyond that of specialist tribunals and into more conventional civil and criminal proceedings. This thesis terms the expansion within the UK across context as 'cross-context policy transfer'.

In 2012 the UK Government published the *Justice and Security Green Paper* (*Green Paper*), which contained its proposals to extend the availability of CMPs to all civil proceedings. Part 2 of the JSA now makes such a provision. Unsurprisingly, such an extension of the use of CMPs provoked strong criticism, particularly amongst human rights groups. In response to the vote of approval given to the Justice and Security Bill in March 2013, Amnesty International's UK Campaigns Director warned of a 'terrible day for British justice'.[13] Those who opposed the JSA reiterated criticism of CMPs in relation to the departure from the fundamental common law principles of open justice and fair trials; and, questioned the ability of special advocates to mitigate this perceived

[9] Eric Metcalf, '"Representative but not Responsible": the use of Special Advocates in English Law' (2004) 1 *JUSTICE Journal* 11.

[10] Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) MLR 73(5) 824, 824.

[11] JCHR, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* (2009-10, HL 86, HC 111) [hereinafter "*JCHR Seventeenth Report*"] para 58. See also: JUSTICE, Secret Evidence (2009), para 79.

[12] For a full list see: JUSTICE *Secret Evidence* (2009), para 79. The expansion of the use of CMPs is outlined in detail in chapter 2, section 2.6.

[13] 'Secret courts vote: 'Terrible day for British justice' (https://www.amnesty.org.uk/press-releases/secret-courts-vote-terrible-day-british-justice) Last accessed, 5 May 2017.

unfairness due to the limitations they face in carrying out their functions. In addition, concerns were advanced in relation to the significant expansion of the availability of CMPs to all civil proceedings. Martin and Bray identify this expansion as the 'creep of "secret justice" in the United Kingdom,'[14] and argue that a 'jurisprudence of secrecy' is emerging.[15]

The enactment of the JSA confirms that whereas CMPs were once considered an exceptional mechanism, they are now the predominant means to deal with secret evidence in the UK. Consequently, this thesis argues that the JSA presents new challenges in that these exceptional measures have been brought into ordinary judicial processes. This warrants the legislation to be subjected to the rigorous analysis taken by this thesis. In order to do this the legislative framework of Part 2 of the JSA, including its drafting and parliamentary passage, and its application in the small body of existing case law currently emerging, will be examined. This is done within the framework of the ECtHR's Article 6(1) jurisprudence, which is necessary due to the ambit of the legislation to provide for the use of CMPs in all civil proceedings, which requires its compatibility with the civil limb of Article 6.

In addition to the cross-context policy transfer within the UK, the UK's model on CMPs and special advocates has been adopted in other jurisdictions including in the Commonwealth, Europe and Israel. This thesis terms such an expansion as 'cross-border policy transfer'. This follows a recognised trend of the cross jurisdictional borrowing of legal mechanisms, by and from, the UK in the national security and counter-terrorism context.[16] Consequently, it would seem that if the JSA is deemed to

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[14] Greg Martin and Rebecca Scott Bray, 'Discolouring Democracy? Policing, Sensitive Evidence, and Contentious Deaths in the United Kingdom' (2013) 40:4 *Journal of Law and Society* 624, 625.

[15] Ibid, 626.

[16] 'Borrowing' is used as a metaphor to capture the phenomena of constitutional transplants, see: Vlad Perju, 'Constitutional Transplants, Borrowing, and Migrations' in Michael Rosenfield and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), p.1307. See also: Kent Roach, 'The Post 9/11 Migration of Britain's Terrorism Act 2000' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006). Roach refers to this concept as 'migration' and in this chapter, considers the influence of the definition of terrorism found in the British Terrorism Act 2000 on post 9/11 anti-terrorism ideas in Canada, Australia, Hong Kong, and South Africa. See also: Rayner Thwaites, 'A coordinated judicial response to counter-terrorism? Counter-examples' in

be operating effectively then it will be transplanted to other jurisdictions.[17] Although so far, the UK is the first to legislate for the significant extension of the availability of CMPs to all civil proceedings.[18]

Whilst there are positives to cross-border policy transfer, one of the dangers is that legal mechanisms are transplanted without a rigorous analysis. The result being that such nuances can be lost in translation, presenting an unsatisfactory result for the particular context or jurisdiction. An illustrative example of this is the establishment of CMPs and special advocates in SIAC. SIAC was the outcome of a cross-border policy transfer from Canada, following the UK government's defeat in *Chahal*. In its judgment in *Chahal* the ECtHR made reference to a system of special advocates used in Canada at the time in a proportionality analysis. The UK government interpreted this as signalling that such a system to deal with the use of secret evidence would be Convention compliant.[19] However, the system adopted in the UK omitted key safeguards provided for in the Canadian system, and this cross-border policy transfer has been widely criticised. Such criticisms have focused on the ECtHR and the UK Government's poor comparative methodology,[20] as opposed to the choice of policy transplanted. Thus, evidencing an example of the negative effect of a cross-border policy transfer without a rigorous analysis of the policy that is transferred. The wider effects of this are illustrated further by the sharing of practices between the UK and Canada. Subsequently, Canada adopted the UK model of CMPs and special advocates in SIAC, omitting the safeguards

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Mark B. Salter (ed), *Mapping Transatlantic Security Relations: The EU, Canada and the War on Terror* (Routledge, Oxon, 2010); and, Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159.

[17] John Jackson, 'The Role of Special Advocates: Advocacy, due process and the adversarial tradition' (2016) 20:4 *International Journal of Evidence & Proof* 343, 344.

[18] David Jenkins, 'The Handling and Disclosure of Sensitive Intelligence: Closed Material Procedures and Constitutional Change in the 'Five Eyes' Nations' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and* Terrorism (Routledge, Oxon, 2015), 281.

[19] This view taken by the UK government is reflected in the SIAC Act's legislative passage which is addressed further in chapter 2, section 2.4.

[20] See in particular: David Jenkins, 'There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology' [2011] *Columbia Human Rights Law Review* 279. This is discussed further in chapter 2, section 2.23

that were present in the original Canadian system adopted in the UK.[21] A comparative study of the use of CMPs and special advocates in different jurisdictions is beyond the scope of this thesis, of which the focus is CMPs within the scheme of the JSA in the UK. Nonetheless, the issue of cross-border policy transfer is of relevance in relation both to informing the choice of the particular study conducted by this thesis; and, the wider lessons that it seeks to demonstrate. This thesis pre-empts the borrowing of the JSA by other jurisdictions, contributing to the 'creep of secret justice' on a global scale; and, acknowledges the unsatisfactory results that this can produce which are already evident in the transplanting of CMPs and special advocates across borders to date. Consequently, the rigorous analysis of the legislative framework for Part 2 of the JSA taken by this thesis is of vital importance before such cross-border policy transfer occurs. This leads to the question as to why this thesis provides such an analysis within the framework of ECHR standards of fairness.

One of the predominant reasons for examining the compatibility of CMPs as provided for by the JSA with ECHR standards of fairness also stems from the origins of CMPs, and the judgment in *Chahal*. The legislative passage of the SIAC Act demonstrates the influence that the ECtHR's judgment had on the decision to adopt the Canadian model in the establishment of SIAC. This thesis contends that the adoption of the Canadian model not only demonstrates the influence of cross jurisdictional trends on the UK, but that it also highlights the role that the ECtHR itself can play in this process within and between the states of the Council of Europe. The relevance of *Chahal* in the decision to embark on the study of the compatibility with the ECHR is that it shows that the ECtHR can, whether directly or indirectly, act as a vessel for cross-border policy transfer. More importantly, how the ECtHR can potentially facilitate (albeit unintentionally) such a transfer with an outcome which omits key safeguards, and poses the risk of providing a lower level of rights protection to individuals. Consequently, it is not only important to engage in an in-depth examination of CMPs under the JSA in anticipation that the extension of their availability to civil proceedings will be copied in other countries. It is also important to engage in this examination in a way that highlights the potential human rights issues, specifically issues of compatibility with the ECHR.

[21] See: *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 9.

The use of CMPs and special advocates has already faced challenges at Strasbourg. However, complaints have been brought under Article 5(4), Article 8 or Article 13. This thesis evaluates this line of cases to discern the framework in which the ECtHR currently examines CMPs and special advocates. This evaluation will reveal that the ECtHR so far accepts that the use of CMPs interferes with the Convention. However, the use of special advocates has the potential to justify such an interference. As a result, special advocates used in CMPs are examined in a proportionality analysis within the framework of the equality of arms and the right to adversarial proceedings. In such an analysis, special advocates have been perceived by the ECtHR as a positive mechanism capable of ensuring the system is proportionate. Significantly, there are recent admissibility decisions challenging the use of CMPs and special advocates which have been rejected as manifestly ill-founded.[22] These decisions are particularly worrying raising the possibility for the development of jurisprudence whereby challenges to CMPs and special advocates will not make it past the first hurdle at Strasbourg. The outcome of these challenges seems surprising given that CMPs have been *criticised* on human rights grounds, yet this case law suggests that with the use of special advocates CMPs can in fact be *justified* on human rights grounds.[23] Furthermore, the use of CMPs and special advocates are still considered domestically as a challenge to the traditions of advocacy in the adversarial system.[24] Accordingly, this thesis contends that the approach of the ECtHR to its application of the ECHR to CMPs and special advocates warrants closer examination; and, that alternative frameworks to examine the system should be sought with a view to a more stringent application of the ECHR.

The extension of the availability of CMPs to all civil proceedings has also, in part, influenced the decision to examine the compatibility with the ECHR. At present, there are no cases whereby a challenge to CMPs has been brought under Article 6. One reason for this could be that the types of cases where CMPs have so far been utilised

[22] *IR v United Kingdom (Admissibility)* (App 14876/12, 63339/12) (2014) 58 EHRR SE14; and, *Khan v United Kingdom* (Admissibility) (App 35394/97) (2014) 58 EHRR SE15.

[23] See: Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 78:6 MLR 913; and, Jackson (n 17).

[24] Jackson (ibid).

have involved immigration issues, which do not necessarily engage Article 6.[25] In this respect the wider ambit of the use of CMPs under the JSA could be deemed to present opportunities at an ECHR level. CMPs are available in all civil proceedings and therefore are required to be compatible with the civil limb of Article 6. A rights-based analysis of the legislation coupled with the potential of a new challenge based on Article 6 could potentially lead to the emergence of a new body of jurisprudence offering a higher level of rights protection. This has contributed to the decision for this doctoral research to aim to highlight the potential human rights issues with the JSA, and to seek to provide an aid to interpretation of Article 6(1) to CMPs under this legislation. It is hoped that this would be of use to both practitioners bringing challenges to the JSA, and judges in their application of Article 6(1) in this context. The following discussion in section 1.2 will highlight explicitly the central hypothesis of this thesis; and, the core research objectives.

1.2. Thesis statement and objectives

The central hypothesis of this thesis is that the use of CMPs within the scheme of the JSA is potentially incompatible with the ECHR, however, in line with the ECtHR's jurisprudence the outcome is ultimately dependent on the circumstances of each individual case. This is in itself inherently problematic given the innate secrecy of CMPs. Three core objectives flow from this position. The first being the rigorous examination of the legislative framework for the JSA, with a view to identifying potential human rights concerns and issues with the relevant Article 6(1) guarantees. At the time of enactment, only some of the issues raised by critics of the JSA were given human rights consideration. On the contrary, this thesis contends that some of the criticisms of the legislation were largely overlooked as raising issues with human rights protection. In this manner, this thesis maintains that the issues with the legislation can be constructed in a different way and therefore given a different understanding. It is argued here that framing debate in terms of human rights standards can help enhance and move debate progressively forward. In addition to the focus on the CMP itself, and the extension of its availability under the JSA, framing the debate in terms of human

[25] *Maaouia v France* (App 39652/98) (2001) 33 EHRR 42; *Mamatkulov v Turkey* (Grand Chamber) (App 46827/99 46951/99) (2005) 41 EHRR 25; *Lupsa v Romania* (App 10337/04) (2008) 46 EHRR 36; *Atkas v Germany* (Admissibility) (App 56102/12) (2014) 58 EHRR SE3.

rights will also enable an analysis and possible re-evaluation of the minimum standards of procedural fairness that should be applied in this context.[26]

The second core objective is to provide an analysis and critique of the ECtHR's Article 6(1) jurisprudence in relation to the relevant fair trial guarantees, with reference to national security and sensitive issues in civil proceedings. This analysis seeks to examine in particular the ECtHR's use of its interpretative principles in this context, and demonstrate the tensions that exist within and between those principles. For example, there are two categories of the ECtHR's interpretative principles which appear to conflict in their aims and underlying rationale. The first category are presented by this thesis as the enhancing principles, their purpose being the further realisation of rights protection. These include the principle of effectiveness which is the notion that the Convention was intended to guarantee rights that are 'practical and effective' as opposed to 'theoretical or illusory'.[27] Thus, seeking to ensure the continued relevance of the Convention rights in an ever-changing society. This approach almost automatically leads to an expansive interpretation. On the other hand, this thesis terms the second category of the ECtHR's interpretative principles the deferential principles. This deferential standard of review is a means of the ECtHR retaining democratic legitimacy, and demonstrates the willingness to defer to the decisions of national authorities in relation to their assessment of their obligations under the Convention. This approach of the ECtHR can lead to a more restrictive interpretation of the Convention rights, therefore creating a tension with the aim of the enhancing principles. This thesis will demonstrate that the approach the ECtHR takes to reconciling such tensions can have a significant impact on the outcome of a case, this has resulted in indeterminacy within the ECtHR's jurisprudence.

Finally, this thesis aims to provide a structured framework for the assessment of compatibility of CMPs under the JSA with the relevant Article 6(1) guarantees, the

[26] Kelman has argued that uncertainty remains regarding the minimum level of disclosure which must be given to a party to proceedings where 'fundamental rights' are at stake. See: David Kelman, 'Closed Trials and Secret Allegations: An Analysis of the 'Gisting' Requirement' (2016) 80:4 *The Journal of Criminal Law* 264.

[27] *Airey v Ireland* (App 6289/73) (1979-80) 2 EHRR 305; *Artico v Italy* (App 6694/74) (1981) 3 EHRR 1, para 33; *Imbrioscia v Switzerland* (App 13972/88) (1994) 17 EHRR 441, para 38; *Wos v Poland* (App 22860/02) (2007) 45 EHRR 28, para 99; *Salduz v Turkey* (App 36391/02) (2009) 49 EHRR 19, para 51; *Stanev v Bulgaria* (App 36760/06) (2012) 55 EHRR 22, para 231.

purpose being to provide an aid to interpretation. It is intended to provide a pragmatic approach, which corresponds with the ECtHR's context-specific approach to interpretation. This thesis recognises that not every line of argument will be relevant in each case and this will be dependent on the circumstances. This aid to interpretation is established both with a view to an assessment based on the ECtHR's current approach to interpretation, and to advance an alternative framework by which the JSA can be examined with the desire to attract a more stringent protection of the fair trial guarantees. This is in keeping with the very spirit of human rights treaties, which is the further realisation of human rights.[28] It will be demonstrated that the key challenge is applying the Article 6 guarantees in the first-place due to the secrecy inherent in CMPs and the ECtHR's context specific approach to interpretation. This highlights the importance of the initial decision-making procedure and general oversight mechanisms.

1.3. Originality

This thesis constitutes an original piece of doctoral research, and this chapter presents the claims to originality as existing on three levels. The first is the legislative level within the UK. The JSA is recently enacted, therefore there has been little contribution in the academic literature to date. In addition, this thesis complements existing literature on CMPs and special advocates prior to the enactment of the JSA by considering how the system is presented in addition to the system's limitations. The second, is at the ECHR level. There is an existing body of work on both the ECHR and Article 6. However, this thesis differs both in terms of the terrain covered, and its normative arguments that it seeks to advance. Finally, the third level of originality is at a policy level. This thesis acknowledges the existence of cross-context and cross-border policy transfer, and the resulting normalisation of exceptional measures. These are not new phenomena, existing literature highlights these trends, and has warned of the dangers. However, this thesis focuses on the next stage of the process. It argues that CMPs, as an exceptional mechanism, have become normalised and that their use has extended across borders and contexts. Therefore, it demonstrates that the concerns advanced in the existing literature are well-founded. The following discussion proceeds on the basis of

[28] See the Preamble to the ECHR.

these three levels, and demonstrates how this thesis makes an original contribution to the academic literature with reference to existing scholarship in these areas.

In relation to the first level of originality, one of the central aims of this thesis is to provide a rigorous examination of the legislative framework for the use of CMPs and special advocates within the scheme of the JSA. This is in itself an original contribution to the academic literature, of which there is a limited body of existing work given the JSA's recent enactment.[29] In addition, this thesis seeks to build on the existing literature on CMPs and special advocates prior to the JSA. It will examine not only the issues with the system but how the system is presented. In this sense, an alternative framework for the examination of the use of special advocates' compatibility with the ECHR is advanced. The majority of the existing literature examining the use of CMPs in the UK focuses on the use of special advocates, and the implications of the limitations placed on their ability to carry out their functions effectively.[30] It has been stressed that special advocates are not the cause of the perceived unfairness, this is attributed to the use of the CMP.[31] Consequently, special advocates are presented as a tool which can help to mitigate the perceived unfairness of the CMP; and, therefore as a safeguard for the individual excluded from the CMP. As a result, the criticisms surrounding the limitations placed on special advocates are framed in terms of implications for the effectiveness of the safeguard that they can provide. In effect, there is a two-stage

[29] Tom Hickman and Adam Tomkins, 'National Security Law and the Creep of Secrecy: A Transalantic Tale' in Christopher McCrudden, Liora Lazarus and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart, 2014); Adam Tomkins, 'Justice and Security in the United Kingdom' (2014) 47(3) *Israel Law Review* 305; Clive Walker, 'Living with National Security Disputes in Court Processes in England and Wales' in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds) *Secrecy, Law and Society* (Routledge, 2015).

[30] For example: John Ip, 'The Rise and Spread of the Special Advocate' [2008] *Public Law* 717; Martin Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) *Civil Justice Quarterly* 314; Joseph Chedware, 'Assessing Risk, Minimising Uncertainty, Developing Precaution and protecting Rights: an Analysis of the Prohibition Between Terrorists Suspects and Special Advocates' (2012) 12 *Oxford University Commonwealth Law Journal* 33; Tamara Tulich, 'Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom' (2012) 12:2 *Oxford University Commonwealth Law Journal* 341; Cian Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 KLJ 19; Jackson (n 23).

[31] Chedware (n 30), 41.

analysis. The first stage being to consider the impact of CMPs on the standard of fairness. The second stage is to address the effectiveness of the safeguard that special advocates can provide, given the restrictions on their ability to carry out their functions. In contrast, this thesis proposes that a holistic approach should be taken in an analysis of the operation of CMPs, which includes the central role played by special advocates, and the effect of the limitations they face on their ability to carry out this role effectively. It is not disputed that special advocates play a vital role in CMPs and are a mitigating tool with regard to the perceived unfairness. Nonetheless, the overall effect still falls short of the acceptable standard of fairness that should be sought to be achieved; and, it is this overall effect that should be the focus of an analysis of the system and rights protection.

A two-stage approach to analysis is inherent in the ECtHR's reasoning when it interprets the Convention's qualified rights. At the first stage, the ECtHR examines whether there is an interference with the right. If it is established that there is such an interference the second stage in the ECtHR's analysis is to examine whether this interference can be justified. The current presentation of special advocates and approach to the examination of the limitations they face is reflected in the ECtHR's analysis of the compatibility of CMPs with the ECHR. CMPs are considered at stage one of the analysis, and have been deemed to constitute an interference with the ECHR. The limitations that special advocates face are examined at the second stage of the ECtHR's reasoning in a proportionality analysis, and have been capable of justifying the interference. The ECtHR has found that the use of special advocates can potentially constitute an adequate safeguard and are capable of counterbalancing the negative impact of CMPs. For example, in *A v United Kingdom*,[32] the Grand Chamber of the ECtHR asserted that the use of special advocates in a CMP, 'could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing'.[33]

Nanopolous is critical of European Human Rights Law in respect of CMPs, her central claim is that the ECtHR has not acted as a constraint on the normalisation of CMPs, instead it has gradually legitimised and furthered the use of the mechanism.[34] Along the

[32] (Grand Chamber) (App 3455/05) (2009) 49 EHRR 29.

[33] Ibid, para 220.

[34] Nanopolous (n 23).

same lines, Jackson has suggested that a 'consensus' is emerging that the use of special advocates may be justified on human rights grounds in that they bring a 'measure of procedural fairness' to CMPs.[35] Jackson's article addresses the paradigm between human rights law and the adversarial tradition, and specifically investigates whether the use of special advocates can lead to a change in our understanding of the adversarial tradition in the UK. This thesis shares a similar motivation. However, the focus is on the effect on our understanding of rights protection and how this can be maximised. It does not go as far as to argue that the normalisation of CMPs is solely attributed to European Human Rights Law or that the ECtHR has legitimised CMPs. Nevertheless, this thesis acknowledges the role that ECtHR jurisprudence can play in contributing to, and possibly restraining, the normalisation of CMPs and special advocates. It seeks to complement Nanopolous' argument and go beyond this by considering a holistic approach to an analysis of the impact of CMPs *and* special advocates, on ECHR standards of fairness. This would involve a different presentation of the limitations that special advocates face, with the view that these should be examined by the ECtHR at the first stage of its examination as to whether there is an interference with the ECHR. As a result, if the ECtHR finds the system constitutes an interference with the ECHR, the UK government would need to establish that adequate safeguards existed to counterbalance the detriment to the individual, in addition to the appointment of special advocates. Therefore, this thesis advances an alternative framework for the examination of the use of special advocates and compatibility with the ECHR. The position is that this could lead to a more stringent application of the ECHR in this context. It follows that this thesis also makes a contribution to the existing literature on the ECHR and Article 6, which is outlined in the subsequent discussion as the second level of the claim to originality.

Originally the research of the ECtHR's Article 6 jurisprudence was undertaken with the view to establishing a standard of fairness that can be applied to the use of CMPs under the JSA. Consequently, the Article 6 ECHR jurisprudence provides the framework for the analysis. It soon became apparent during the course of the research that this framework can only go so far, because there can be tensions between and within the principles that constitute such a framework. This thesis examines how the ECtHR has

[35] Jackson (n 17), 343.

resolved these conflicts in this particular context, and uses this to highlight wider concerns about the ECtHR's interpretation of the Convention which could potentially weaken rights protection as opposed to enhancing it. Therefore, this thesis seeks to make a wider contribution to human rights scholarship specifically in relation to the ECHR and Article 6. It differs from the existing literature both in terms of the terrain covered, and the normative arguments it seeks to advance. With regard to its terrain, this research provides a critique of the Article 6 jurisprudence predominately in civil proceedings with reference to national security considerations. Significant contributions to the Article 6 academic literature already exist both directly,[36] and within broader studies on the ECHR.[37] However, much of the scholarship directly on Article 6 focuses predominately on the application of the criminal fair trial guarantees, taking a rights-by-rights approach to analysis.

Leanza and Pridel's work examines the Article 6 guarantees in both criminal and civil proceedings. It is an important and useful resource as it addresses the scope of the applicability of Article 6, the guarantees that make up the right to a fair trial, conflicts between these individual guarantees, and provides recommendations to domestic courts to ensure domestic processes operate within the boundaries of Article 6. The aim is to provide a detailed understanding of all aspects of Article 6. This doctoral research differs in ambition, it focuses on a specific context as opposed to all aspects of Article 6. The aim is not merely to provide an understanding of what the Article 6 ECHR currently says and how it is currently applied, rather it aims to provide an argument as to why certain guarantees have certain shortcomings. The work of Goss differs to the leading Article 6 texts, in that he takes an issue based approach to his analysis of the

[36] Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff, 1993); Stefan Treschel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2006); Sarah Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing, 2007); Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice*, 3rd ed (Sweet and Maxwell, 2012); Piero Leanza and Ondrej Pridal, *The Right to a Fair Trial* (Kluwer Law International, 2014); Ryan Goss, *Criminal Fair Trial Rights* (Hart Publishing, 2014).

[37] Pieter van Dijk and GLH van Hoof, *Theory and Practice of the European Convention on Human Rights*, 4th edn (Intersentia, 2006); Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (3rd ed, Oxford University Press, 2014).

ECtHR's application of the criminal fair trial guarantees,[38] in contrast to the rights-by-rights approach. This is an innovative method and contributes significantly to existing scholarship. This thesis is generally in agreement with Goss' conclusions regarding the uncertainty, inconsistencies, and incoherence often evident in the ECtHR's Article 6 jurisprudence. It seeks to complement this by highlighting the consequences of this for the outcome of cases, and argues that the effect that this reasoning has results in indeterminacy. Therefore, the normative argument sought by this thesis is different to Goss' as is the specific context, namely civil proceedings with reference to national security and sensitive issues as opposed to the criminal guarantees.

There is also existing scholarship examining fair trial rights in a specific context, and at first glance some of these studies appear to share the same aspirations. Nevertheless, they concern different legal instruments as the subject of analysis. For example, Pati has undertaken a study of fair trial rights in the area of international terrorism.[39] Pati focuses on the due process rights of those convicted of crimes, under universal and regional human rights regimes, customary international law and international humanitarian law. As opposed to the ECHR, and the applicability of its fair trial guarantees to civil proceedings in the national security context. Hovell has examined the need to develop a due process framework for Security Council targeted sanctions.[40] The study aims to develop procedural principles in this international institutional context. Nevertheless, this thesis does not purport to develop a new framework as this is already provided by the ECHR because the research is rooted in the ECtHR and its interpretative principles used in its Article 6 jurisprudence. This research reveals that the existence of a framework is insufficient due to tensions that exist between the principles which constitute that framework, and how these tensions are resolved effects the outcome of the case. This thesis argues that this results in indeterminacy in the ECtHR's jurisprudence, and as a result the existence of the framework is not enough.

One of the broader lessons to take from this research is the general danger of cross-border, and/or cross-context policy transfer without a nuanced analysis, and the effect that this can have on the future of rights protection in general. It uses the examination of

[38] Goss (n 36).

[39] Roza Pati, *Due Process and International Terrorism* (Nijhoff, 2009).

[40] Devika Hovell, *The Power of Process* (Oxford University Press, 2016).

the expansion of CMPs and special advocates within the UK, and the approach of the ECtHR in its interpretation and application of Article 6(1), in order to demonstrate this. This thesis purports that CMPs, even with the use of special advocates, are exceptional measures in the sense that they deviate from the adversarial tradition and the perceived normal in terms of due process and fair trial guarantees. It is the expansion and so-called normalisation of such exceptional measures which could potentially result in a downgrade of rights protection. The theme of normalisation of exceptional measures, and cross-border, and/or cross-context, policy transfer is presented here as the third level to this thesis' claim to originality, although this is not in itself a new concept arising in the academic literature.

There is an existing body of scholarship that seeks to highlight and explain cross border policy transfer, which include both the migration of legal mechanisms and constitutional norms.[41] As noted by Choudry, 'the migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice.'[42] The edited collection of Fabbrini and Jackson illustrates the trend of cross border policy transfer in response to threats of terrorism. The studies in this work seek to discern the causes for such policy transfer and advocates for mechanisms to ensure human rights compliance. This thesis differs from such a study in that it does not purport to examine justifications for cross-border policy transfer. It is accepted that such trends exist and are relevant to this research, and that in the context of CMPs the policy transfer across borders already exists. However, this thesis is not a comparative study alike the existing literature on this topic. It pre-empts the danger of the JSA being transplanted into other jurisdictions and therefore advocates for the importance of its in-depth examination.

On the topic of normalisation of exceptional measures,[43] ni Aolan and Gross' edited collection entitled *Guantanamo and Beyond* focuses on the use of exceptional courts

[41] Alan Watson, *Legal Transplants: An approach to Comparative Law* (1974); Federico Fabbrini and Arianna Vedaschi, *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing Limited, 2013); Choudhry (n 16).

[42] Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Choudhry (n 16) 16.

[43] On the discourse of exceptionalism in the war of terror see: A. W. Neal, *Exceptionalism and the Politics of Counter-Terrorism. Liberty, Security and the War on Terror* (Routledge, 2011).

and military commissions.[44] They refer to the use of these judicial processes as part of the phenomena that they term 'due process exceptionalism'. This thesis is in agreement with the use of that term for the State's modification of well-established principles and rules of due process. Whilst the collections in the book focus the use of exceptional courts, this thesis suggests that the use of CMPs can also be located within this phenomenon.

The JSA's provisions for the use of CMPs are not providing for the use of 'exceptional courts' *per se*, and Walker makes the point that this has not been a part of the UK's counterterrorism agenda.[45] Instead, providing for the use of CMPs which are presented by this thesis as exceptional mechanisms, in all civil proceedings places 'due process exceptionalism' within the realms of ordinary judicial processes. Consequently, this thesis goes beyond the themes that come through in ni Aolan and Gross' book, which examines the relationship between exceptional courts and ordinary judicial processes; and, warns of the danger for the exceptional to contaminate the 'normal'. The position taken by this study is that, with regard to CMPs, the exceptional mechanism has become the norm and therefore their concerns were well-founded. This doctoral research demonstrates that the JSA has facilitated this contamination, and that this reinforces the importance of a rigorous analysis of the analysis and its compatibility with human rights standards. It will be argued that normalisation of exceptional mechanisms such as CMPs presents the danger of a long-term effect on diminished rights protection; and, that the way in which the ECtHR reconciles the tensions between the interpretative principles could play a vital role in such a development.

1.4. Methodology and thesis structure

The JSA is at the early stages of being embedded in the UK's legal system. Hence, the focus of this thesis is on the legislative framework for the operation of the legislation, as opposed to the operation of the legislation itself. Consequently, this thesis primarily takes a doctrinal approach to research. However, this is not to suggest that it will simply

[44] Fionnuala ni Aolan and Oren Gross (eds), *Gunatanamo and Beyond: Exceptional Courts and Military Commissions in Comparative and Policy Perspective* (Cambridge University Press, 2013).

[45] Clive Walker, 'Terrorism Prosecution in the United Kingdom: Lessons in the Manipulation of Criminalization and Due Process' in ni Aolan and Gross (eds) (n 44).

engage in a discussion of what the law *is*, based on a current understanding of the ECtHR's jurisprudence and the use of CMPs within the scheme of the JSA. The doctrinal approach is taken in order to extract wider theoretical arguments. Neither is the doctrinal approach taken by this thesis meant to disparage the value of other approaches to research in this area. The significance of an examination of the implementation of the legislation will be invaluable to an evaluation of the ultimate compatibility with Article 6 in specific cases. As the system is embedded further into UK law, the operation of the legislation will form the basis for further research into the implementation of the JSA.

The research for this thesis was conducted in primarily three stages. The first stage was the analysis of CMPs and their expansion within the UK, and the legislative framework for Part 2 of the JSA. This enabled the identification of the perceived human rights concerns, and potential violation of the Article 6 fair trial guarantees which were examined at stage 2. Stage one involved a review of the academic literature on the use of CMPs and special advocates; and, the leading UK case law, statutory provisions, and parliamentary and governmental reports existing prior to the introduction to the JSA. From this research, it was possible to identify the key concerns with the system including the central role of special advocates and the limitations that they faced. This research was then systemised based on the identification of the concerns with the system that existed at the time, including the issue of its expansion across contexts within the UK. This was important as it contextualised the topic and assisted in an understanding of the introduction of the JSA, and the resistance it faced from those who opposed it. This research examined the legislative framework of Part 2 of the JSA, from the publication of the government's proposal in the *Green Paper*, the responses to the *Green Paper*, and the JSA's parliamentary passage up to the point of its enactment. The sources used to enable this part of the doctoral research were predominately governmental and parliamentary reports, the responses to consultation in relation to the *Green* Paper, and the Parliamentary debates during the course of the JSA's passage through parliament. This research led to a categorisation of the main concerns with the introduction of this new legislation, which informed the analysis of CMPs under Part 2 of the JSA and the identification of the relevant Article 6(1) guarantees.

The second stage of research was a systematic analysis of the ECtHR's Article 6(1) jurisprudence, the focus being on the relevant fair trial guarantees to examine the

compatibility of CMPs within the scheme of the JSA. This second stage included the interpretation of the ECHR in this context, and enabled a rigorous review of the ECtHR's approach to security and sensitive issues in civil proceedings. The main challenge in conducting this stage of the research was the sheer volume of cases brought before Strasbourg under Article 6, presenting the challenge to the process of selecting those judgements which are to be made the subject of analysis. Thus, the need to narrow the focus of the review. In order to do this the first step was to identify the relevant fair trial guarantees. These were identified based on the rigorous examination of CMPs in the UK, and the legislative framework for the JSA carried out at the first stage of research. This was in addition to a review of the literature generally on Article 6 ECHR. The review of the ECtHR's Article 6(1) case law proceeded on the basis of the identification of the following fair trial guarantees: the requirements of independence and impartiality; the right to a public hearing and a public judgment; the principle of equality of arms; the right to adversarial proceedings; and, the right to access a court. In order to be as comprehensive in the search as possible, the choice was made to begin the review on the basis of the European Human Rights Reports, which enabled a review of the case law in chronological order. This was then supplemented by a HUDOC search, based on selected keywords reflecting the relevant fair trial guarantees identified. The focus was judgments of the ECtHR emanating either from a Chamber, or Grand Chamber. With regard to admissibility decisions by the ECtHR, and reports from the former European Commission of Human Rights (EComHR), a search was conducted in HUDOC. This resulted in a number of admissibility decisions that contribute important perspectives. In total, over 1000 cases heard at Strasbourg were reviewed, nearly 300 of which are cited in this thesis.

The third stage of research is informed by stages one and two. The analysis of the legislative framework for the use of CMPs under the JSA; and, the systematic review of the ECtHR's jurisprudence on the relevant Article 6(1) guarantees are used to enable the examination of the legislation's compatibility with the Convention.

The structure of this thesis is, in part, a reflection of the methodology. Chapters 2 and 3 set the scene for the expansion of the use of CMPs within the UK. Chapter 2 acts as an introduction to the key features of CMPs, including the central role played by the special advocate. It provides a comprehensive overview of the origins of the use of CMPs and special advocates in the UK and their subsequent expansion up to the point

of the enactment of the JSA. Chapter 2 begins to highlight concerns and criticisms of the use of CMPs, with particular attention paid to the limitations that special advocates face which are perceived as restricting their ability to carry out their functions effectively. Chapter 3 provides the introduction to the legislative framework of Part 2 of the JSA, and the provisions for the use of CMPs in all civil proceedings. The Chapter tracks the legislation's parliamentary passage and, in doing so, highlights the issues that arose in the drafting of the legislation.

The thesis then shifts its focus specifically to Article 6 and the ECtHR's approach to interpretation of the Convention in Chapter 4. Chapter 4 provides the framework for the analysis of the relevant fair trial guarantees in Chapters 5 to 8. It provides an introduction to Article 6, outlining its structure and the ECtHR's approaches to interpretation. This assists in an understanding of how Article 6(1) could be applied to CMPs. The chapter also outlines the general principles of interpretation utilised by the ECtHR, highlighting tensions that potentially exist within and between these principles. Subsequent chapters will demonstrate how these tensions come to the surface in specific cases, and how, if at all, the ECtHR reconciles such tensions and the effect that this can have on the outcome of a case.

Chapters 5 to 8 provide a nuanced analysis of the relevant Article 6(1) guarantees in applying ECHR standards of fairness to CMPs under Part 2 of the JSA. This analysis begins in Chapter 5 which focuses on the initial decision-making procedure for the use of a CMP in a particular case. This aspect of the legislation proved highly controversial, and the arguments advanced from those who opposed the provisions were framed in terms of the potential to undermine the separation of powers. This was due to the perceived wide-ranging executive power. The chapter responds to these arguments, and examines the provision within the framework of the Article 6(1) requirements of independence and impartiality. The reason for this is that although the ECtHR proclaims not to recognise the domestic constitutional doctrine, there is a growing emphasis in its case law of the recognition of the importance of the independence of the judiciary from the executive. This recognition is, in part, manifested on the ECtHR's application of these Article 6(1) guarantees. Chapter 5 advances an alternative decision-making framework which it purports should be used in replacement of the existing JSA provisions for triggering the use of a CMP in each individual case. As the thesis develops the importance of the initial decision-making procedure will become

increasingly prominent. One of the key lessons of this thesis is the challenge in itself of applying the Article 6(1) guarantees given the innate secrecy of the proceedings, coupled with the ECtHR's context-specific approach to interpretation. Hence, the vital importance of the initial decision-making procedure utilised in triggering the use of a CMP in the first instance.

Chapter 6 considers the compatibility of CMPs with the Article 6(1) requirements of publicity. Due to their innate secrecy, at first sight CMPs appear to raise issues of compatibility with both aspects, namely the right to a public hearing and the right to a public judgment. This chapter will address the underlying rationale of the requirements, their meaning, and the circumstances in which the requirements can be lawfully restricted.

Chapters 7 and 8 predominately focus on the role of special advocates in CMPs. Chapter 7 provides an analysis of the current approach of the ECtHR in its assessment of the use of special advocates. However, it proceeds to advance an alternative framework by which to assess their compatibility. This analysis was undertaken within the framework of the ECtHR's jurisprudence on the right to access a court; and, therefore examines the limitations that special advocates face in relation to initiating proceedings and the impact this could potentially have on an individual's ability to access a court, in accordance with Article 6(1). Chapter 8 builds on this alternative framework and uses it to examine special advocates in line with the requirements of equality of arms and the right to adversarial proceedings. The focus here, is on the limitations that special advocates are faced with during the conduct of the proceedings. Chapters 7 and 8 illustrate the effect of the ECtHR's approach to resolving tensions between its own interpretative principles can have on the outcome of a case. They will demonstrate that the ECtHR's current approach is mechanistic, and this presents the danger of debasing as opposed to enhancing rights protection.

Finally, chapter 9 calibrates all the strands of analysis identified in Chapters 5 to 8 and applies the fair trial guarantees in hypothetical case studies. These case studies are based upon the types of cases that will be heard on the JSA, informed by the small body of existing case law. This will demonstrate the indeterminacy and illustrate how the tensions between the ECtHR's interpretative principles may impact on the outcome of a challenge brought to Strasbourg.

Chapter 2 The Establishment and Expansion of CMPs

Chapter 2 introduces the system of CMPs in the UK by providing a comprehensive overview of the origins and their key features. This includes the mitigation tools that have developed, such as a changed role of judges in specialist tribunals, the use of gisting, and the central role played by special advocates in the proceedings. The first use of CMPs was in SIAC following the UK government's defeat in *Chahal v United Kingdom*,[46] in which the ECtHR referred to a system of special advocates used in Canada at the time. Therefore, this chapter will address the judgment of the ECtHR, and in doing so, provides the starting point in cautioning against cross-border policy transfer without a nuanced and rigorous analysis of the policy being transferred. It will demonstrate the influence of cross-jurisdictional trends on the UK, and evidences the potential for the ECtHR to act indirectly as a vessel for cross-border policy transfer as illustrated in *Chahal*. This discussion will illustrate the importance of the rigorous analysis of the JSA taken by this thesis, by highlighting that nuances can be lost in translation across borders with the danger of adopting a system which provides a lower level of rights protection. In addition, it is argued here that the cross-border policy transfer evidences the need to subject the JSA to universalised norms, such as the ECHR. The ECHR is the subject of study of this thesis, in part, following the ECtHR's judgment in *Chahal* and hence the potential for the ECtHR to facilitate such transfers, albeit indirectly.

In addition to cross-border policy transfer, this chapter will also illustrate the cross-context policy transfer within the UK. It will track the evolution of the use of CMPs within the UK following the expansion of their availability outside of SIAC up to the point of the enactment of the JSA. This will illustrate the impact of the expansion of the availability of CMPs in more conventional criminal and civil proceedings, as opposed to specialist tribunals such as SIAC. This is important as it assists in an understanding for the enactment of the JSA, including the arguments advanced in favour of the subsequent expansion to all civil proceedings and the arguments advanced in opposition to the introduction of the legislation. This contextualises the use of CMPs and special

[46] (App 22414/93) (1996) 23 EHRR 413. Hereafter, '*Chahal*'.

advocates in the UK, before embarking on an evaluation of the legislative framework of the JSA which is one of the core objectives of this thesis. Chapter 2 provides the starting point and forms the basis for such an evaluation. In carrying out this analysis, chapter 2 serves as an introduction to the leading cases on CMPs and special advocates in the UK up to the point of the enactment of the JSA. Moreover it provides a review of the literature in this area. The literary review demonstrates a significant focus on the ability of special advocates to carry out their functions, hence the central focus of special advocates in the operation of CMPs.

This chapter will begin by outlining the establishment of SIAC, including the system that existed previously. This is fundamental to the understanding of the reasoning of the ECtHR in *Chahal*, which the chapter proceeds to address. The ECtHR referred to the system of special advocates used in a Canadian system. It follows that this chapter will identify the key features of that system and engage in a comparison with the system that was adopted in SIAC. Section 2.5. of this chapter will track the evolution of CMPs within the UK. Sections 2.6. and 2.7. will address two key features of the regime: the use of special advocates, and the requirement of 'gisting'.

2.1. The Establishment of CMPs in the UK

The system of CMPs and special advocates originates in SIAC which was established on the 3 August 1998 by virtue of the SIAC Act 1997.[47] SIAC's and its initial jurisdiction included immigration and asylum appeals; and, certain deportation and removal of citizenship cases.[48] SIAC is an independent and specialist tribunal under the general duty to ensure that:

> Information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detention and prevention of crime, or in other circumstances where disclosure is likely to harm the public interest.[49]

[47] See: SIAC Act, s.1.

[48] SIAC Act, s.2, defines SIAC's jurisdiction.

[49] SIAC (Procedure) Rules 2003 No. 1034, r4(1).

Appeals to SIAC are conducted in two parts: open proceedings and closed proceedings.[50] The appellant and their legal representation are excluded from the closed proceedings (the CMP), so to enhance procedural fairness section 6 of the SIAC Act provides for a special advocate is appointed.

The SIAC Act, was enacted by the UK government in response to their defeat in the ECtHR in the case of *Chahal*. The ECtHR pronounced that the applicant's Article 5(4) ECHR had been breached. Article 5 guarantees the right to liberty and paragraph 4 entitles 'everyone who is deprived of his liberty by arrest or detention' the right to have the 'lawfulness of his detention' decided, 'speedily by a court and the release ordered if the detention is not lawful.' Therefore, the violation occurred due to the previous mechanism available for immigration and deportation decisions.

Prior to SIAC, the decision to deport a non-British national on national security grounds was taken by the Home Secretary on the basis of material which could not be disclosed to the individual if there was a danger that national security would be compromised.[51] Under the Asylum and Immigration Appeals Act 1993, there was no formal right of appeal against a deportation decision if the decision had been made in the interests of national security. Instead cases were subject to a 'non-statutory advisory procedure' which entailed the Home Secretary's decision to deport the individual being reviewed by an Advisory Panel,[52] who would review the sensitive material relevant to the Home Secretary's decision.[53] The panel would then make recommendations about whether the deportation should go ahead. The potential deportee could make representations and call witnesses to the panel. However, there was no right to legal representation.[54] The

[50] Special Advocate Support Office *A Guide to the Role of Special Advocates and the Support Office* (November 2006), para 108. [Hereinafter 'SASO Open Manual'].

[51] Ibid, para 2.

[52] The panel became known as the 'three wise men'.

[53] SASO Open Manual (n 50) para 2.

[54] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission* (2004-05, HC 323-1), para 46. [hereinafter "*Constitutional Affairs Committee, The Operation of SIAC, Vol* 1"]

primary concern about this procedure was that it was purely advisory and the Home Secretary was under no obligation to follow the recommendation.[55]

As a result of the national security concerns in the advisory procedure, much of the material the Home Secretary sought to rely on was confidential and would only be seen by the panel. One of the difficulties this presented was that, although it was stated that the potential deportee would be 'informed as far as possible' of the allegations against him, the evidence withheld on national security grounds was not seen by himself or his legal representation.[56] Thus, raising questions as to whether the potential deportee was given sufficient information against him, and as a result, potentially denied the opportunity to correct or contradict it.[57] Furthermore, even if the individual brought an action for judicial review of the Home Secretary's decision, the reviewing courts were unable to review the sensitive material considered in the panel's decision.[58] Unsurprisingly, this procedure was found to be wholly unsatisfactory by the ECtHR who held that, in this respect, the UK government were in violation of Article 5(4) ECHR.[59]

2.2. *Chahal v United Kingdom*

In Chahal, the ECtHR stated that because the Home Secretary's decision concerned national security the domestic courts were not in a position to review it.[60] However, the ECtHR emphasised that whilst the panel provided 'some degree of control'. Chahal had not been entitled to legal representation, was only given an outline of the grounds for the intention to deport, and the panel's decision was not binding on the Home Secretary.[61] Consequently, the requirements of Article 5(4) were not satisfied. The

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[55] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission* (2004-05, HC 323-2), Ev 80, para 1 [hereinafter "*Constitutional Affairs Committee, The Operation of SIAC, Vol 2*"].

[56] SASO Open Manual (n 50) para 3.

[57] *R v Secretary of State for the Home Department, ex parte Hosenball* [1977] 1 WLR 766, at 777 per Lord Denning MR.

[58] *R v Secretary of State for the Home Department, ex parte Chahal* (1995) 1 WLR 526, at 532 per Straughton LJ.

[59] *Chahal* (n 46) para 133.

[60] Ibid, para 133.

[61] Ibid, para 133.

ECtHR recognised that where there was a danger that national security would be compromised, the use of closed material may be unavoidable. Nevertheless, this did not permit national authorities to be free from effective control by the domestic courts.[62] In a proportionality assessment, the ECtHR made reference to the use of special advocates in Canada at the time, as an example of the use of safeguards to minimise the negative effect of closed courts. It described the Canadian system, as it understood it as:

> 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 or her and has the right to be represented and to call evidence. The 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.[63]

The UK government interpreted this to mean that CMPs would be compatible with the ECtHR, so long as domestic law made provision for the appointment of special advocates to represent the interests of the excluded individual. During the parliamentary passage of the SIAC Act, members of both Houses inferred that the provisions of the legislation built on the Canadian procedure that had been 'commended' by the ECtHR.[64] The UK government appeared to have failed to appreciate that the ECtHR had not explicitly stated approval of the Canadian model in terms of Convention compliance. It had merely referred to it as illustrating a less restrictive approach as part of a proportionality analysis. The ECtHR stated that the Canadian system illustrated that there are,

> techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.[65]

The statement was not central to the ECtHR's reasoning, neither was it essential to their conclusion.[66] Regrettably, the UK government omitted important safeguards that were

[62] Ibid, para 131.

[63] Ibid, para 144.

[64] HL Deb, 5 June 1997, vol 580, col 736, Lord Williams.

[65] *Chahal* (n 46) para 131.

[66] Jenkins (n 66) 286.

embedded in the Canadian system and imposed a procedure with fewer procedural protections.[67] This was in part a result of a lack of research and investigation into the Canadian legislation and procedure.[68]

One commentator has stated that the ECtHR's judgment in *Chahal* acted as a 'catalyst for significant legal cross-borrowing between the United Kingdom and Canada in their anti-terrorism laws.'[69] This thesis proposes that the UK government's reaction to its defeat in *Chahal* evidences the potential for the ECtHR to act as a vessel, whether directly or indirectly, for cross-border policy transfer. In this sense, the ECtHR was careless to a degree in its reference to the Canadian system in its reasoning; and, there are three key problems with the ECtHR's approach as identified by Jenkins who is critical of the ECtHR's 'carelessness'.[70] Jenkins refers to these three 'major flaws' as: 'the section problem and "wide context"'[71]; 'the knowledge problem and "deep context"'[72]; and, 'the borrowing problem and "local context".'[73] In terms of the selection problem, the argument advanced is that the ECtHR's selection of its comparator was too narrow. The ECtHR failed to consider alternatives to dealing with secret evidence within Canada and in other jurisdictions. Arguably, the selection of a Canadian legal mechanism was not the error. On the contrary, the error was in failing to provide a justification for such a selection. The ECtHR did not refer to other common law jurisdictions, such as Australia or New Zealand and distinguish from these. Additionally, the ECtHR did not highlight as to why it had not selected other states within the Council of Europe and therefore party to the ECHR, which would arguably have been a more logical comparator given their obligation to comply with Article 5(4). In addition, the ECtHR did not consider alternative legal mechanisms dealing with secret evidence within Canada, other than the special advocate model.[74]

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[67] Ibid, 300.

[68] JUSTICE, *Secret Evidence* (2009) para 340.

[69] Jenkins (n 66) 280.

[70] Ibid.

[71] Ibid, 290-297.

[72] Ibid, 297-304.

[73] Ibid, 304-312.

[74] Michael Code and Kent Roach, 'The Role of the Independent Lawyer and Security Certificate' (2006) 52 *Criminal Law Quarterly* 85.

This thesis agrees with the position of Jenkins in his article. The lack of justification and 'wide context', can result in 'seeming or actual arbitrariness' in the legal comparison.[75] This reduces the persuasiveness of the decision. It is not argued here that the Canadian special advocate model was an inappropriate comparator, and it is acknowledged that there are benefits to cross-border policy transfer. Present discussion purports to highlight the specific problems the judgment in *Chahal* caused, specifically the effect of this on the legislative framework on the UK. The aim is not to outline all the possible alternatives that the ECtHR should have referred to in its comparative methodology neither is it to engage in an in-depth analysis of all the difficulties presented by a lack of sufficient method for such a comparative methodology.

Jenkins refers to the danger of a poor comparative methodology leading to a misconception that the court has 'rights-proofed' a foreign legal mechanism. This was the effect of the ECtHR's reasoning in *Chahal,* during the SIAC Act's parliamentary passage, members of both the House of Lords and the House of Commons took the judgment as illustrating that special advocates were compatible with the Convention. However, the ECtHR made no such pronouncement. This was made more explicit by the ECtHR in its judgment in *Al Nashif v Bulgaria*, where reference was made to alternative less restrictive means without stating, 'an opinion on the conformity of the above system [the special advocate] with the Convention.'[76] In fact, the ECtHR did not consider the compatibility of the use of CMPs and special advocates with the Convention until 2009 in the case *A v United Kingdom.*[77] This thesis argues that this misconception contributed to unsatisfactory policy and legislative decisions in the UK, with regard to the establishment and subsequent expansion of CMPs and special advocates.

The 'selection problem' was not the only contributing factor, the ECtHR appeared to misunderstand the Canadian model and consequently failed to provide an adequate description of the key features of the system, and the context in which it operated. This is identified as the second major flaw in the ECtHR's reasoning, namely the 'knowledge

[75] Jenkins (n 66), 296.

[76] *Al-Nashif v Bulgaria* (App 50963/99) (2003) 36 EHRR 37.

[77] (Grand Chamber) (App 3455/05) (2009) 49 EHRR 29.

problem and "deep context".'[78] The ECtHR's portrayal of the special advocate system in Canada was brief, and in part inaccurate. First, the ECtHR appeared to be referring to procedures in the Federal Court; however, at the time there was no provision for the use of special advocates in Federal Court in Canada.[79] It appears that the ECtHR were actually referring to the use of security-cleared counsel before the Security Intelligence Review Committee (SIRC).[80]

The Immigration Act 1985 was in force at the time in Canada, which provided for the SIRC, an administrative tribunal.[81] Until 2002 under Canadian immigration law, deportation hearings before the SIRC were one of the special procedures established to deal with confidentiality and national security.[82] SIRC was an 'independent, external review body', which examined the operations of, and investigated complaints against the Canadian Security and Intelligence Service (CSIS).[83] Prior to 2002, the SIRC played a prominent role in immigration proceedings in reviewing deportation orders made against permanent residents of Canada on grounds of national security.[84] Under the Canadian Immigration Act, the Minister of Immigration of Canada would issue a report to the SIRC, if they were of the opinion that a permanent resident was inadmissible to Canada on national security related grounds.[85] SIRC would then investigate the matter. It is important to note that in carrying out this function SIRC had access to 'virtually all information' on the complainant in the possession of the CSIS in reaching its decision.[86]

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[78] Jenkins (n 66) 297.

[79] Jenkins (n 66) 300; Code and Roach (n 74) 97; JUSTICE (n 68) para 180.

[80] Code and Roach (n 74) 97; John Ip, 'The rise and spread of the special advocate' [2008] PL 717, 719; Jenkins (n 66) 300.

[81] See section 34.

[82] Jenkins (n 66) 286.

[83] Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23 (CSIS Act), s.38.

[84] Immigration Act, R.S.C. 1985, c-12, s.39.

[85] Craig Forcese and Lorne Waldam, *Seeking Justice in an Unfair Process* (August 2007), 6.

[86] Murray Rankin, 'The Security Intelligence review Committee: Reconciling National Security with Procedural Fairness' (1990), 3 Can. J. Admin. L. & Prac. 173, 182. Rankin stated that the only exception to this rule was, 'to Cabinet records in the possession of the Service, but in almost all complaints cases, this statutory exception would be of limited relevance.'

The SIRC had the power to implement its own investigative procedures; and, 'established a quasi-judicial process for its proceedings.'[87] In consultation with the CSIS and the government's legal representation, SIRC would decide the extent of the material that could be disclosed to the complainant and their legal representation.[88] A summary of the undisclosed sensitive material would then be provided to the complainant and their legal representation.[89] SIRC was empowered to hold *ex parte* and *in camera* hearings to receive sensitive material that is not disclosed,[90] if national security sensitive material was introduced, the permanent resident in question and their legal representation would be excluded from that part of the hearing. The practice of the SIRC in such circumstances was to appoint security-cleared SIRC counsel whose function was to challenge the government's position, and in doing so, furthered the complainant's interests.[91] Murray Rankin, a former SIRC legal advisor, described the counsel's role as:

> The Committee's counsel is instructed to cross-examine witnesses for the Service with as much vigour as one would expect from the complainant's counsel. Having been present during the unfolding of the complainant's case, the Committee counsel is able to pursue the same line of questions. In addition, however, since Committee counsel has the requisite security clearance and has had the opportunity to review files not available to the complainant's counsel, he or she is also able to explore issues and particulars that would be unknown to the complainant's counsel.[92]

The primary interest of the SIRC counsel was 'SIRC's fair conduct of an investigation.'[93] Their role was more in line with counsel to the SIRC, testing the reliability of the government's case means that the interest of SIRC 'intersects' with the interest of the complainant.[94] Nevertheless, the relationship between the complainant and the SIRC counsel did not resemble that of solicitor-client, there was no obligation

[87] Ip (2008), 719. See also: Rankin (ibid) 179.

[88] Jenkins (n 66), 299.

[89] Ibid, 299.

[90] Forcese and Waldam (n 85), 7.

[91] Ibid.

[92] Rankin (n 86) 184.

[93] Forcese and Waldam (n 85), 9. See also *Khawaja v. Canada*, 2007 FC 463 at para 55 (FC).

[94] Ibid.

of confidentiality owed because of obligations of counsel to the SIRC.[95] Significantly, SIRC counsel could maintain contact with the complainant and their legal representation throughout the proceedings. Therefore, SIRC counsel could communicate with the complainant following their viewing of the sensitive material. In a study commissioned by the Canadian Centre for Intelligence and Security Studies with the support of the Courts Administration Service, it was reported that SIRC had not received any complaint that this continuous contact had resulted in an 'involuntary disclosure injurious to national security.'[96]

In 2002 the Immigration and Refugee Protection Act (IRPA) was enacted which eliminated this SIRC model. Instead it extended the Federal Court security certificate system.[97] This system under the Federal Court did not provide for the appointment of security-cleared counsel to test the government's case, as under the SIRC. Therefore, the ECtHR were mistaken in their reference to the Federal Court of Canada, as there was nothing akin to the use of special advocates operating at the time. Hence, why it is taken that the ECtHR meant to refer to the SIRC model outlined above.

The third major flaw in the ECtHR's reasoning as outlined by Jenkins is 'the borrowing problem.' Jenkins is critical of the ECtHR for failing to advocate the restrictions and dangers of legal 'borrowing', or policy transfer across borders, he suggests that the ECtHR should have been wary that the UK government may 'abuse' its suggestion. In effect, Jenkins takes the position that the ECtHR should have anticipated that the UK government adopted a system that was unsatisfactory and its subsequent expansion outside the small context of immigration law.[98] This thesis does not suggest the ECtHR should have foreseen such an expansion of the use of CMPs and special advocates across contexts in the UK. However, it does contend that the ECtHR's lack of in depth reasoning in *Chahal* was careless; and, whether indirectly or directly acted as a catalyst for the establishment and expansion of CMPs in the UK. The consequences are arguably unsatisfactory, and this will become apparent during the course of this thesis, which provides a rigorous examination of the use of the system. In this sense, this thesis

[95] Ibid.

[96] Ibid.

[97]Ibid, 10.

[98] Jenkins (n 66), 304.

is critical of the ECtHR's reasoning in *Chahal* and maintains that the problems with cross-border and cross-context policy transfer should have been highlighted by the court. As a minimum, the ECtHR should have issued some words of caution. The following discussion in section 2.5. evidences the effect of *Chahal* as the motivation for the enactment of the SIAC Act, with reference to the Act's parliamentary passage.

2.3. The Special Immigration and Appeals Commission Act 1997

The significance of the ECtHR's reference to the Canadian model of special advocates in its judgment in *Chahal* and its impact on the establishment of SIAC is illustrated in the speeches given in both Houses during the SIAC Act's parliamentary passage. In the Public Bill Committee,[99] John Greenway asserted that, 'it is a simple but fundamental point that the legislation would not be before us now were it not for the European Court's decision in the *Chahal* case.'[100]

First, it is evident from the speeches that it was believed that SIAC was modelled on the Canadian system of special advocates. Mike O'Brien, a Minister from the Home Office made clear in the House of Commons that the system under SIAC would 'build on an approach adopted by the Canadians, which was commended by the European Court in its findings in *Chahal*.'[101] Similarly, in the House of Lords, Lord Lester maintained that the SIAC bill was 'to some extent modelled on Canadian immigration law'.[102] Lord Lester went further to contend that the bill was an improvement on the Canadian model.[103] He commended Ministers for looking 'carefully at the Canadian Immigration law';[104] nevertheless, JUSTICE disputes this in their report *Secret Evidence.*[105] JUSTICE made requests under the Freedom of Information Act for: 'details of any requests by the UK government to the government of Canada concerning the Canadian use of special advocates or special security-cleared counsel'; and, 'details of any

[99] Referred to at the time as the Standing Committee.

[100] SC Deb (D), 11 November 1997.

[101] HC Deb 30 October 1997, vol 299, col 1056. A statement to the same effect was given by Lord Williams in the House of Lords, see HL Deb 5 June 1997, vol 580, col 736.

[102] HL Deb 5 June 1997, vol, 580, col 742.

[103] HL Deb 23 June 1997, vol 580, col 1438.

[104] HL Deb 23 June 1997, vol, 580, col 1438.

[105] JUSTICE (n 68).

research undertaken into the Canadian law relating to special advocates or special security-cleared counsel', between 1 November 1996 and 17 December 1997.[106] They reported that the Foreign Office, the Home Office and the Attorney General's office confirmed they had no information of any such requests or research.[107] In addition, the SIAC Act's parliamentary passage is illustrative of the belief that the new system of CMPs and special advocates would be Convention complaint. For example, Mike O'Brien also stated that the Canadian model 'was commended by the European court in its findings in Chahal.'[108] As highlighted by Jenkins, the government appeared to take the ECtHR's dicta as a 'positive suggestion and an authoritative pronouncement on the Convention compatibility'.[109] However, not all members of Parliament were so optimistic to readily accept the compatibility of the Canadian model with the ECHR, without further investigation.[110]

Regardless of the poor comparative methodology followed by the ECtHR in *Chahal*, and the significance of this on the drafting of the SIAC Act, SIAC undeniably represented a fundamental shift from the system that operated previously in the UK. Namely, the 'three wise men'. At the time of its enactment, SIAC was considered progressive, in light of the situation previously. One commentator described it as a 'serious attempt to resolve the clash between fairness to the individual and the public interest in protecting intelligence sources.'[111] When the SIAC bill was introduced into the House of Commons, members on both sides of the House praised it.[112] It was

[106] Ibid, 181.

[107] Ibid.

[108] HC Deb 30 October 1997, vol 299, col 1056. See also col 1071: 'meets our European Convention obligations, and we do not expect that it would be challenged.'

[109] Jenkins (n 66) 314.

[110] HL Deb 5 June 1997, vol 580, col 748, Lord Hylton: 'I do not consider that the bill in its present form entirely fulfils the desire of the Court of Human Rights.' HL Deb 5 June 1997, vol 580, col 747, Lord Thomas; Lord Lester at col 742 drew attention to important differences between the actual Canadian System and that proposed by the government.

[111] Christopher Forsyth, 'Control Orders, Condition Precedent and Compliance with Article 6(1)' 1 (2008) *The Cambridge Law Journal* 1, 4.

[112] JUSTCE (n 68) para 86.

described as 'necessary'[113] and 'not a contentious piece of legislation.'[114] Nevertheless, following the establishment of SIAC the use of CMPs and special advocates began to face criticism that has proliferated in line with their expanded use. The question is whether the criticism emanates from the system itself, or, its transfer across contexts, which includes the use of CMPs and special advocates outside of specialist tribunals such as SIAC. The remainder of this chapter seeks to go some way to address this question, by examining in closer detail the key features of CMPs and special advocates in SIAC and tracking their evolution within the UK.

2.4. CMPs and Special Advocates in SIAC

SIAC is a specialist tribunal established by the SIAC Act 1997 and was intended as the 'independent body….appraised of all the facts and evidence and entitled to reach a decision which would be binding on the Secretary of State', referred to in the ECtHR's judgment in *Chahal*.[115] During its parliamentary passage, SIAC's ability to make binding decisions on the Home Secretary, was viewed as an essential component of the legislation in order to comply with the Convention.[116] SIAC consists of three members appointed by the Lord Chancellor.[117] This includes one member who has held (or holds) high judicial office, one member who is or has been an immigration judge, and a lay person.[118] The legislation does not specify that the layperson must have any particular expertise however, 'it has been generally recognised that the third lay member of the panel is expected to have a background in, a familiarity with and to have made us at a high level of, secret intelligence.'[119] These members recruited are primarily, 'former

[113] HC Deb 30 October 1997, vol 299, col 1063.

[114] Ibid, col 1033.

[115] *Chahal* (n 46), para 144.

[116] See: HC Deb 26 November 1997, vol 301, col 1033, Mike O'Brien. Also, HL Deb 5 June 1997, vol 580, col 752, Lord Williams of Mostyn: 'it is intended that the decision should bind the Home Secretary. I respectfully suggest that this is a very significant advance in human rights terms.'

[117] SIAC Act 1997, Sch 1 s.1(1).

[118] SIAC Act 1997, Sch 1.

[119] *Zatuliveter v SSHD (Deportation – The hearing of an application by the appellant – Refused)* [2011] UKSIAC 103/2010), at [4]. This was recognised briefly by Lord Woolf in *The Secretary of State for the Home Department v. Rehman* [2003] AER 782, and by Lord Steyn [2003] 1 AC 153 at [30].

senior officials from the intelligence agencies and the Foreign and Commonwealth Office'.[120] Consequently they can, arguably, contribute to the decision making process in way in which a panel made up entirely of judges cannot.[121]

In the same fashion as SIRC, the Lord Chancellor is empowered to make procedural rules for SIAC;[122] and, the SIAC Act expressly permits such rules to include the power of SIAC to hold hearings in closed session whereby the appellant and their legal representation are excluded.[123] The Act also contemplates the appointment of a special advocate to represent the interests of the individual excluded from the closed part of their hearing.[124] The rules of procedure for SIAC are set out in the SIAC (Procedure) Rules 2003[125] which contain further details of the proceedings before SIAC and the use of special advocates. The provision for special procedure rules is an indication of itself that proceedings before SIAC are of a different nature to conventional civil and criminal proceedings.[126]

SIAC is under a general duty to ensure that 'information is not disclosed contrary to the interests of national security…..or any other circumstances where disclosure is likely to harm the public interest.'[127] Therefore, SIAC are also entrusted with a public interest duty, further highlighting the different nature of proceedings in comparison to normal litigation. Jackson illustrates the difference in this respect, he points out that specialist tribunals can differ from conventional civil and criminal proceedings where parties

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[120] *Zatuliveter* (n 119), [6].

[121] Ibid.

[122] The procedure rules for SIAC are made by the Lord Chancellor under sections 5 and 8 of the SIAC Act.

[123] SIAC Act, s.5.

[124] SIAC Act, s.6.

[125] SI 2003/1034 as amended by SI 2007/3370 and, more recently, SI 2013/2995 ('the 2013 Rules'). The introduction of the 2013 Rules followed the enactment of the JSA 2013 by which s.15 JSA increased SIAC's jurisdiction to hear applications on judicial review grounds, challenging decisions which do not carry a right of appeal, exclusion and refusal of citizenship. See *R (on the application of Ignaoua) v Secretary of State for the Home Department* [2013] EWHC 2512 (Admin), [2013] EWCA Civ 1498.

[126] Clive Walker, 'Living with National Security Disputes' in Greg Martin, Rebecca Scott Bray and Milko Kumar *Secrecy, Law and Society* (Routledge, 2015).

[127] 2003 Rules, r.4(1).

make their case before a neutral third party.[128] Rather, specialist tribunals are often 'entrusted with important functions such as balancing various public interests' which necessitates the adoption of less adversarial procedures.[129]

In addition, SIAC must be satisfied that the material available to them enable it 'properly to determine proceedings.'[130] Therefore, it appears that SIAC has, to a limited, extent an inquisitorial role and is not merely a 'passive referee of evidence material and arguments submitted to it by the parties.'[131] This is a fundamental difference between procedures in a specialist tribunal, such as SIAC, to more conventional civil and criminal proceedings, which are adversarial.[132] Whilst the use of special advocates is presented as a fundamental safeguard for the excluded individual in a CMP, the more active role of the judges in the investigation in SIAC provides an additional layer of protection for such individual.[133] Barak-Erez and Waxman present the more active role as the 'judicial management model',[134] and argue that this can potentially safeguard fairness in proceedings where national security concerns dictate the non-disclosure of evidence.[135] Barak-Erez and Waxman identify that under this model the judges' experience, expertise, and confidence regarding security sensitive information, and the practice of the security services, would be indicative of the effectiveness of such a safeguard.[136] Accordingly, the inquisitorial role of the judges, coupled with their

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[128] John Jackson, 'The Role of Special Advocates: Advocacy, due process and the adversarial tradition' (2016) 20(4) *the International Journal of Evidence & Proof* 343, 356.

[129] Ibid, 356.

[130] 2003 Rules, r.4(3).

[131] *Zatuliveter* (n 119), para 4.

[132] Walker (n 126) 33.

[133] See: Daphne Barak-Erez and Matthew C. Waxman, 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) 48 *Columbia Journal of Transnational Law* 3.

[134] Ibid, 22-30. Barak-Erez and Waxman present this in relation to the approach taken at the time by the Israeli Supreme Court.

[135] Ibid, 20. In relation to immigration law in the US, Hall advances the argument that in terms of classified evidence that cannot be disclosed in the interests of national security the immigration judge must, 'step outside the adversarial system' and contemplate an inquisitorial role. See: Matthew Hall, 'Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings' (2002) 35:3 *Cornell International Law Journal* 515.

[136] Barak-Erez and Waxman (n 133), 46. Cf, Shiri Krebs, 'National Security, Secret Evidence and Preventative Detentions: The Israeli Supreme Court as a Case Study' in David Cole,

expertise and experience of national security imperatives, illustrates the ability to provide an important tool to mitigate the perceived unfairness of CMP. This is in addition to the appointment of special advocates to represent the interests of the excluded individual.

SIAC has been praised by members of the judiciary who acknowledge that procedures for CMPs are not ideal. However, have stated that it is possible with appropriate safeguards to ensure individuals can 'achieve justice', and therefore it is wrong 'to undervalue the SIAC appeal process.'[137] It is submitted here that it is significant that SIAC is a specialist tribunal. In *RB (Algeria) v Secretary of State for the Home Department*[138] Lord Phillips noted in relation to SIAC's composition that it was, 'well equipped to resolve issues of fact', arising in immigration decisions in the national security context.[139] The decisions of specialist tribunals are generally held in high regard by other members of the judiciary. For example, in reference to the Asylum and Immigration Tribunal Baroness Hale stated that, 'ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right'.[140]

In summary, whilst the use of CMPs impacts the fairness of the proceedings for the individual concerned, an effort had been made to mitigate the perceived unfairness. One of these was the specialist nature of SIAC, including the changed role of the judge and their specific expertise in the national security context. Additionally, the appointment of special advocates has played a key role in seeking to accord the individual excluded from the CMP with a measure of procedural fairness. Moreover, the requirement of gisting is capable of providing an important mitigation tool. Nevertheless, the use of CMPs, special advocates, and the application of the gisting requirement, have all faced

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Federico Fabbrini, and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing Limited, 2013).

[137] *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, at [34].

[138] [2009] UKHL 10.

[139] Ibid, at [65].

[140] *AH (Sudan) v Secretary of State for the Home Department (UNCHR intervening)* [2007] UKHL 49 at [30]. See also *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, at [16].

criticisms. It is argued here that the use of CMPs became increasingly problematic with the extension of their use across contexts within the UK. The danger being that the originally considered exceptional mechanism becomes normalised over time. The following section will provide an overview of the cross-context policy transfer.

2.5. The Expansion of CMPs within the UK

The initial claims that CMPs were exceptional measures proved true in the early years of the establishment; between 1997 and 2001, SIAC had heard just three substantive cases.[141] However, the proliferation of the use of CMPs and special advocates began with SIAC itself due to its expanding jurisdiction. SIAC's initial jurisdiction included immigration and asylum appeals, and certain deportation and removal of citizenship cases.[142] In 2002 The Nationality, Immigration and Asylum Act extended SIAC's jurisdiction to reviewing removal of citizenship appeals.[143] Subsequently, the use of CMPs and special advocates migrated out of immigration law into a range of contexts; and, with this there was an increase in the type of courts that could have recourse to a CMP. SIAC is a specialist tribunal, however the cross-context policy transfer saw the availability of CMPs and special advocates in more conventional civil and criminal proceedings. In addition, the courts allowed the use of special advocates in proceedings despite the absence of statutory provision for their appointment nor any rules of procedure regarding their role and functions.[144] In 2010 the JCHR reported that there were a total of twenty-one different contexts in which special advocates may be used in the UK, including statutory and non-statutory proceedings.[145]

2.5.1. Counter-terrorism measures

The first phase of cross-context policy transfer was from the area of immigration law to counter-terrorism.[146] CMPs were available to cases involving a number of counter-

[141] Ip (n 80) 739.

[142] See s.2 which defines SIAC's jurisdiction.

[143] JSA 2013, s.15 further extends SIAC's jurisdiction.

[144] Andrew Boon and Susan Nash, 'Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems' (2006) 9 *Legal Ethics* 62, 105.

[145] *JCHR Seventeenth Report* (n 11) para 58. See also JUSTICE (n 68) para 79.

[146] The UK is known for using immigration law as anti-terrorism law in the post-9/11 era, as are other countries such as, the United States, Canada and Israel. See Kent Roach, 'Thematic

terrorism measures including, preventative detention,[147] control orders,[148] terrorism prevention and investigation measures (TPIMs),[149] financial restrictions,[150] and proscription as a terrorist organisation.[151] This expansion occurred within SIAC itself,[152] other specialist tribunals,[153] the High Court,[154] and the magistrate's court.[155] The migration to counter-terrorism within SIAC was a consequence of the Anti-Terrorism Crime and Security Act 2001 (ATCSA). Part IV of ATCSA provided for suspected international terrorists, who were liable for deportation,[156] to be detained without trial on the basis that the Home Secretary had reasonable grounds to suspect they were international terrorists. They were therefore detained indefinitely pending deportation. Extending the function of SIAC to indefinite detention under ATCSA was controversial

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Conclusions and Future Challenges' in Kent Roach (ed), *Comparative Counter-Terrorism Law* (Cambridge Univeristy Press, 2015), 737.

[147] Anti-Terrorism Crime and Security Act 2001 (ATCSA), Part 4; now repealed.

[148] Prevention of Terrorism Act 2005 (PTA), Schedule 1; now repealed.

[149] Terrorism Prevention and Investigation Measures Act 2011 (TPIM Act), Schedule 4.

[150] Counter-Terrorism Act 2008, Part 6. S.63 of the Counter-Terrorism Act defines financial restrictions proceedings as encompassing the UN terrorism orders (now annulled and replaced by the Terrorist Asset-Freezing et Act 2010), freezing orders under Part 2 of ATCSA, and restrictions under Schedule 7 to the Counter-Terrorism Act 2008.

[151] Terrorism Act 2000, Schedule 3. See also Proscribed Organisation Appeals Commission (Procedure) Rules 2007.

[152] For example, preventative detention under ATCSA.

[153] For example: Investigatory Powers Tribunal (IPT); Proscribed Organisations Appeal Commission (POAC); Pathogens Access Appeal Commission (PAAC).

[154] For example, control orders and TPIMs, and financial restriction proceedings under the Counter-Terrorism Act 2008.

[155] For example, section 1of the Counter-Terrorism and Security Act 2013 makes provision for the seizure and temporary retention of travel documents where a constable has reasonable grounds to suspect that a person is attempting to leave the UK in connection with terrorism-related activity. The travel documents may be retained for up to 14 days, at the end of this period further extension may be sought by a police superintendent which is reviewed by a District Judge (Magistrates' Courts). Under Schedule 1, para 9 the subject and their legal representation may be excluded from any part of the hearing in the interests of national security. Blackbourn and Walker note that this is beyond the jurisdiction of the JSA, and the CMP in this context is, 'left wholly unstructured.' See Jessie Blackbourn and Clive Walker, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79:5 *Modern Law Review* 840, 846.

[156] But for the likelihood that they would be subjected to torture, inhuman or degrading treatment in the country to which they would be returned.

and 'significantly increased the number of cases' before the Commission,[157] and as a result increased the use of CMPs and special advocates.[158] The provisions were criticised and JUSTICE claimed that in enacting the legislation the government had attempted to, 'adapt SIAC from a specialist immigration tribunal to a de facto counter-terrorism court'.[159] Part IV of ATCSA was repealed following the judgment of the House of Lords in *A and others v Secretary of State for the Home Department*.[160] The House of Lords ruled by majority that indefinite detention under s.23 of the ATCSA was in breach of Article 5(1) and Article 14 ECHR. It was accepted that there was a public emergency sufficient to warrant derogation under Article 15 ECHR, however s.23 of the ATCSA was not 'strictly required' by the exigencies of the situation and was therefore disproportionate. *A and others v Secretary of State for the Home Department*, was a landmark decision in terms of the court demonstrating an interventionist stance in matters concerning national security. The House of Lords departed from the traditional strong deference to the executive in this context.[161] Nonetheless, the decision did not interrupt the continuing expansion of the use of CMPs in the counter-terrorism context; and, the judgment contained no assessment of SIAC's rules and procedures in relation to CMPs and special advocates.[162]

The Labour Government replaced Part IV of the ATCSA with the Prevention of Terrorism Act 2005 (PTA) which legislated for control orders to be imposed on individuals suspected of involvement with terrorism.[163] Control orders were a

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[157] Boon and Nash (n 144) 104.

[158] SASO *Open Manual* (n 50) para 9.

[159] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2* (n 55) Ev 62, para 5. Evidence submitted by JUSTICE.

[160] [2004] UKHL 56.

[161] See further: chapter 5, section 5.2.

[162] The focus of the judgment was the justification of detention without trial. The significance of the case is the individuals brought a challenge to Strasbourg – the first ruling of compatibility of CMPs with the Convention. Whilst the use of CMPs and special advocates was not a part of the detainees challenged the system at Strasbourg. The challenge was brought under Article 5(4) and a judgment was delivered by the Grand Chamber in, *A* (n 77).

[163] Control orders appeared to be the Labour government's response to the House of Lords decision in *A v Secretary of State for the Home Department*, see: Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) *Current Legal Problems* 174, 176.

preventative measure imposing certain restrictions on the liberty of an individual suspected of 'involvement in terrorism-related activity'. They were aimed at individuals who the government could not prosecute, or deport. There were two types of control order: 'derogating' and 'non-derogating'. 'Derogating' control orders could only be imposed by the High Court upon application by the Home Secretary. The Home Secretary could impose non-derogating control orders, with permission from the High Court. For present discussion, the significance of the PTA was the modifications made to evidential and procedural rules.[164] Consequently, the PTA effectively transported SIAC's procedures for CMPs[165] and special advocates[166] into the High Court; and, begun the process for the migration of these exceptional measures from specialist tribunals into the ordinary courts.

The Coalition government confirmed a commitment to repeal the PTA and the control order regime,[167] which was replaced by Terrorism Prevention and Investigation Measures (TPIMs).[168] TPIMs remain similar to control orders and they use essentially the same CMP scheme, although they cannot contain some of the more restrictive conditions as could be imposed under the control order regime.[169] In addition, financial restrictions proceedings under Part 6 of the Counter-Terrorism Act 2008 and Part 1 of the Terrorist Asset-Freezing etc Act 2010 are also heard before the High Court. In a similar vein to control order and TPIM reviews, these statutory schemes also introduce, 'SIAC like procedures into the High Court'.[170] For the purpose of this study, this is the real significance of the legislative framework for control orders and TPIMs, and these financial restrictions proceedings. The position taken by this thesis is that they have

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[164] Prevention of Terrorism Act 2005 Sch.; Civil Procedure (Amendment No.2) Rules 2005 (SI 2005/656).

[165] See Rule 76.22.

[166] CPR rr.76.23-76.30.

[167] HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm. 8004, 2011), para 23. Unlike control orders, TPIMs were not prompted by a judicial ruling.

[168] As provided for by the TPIM Act 2011.

[169] Independent Reviewer of Terrorism Legislation, *First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (March, 2013), p.4 (Executive Summary).

[170] JUSTICE (n 68).

facilitated the migration of CMPs to the wider legal system; and, therefore contributed to the normalisation of CMPs as exceptional measures.

Nevertheless, control order hearings, TPIM reviews, and financial restrictions proceedings are still processes that are unique to mainstream litigation. This is despite proceedings taking place before the High Court, as opposed to a specialist tribunal such as SIAC. Schedule 4 of the TPIM Act sets out the provisions relevant to proceedings relating to TPIMs, and provides for special rules of court found in Part 80 of the Civil Procedure Rules.[171] In relation to the financial restrictions proceedings, Part 79 of the Civil Procedure Rules provides the rules of court which also modifies procedural and evidentiary rules applicable in mainstream litigation.[172] In correspondence to the position of SIAC, it is submitted here that the provision for special procedural rules is in itself an indication in itself that these proceedings are of a different nature to conventional criminal and civil proceedings. The same can be said for the availability of CMPs in proceedings concerning counter-terrorism measures in alternative specialist tribunals, such as the proscription proceedings heard in the Proscribed Organisations Appeal Commission (POAC)[173] which are governed by the POAC (Procedure) Rules 2007.[174] The applicable procedures are akin to SIAC,[175] and not just in the sense that a CMP is available as a mechanism to deal with secret evidence. For example, Civil Procedure Rule 80.2 and 79.2 allow for modifications to the overriding objective.[176] These rules state that the 'court must ensure that information is not disclosed to the

[171] See Civil Procedure Rules, Part 80 – Proceedings under the Terrorism Prevention and Investigation. The procedural rules for control order proceedings in the High Court were set out in Part 76 of the Civil Procedure Rules.

[172] See Civil Procedure Rules, Part 79 – Proceedings under the Counter-Terrorism Act 2008 and Part 1 of the Terrorist-Asset Freezing Act 2010.

[173] The POAC was established under Part 2 of the Terrorism Act 2000.

[174] See also, the Pathogens Access Appeals Commission (PAAC) which was established under s.70 of the ATCSA. The rules of court are contained in the PAAC (Procedure) Rules 2002.

[175] See Clive Walker, *Terrorism and the Law* (Oxford University Press, 2011), para 7.67. In relation to procedures for control order reviews Walker has also stated the resemblance, see: Clive Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 *Stanford Law Review* 1395, 1409.

[176] See also, Civil Procedure Rule 79.2 applicable to financial restriction proceedings under the Counter-Terrorism Act 2008 and Part 1 of the Terrorist Asset-Freezing Act 2010. The overriding objective is outlined in Part 1 of the Civil Procedure Rules.

public interest'.[177] Accordingly, the court appears to be entrusted with a public interest duty corresponding with the position of SIAC, distinguishing the role of the court in these proceedings from that in mainstream litigation. Hence, the need to adopt less adversarial procedures.[178] In addition, Rules 79.2 and 80.2 state that the relevant tribunal 'must satisfy itself that the material available to it enables it properly to determine proceedings'.[179] This resembles the SIAC (Procedure) Rules 2003, r. 4(3), thus signalling that in proceedings of this kind the court has an inquisitorial role. Thus, fundamentally different to mainstream litigation which adheres to an adversarial system of justice. In this manner, these proceedings also adhere to the more active role of judges in the investigation, which can provide an important tool in mitigating the perceived unfairness of a CMP in addition to the use of special advocates.[180]

2.5.2. From employment law to planning inquiries

In hindsight, the policy transfer of CMPs from immigration law to counter-terrorism measures is unsurprising given the global trend of using immigration law as anti-terror law in the post 9/11 era.[181] However, CMPs and special advocates also proliferated into a range of contexts as provided for by legislation. For example, section 10 of the Employment Tribunals Act 1996 authorises the use of a CMP and the appointment of special advocates in proceedings where necessary in the interests of national security. The proceedings must then be carried out in accordance with the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237.[182] Rule 94, provides that the tribunal 'shall ensure that information is not disclosed contrary to the interests of national security', in correspondence with the rules of court already outlined in the context of counter-terrorism measures. Section 117 of the Equality Act 2010, also states

[177] Civil Procedure Rules, 79.2 and 80.2. See also POAC (Procedure) Rules 2007, r.4(1); and, PAAC (Procedure) Rules 2002, r.3(1).

[178] Jackson (n 128), 356.

[179] See also, POAC (Procedure) Rules 2007, r.4(3); and, PAAC (Procedure) Rules 2002, r.3(3).

[180] Barak-Erez and Waxman (n 133).

[181] Colin Harvey, 'Our responsibility to respect the rights of others: legality and humanity'; and, Kent Roach, 'Canada's response to terrorism' both in Victor V. Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd ed, Cambridge University Press, 2012).

[182] The 2013 Rules replace the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004/1861. The applicable rules were provided in Schedules 1 and 2.

that the claimant and their legal representative can be excluded from all or part of the proceedings if the court believes this to be, 'expedient to do so in the interests of national security'. If the CMP is deemed necessary, the Equality Act also specifies that a special advocate will be appointed to represent the interests of the individual.[183] Moreover, CMPs and special advocates have been available as a mechanism in local planning inquiries in accordance with the Town and Country Planning Act 1990.[184]

2.5.3. Special advocates in non-statutory contexts

The courts had also permitted the use of special advocates in proceedings despite the absence of statutory provision for their appointment, nor any rules of procedure regarding their role and functions.[185] This has also occurred in a range of contexts. In *Rehman v Secretary of State for the Home Department*,[186] the Home Secretary appealed against a decision of SIAC that Rehman did not pose a threat to national security and that he should not be deported. The primary issue was whether SIAC had erred in taking too narrow an approach to the question of what constituted a threat to national security. However, the Court of Appeal also considered the question of the use of a special advocate in an appeal heard outside of SIAC. The Court of Appeal acknowledged that the SIAC Act made no provision for special advocates on an appeal but where submissions were heard in absence of one of the parties then the court should use it's, 'inherent power to reduce the risk of prejudice to the absent party so far as possible and by analogy with the 1997 Act'.[187] It was held that a similar role to a special advocate in SIAC could be performed, 'without statutory backing'.[188] Similarly special advocates were appointed in the judicial review proceedings brought by Maya Evans against the

[183] s.117. See also: Practice Direction – Proceedings under enactments relating to equality, s.4.

[184] s.321 Town and Country Planning Act 1990 as amended by s.80 Planning and Compulsory Purchase Act 2004. The role of special advocates in these cases are to be found in Planning (National Security Directions and Appointed Representatives) (England) Rules SI 2006/1284; and Planning (National Security Directions and Appointed representatives) (Wales) Regulations SI 2006/1387.

[185] Boon and Nash (n 144), 105

[186] [2000] 3 WLR 1240 (Court of Appeal); [2001] UKHL 47.

[187] Ibid, at [31] *per* Lord Woolf MR.

[188] Ibid.

Defence Security who claimed that the British military in Afghanistan were unlawfully transferring suspected insurgents to inhumane treatment.[189] The court stressed the public interest in the 'troubling and difficult case'[190] and adopted a CMP 'to ensure that material covered by public interest immunity or by statutory restrictions on disclosure could be taken fully into account'.[191] In addition, the court has held that special advocates should be appointed in absence of statutory provision in judicial review proceedings in immigration proceedings,[192] and proceedings concerning unlawful disclosure under the Official Secrets Act 1989.[193] Non-statutory arrangements for CMPs have also occurred in the context of family law,[194] in the Security Vetting Appeals Panel, and intellectual property proceedings involving commercial confidentiality.[195]

Interestingly, a majority of the House of Lords approved the use of special advocates in a Parole Board hearing in *Roberts v Parole Board*.[196] This was viewed by the Constitutional Affairs Committee as sanctioning their use in a 'quasi-criminal' context.[197] The House of Lords held that the power to withhold information and appoint a special advocate was inherent in the Parole Boards powers under the Criminal Justice Act 1991, and in accordance with Rule 6 of the Parole Board Rules 2004.[198] Roberts was being considered for release on licence by the Parole Board, and during the course of its review, the Parole Board decided that there was sensitive information that could not be disclosed to Roberts or his legal representation in order to protect the confidential source of that information. However, the sensitive information would be disclosed to a special advocate appointed to represent his interests. The House of Lords were required

[189] *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

[190] Ibid, at [287].

[191] Ibid, at [8].

[192] For example, *MH v Secretary of State for the Home Department* [2008] EWHC 2525 (Admin).

[193] *R v Shayler* [2002] UKHL 11.

[194] CMPs have been adopted in some wardship proceedings by consent, e.g. *Re T (Wardship: Impact of Police Intelligence)* [2009] EWHC 2440 (Fam)

[195] *British Sky Broadcasting Group plc v Competition Commission* [2010] EWCA Civ 2.

[196] [2005] UKHL 45.

[197] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54) para 50.

[198] *Roberts* (n 196) [83] *per* Lord Woolf, [107] *per* Lord Rodger, [131] *per* Lord Carswell.

to rule as to whether the Parole Board were authorised to take that course of action. In this case it was Roberts, the individual excluded, who objected to the appointment of the special advocate to act in his interests.[199] This case differs in that it appears that if the special advocate had not been appointed then the Home Secretary would not have sought to rely on information that could not be disclosed. This stands in contrast to cases where the special advocate is appointed to mitigate the perceived unfairness, where the use of CMP is already provided for by legislation.

Special advocates have not only been appointed to cases where a CMP has been used, but their appointment has also been considered in relation to public interest immunity (PII) proceedings.[200] This cross-context policy transfer of the special advocate brought their use into the realm of criminal proceedings. PII is an exclusionary rule of evidence and permits one party to withhold evidence relevant to the proceedings. The main difference between PII and CMPs is that sensitive material excluded under PII is not used in the course of the proceedings, it is excluded completely.[201] Consequently, in this context special advocates will only carry out their disclosure functions, as opposed to their representative functions. Jackson contends that the use of special advocates in PII applications is less controversial for this reason.[202] It appears that in PII applications special advocates are more akin to 'advocates of the court', and that they are present predominately to represent the public interest in the administration of justice, as opposed to being appointed primarily to represent the interests of the excluded individual. The leading case is *R v H and C*,[203] in which the House of Lords ruled that in some cases the appointment of a special advocate in PII applications may be necessary 'where the interests of justice are shown to require it'.[204] This was despite Lord Bingham's acknowledgment of the 'ethical problems', and some of the practical

[199] In the proceedings before the High Court Roberts submitted that the decision to appoint a special advocate was disproportionate see: [2003] EWHC 3120 (Admin) at [9].

[200] PII is explained further in chapter 3, section 3.1.1.

[201] The difference between PII and CMPs are addressed in more detail in chapter 3, section 3.1.2.

[202] Jackson (n 128), 355.

[203] [2004] UKHL 3.

[204] Ibid, [22].

difficulties that existed.[205] However, he went on to state that recourse to the appointment of a special advocate should, 'always be exceptional, never automatic'.[206]

The use of special advocates outside of a statutory scheme can be considered problematic for a number of reasons which were acknowledged by the Special Advocates Support Office.[207] The first is the lack of applicable rules to govern how their use in the cases.[208] In general, the cases were dealt with by analogy to the rules governing the use of special advocates in SIAC. However, the SASO recognised that the cases are not 'directly analogous' and they do often do not refer to national security sensitive material. This could be used in support of further statutory provisions for the availability of special advocates, in order to ensure applicable rules, exist that are appropriate to the context. In relation to the issue of a lack of statutory provision, the final section in this discussion on the expansion of CMPs and special advocates will address this in relation to recent criminal proceedings.

2.5.4. Criminal proceedings

Special advocates have, therefore, been appointed in criminal proceedings in the context of PII applications; and, arguably parole board hearings saw the use of a CMP and special advocates in a 'quasi-criminal' context. However, the creep of CMPs and special advocates in a criminal trial is yet to have occurred. At least not within a statutory scheme. However, in May 2014, Nicol J ruled that the entirety of a criminal trial should be conducted in private to the exclusion of the public and the media; and, prohibiting publication of the reports of the trial.[209] The order also provided that the names and identities of the defendants should be withheld and publication of those would be prohibited. The defendants faced charges of having committed terrorism offences.[210] A number of media organisations appealed Nicol J's order, and the Court of Appeal heard

[205] Ibid.

[206] Ibid.

[207] SASO Open Manual (n 50).

[208] Ibid, para 66.

[209] See, *Guardian News and Media Ltd v Incedal* [2014] EWCA 1861, at [4]. For comment see: Ramya Nagesh, 'Closed Criminal Proceedings or the "Secret Trial": Past, Present and Future' (2015) 179 *Justice of the Peace* 215.

[210] S.58 Terrorism Act 2000, s.5 Terrorism Act 2006, and s.4 Identity Documents Act 2010.

part of the appeal in private and part in open court. The order that the core of the trial would be held in private was upheld. The reasoning centred on the administration of justice and it was held that there was a 'significant risk' that the administration of justice would be 'frustrated' if the trial was conducted in open court.[211] It was feared that the Crown may have been deterred from continuing with the prosecution.[212] Nonetheless, it was decided that the defendants should not remain anonymised. The Court of Appeal expressed, 'grave concern as to the cumulative effects of (1) holding a criminal trial *in camera and* (2) anonymising the Defendants.'[213] It found it, 'difficult to conceive of a situation where both departures from open justice will be justified.'[214] Following the trial various media organisations sought an order that the reporting restrictions which applied during the trial be varied to permit the publication of reports of what took place during the hearings held in private.[215] They submitted that there was no longer a significant risk that the administration of justice would be frustrated if the media could publish reports of the core of defendant's trial following its conclusion.[216] The Court of Appeal recognised that there was a strong public interest in the evidence heard *in camera* being placed in the public domain.[217] However, due to the nature of the evidence and other information heard *in camera*, the original reasoning for the hearing of that evidence in private continued to 'necessitate a departure from the principle of open justice after the conclusion of the trial and at the present time.'[218] Consequently this appeal was also dismissed.

There is a difference between these circumstances and the CMP, namely the defendants in *Incedal* were not excluded from the parts of the trial heard *in camera*. The Court of Appeal stated that, 'a defendant's rights are unchanged whether a criminal trial is heard in open Court or *in camera* and whether or not the proceedings may be reported by the

[211] *Incedal* (n 209) at [31].

[212] Ibid.

[213] Ibid, at [47].

[214] Ibid.

[215] These were held in the presence of some accredited journalists. However, they were restricted on reporting on the conduct of the private part of the proceedings.

[216] *Guardian News and Media Ltd v R and Incedal* [2016] EWCA Crim 11, at [4].

[217] Ibid, at [70].

[218] Ibid, at [75].

media'.[219] The predominant issue here is one in relation to accountability and public scrutiny, which is also an issue with CMPs. Nagesh contended that the Court of Appeal's reasoning did not represent a, 'radical departure from existing and well-established principles.'[220] Nevertheless, critics expressed concerns, and the case was branded the 'secret terror trial' in the media.[221] The decision also occurred in the same year as the JSA entered into force. Hence, concerns arise as to whether the effect of both the extension of CMPs to all civil proceedings and the decision to conduct the core of a criminal trial *in camera* signal a shift towards an increasing acceptance of the "secret trial".[222] This could also be taken as contributing to the 'creep' of secret justice. An additional question that this raises is whether there should be statutory provision for the use of a CMP, or procedure akin to a CMP in criminal proceedings. This relates to the concerns with the use of special advocates outside of a statutory scheme and there being a lack of formal rules of procedure. If the courts begin to show an increasing willingness to hold the core of a criminal trial *in camera* to the exclusion of the press and the public, there is an argument that a mechanism for doing so to the extent in the *Incedal* trial, should be provided in legislation. On the contrary, this could be viewed as a step too far in terms of the normalisation of exceptional measures in ordinary legal processes.

2.5.5. Al Rawi and the end to expansion

In *Al Rawi v The Security Service and others*,[223] the Supreme Court were faced with the question as to whether the court had the inherent power to order the use of a CMP, on the government's request, without statutory provision in an ordinary claim for damages. The Supreme Court held that CMPs involved such a departure from the principles of open and natural justice that the court had no such power, and this was a change that

[219] *Incedal* (n 209), at [36].

[220] Nagesh (n 209) 216.

[221] E.g. The Guardian, 'Secret terror trial is threat to open justice, human rights campaigners warn' 4 June 2014; The Telegraph, 'Secret terror trial is "assault" on British justice' 4 June 2014; BBC News, '"Secret" terror trial begins at Old Bailey' 13 October 2014.

[222] Nagesh (n 209) 216.

[223] [2011] UKSC 34.

only Parliament could make.[224] Therefore, it appeared that the cross-context policy transfer of CMPs and special advocates had been halted. Their Lordships' judgments focused on the fundamental principles of open and natural justice, advancing the claims that a CMP involves a departure from these principles. The Supreme Court drew analogy to the decision of the House of Lords in *R v Davis*,[225] which was a criminal case. That case concerned the question whether the judge at criminal trial could permit witnesses to give evidence for the prosecution under conditions of anonymity. Which also raised questions about the departure from the principle of open justice. Their Lordships recognised that, 'in some exceptional situations there may be a departure from the principle of open justice when justice may only be done if administered in private.'[226] However:

> the creeping emasculation of the common law principle must be not only halted but reversed. It is the integrity of the judicial process that is at stake here, this must be safeguarded and vindicated whatever the cost.[227]

Accordingly, it is presented here that *R v Davis* was the real turning point in this line of authority which reasserted the fundamental importance of the principle of open justice and clearly stated that the court cannot, 'abrogate it in the exercise of its inherent power.'[228] This was something that only Parliament could do.

Nevertheless, in October 2011 the UK government published the *Justice and Security Green Paper* (*Green Paper*) which proposed to legislate to extend the availability of CMPs, 'wherever possible in civil proceedings' where sensitive material is relevant to the case. A three month public consultation exercise followed the *Green Paper's* publication resulting in 84 published responses (including a collective submission from special advocates); and 6 unpublished responses which were summarised by the Government.[229] The Government introduced the Justice and Security Bill into the House

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[224] Ibid at, [44] – [47] *per* Lord Dyson, [71] *per* Lord Hope, [78] *per* Lord Brown, [162] *per* Lord Clarke.

[225] [2008] UKHL 36.

[226] Ibid, at [11] *per* Lord Bingham.

[227] Ibid, at [66] *per* Lord Brown.

[228] *Al Rawi*, at [35]. Lord Dyson in reference to the House of Lords' judgment in *Davis* (n 225).

[229] The responses to the consultation can be found at: http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation (last accessed 23/01/2016). [hereinafter responses to the *Green Paper* in relation to this consultation

of Lords in May 2012 (Government's Bill).[230] Following considerable amendments from the Lords, the Bill reached the Commons in November 2012 (Lords' Bill).[231] The JSA completed its Parliamentary passage in March 2013 and received Royal Assent in April 2013. Therefore, whilst the judgments in *R v Davis* and *Al Rawi* signalled a halt to the court authorising procedures departing from common law principles of open justice and fair trials; this did not halt the extension of CMPs.

In summary, even prior to the enactment of the JSA, the use of CMPs and special advocates had extended significantly across contexts within the UK. The migration out of the small context of immigration law also provided the platform for the migration of their use outside of specialist tribunals, such as SIAC. Consequently, the seeping of the once exceptional measures into ordinary judicial processes had already begun, or the 'creep' of secret justice. The use of CMPs in more conventional criminal and civil proceedings makes the use of special advocates and application of the gisting requirement all the more important, as the additional mitigation tools in relation to the judges may not be present in the same way as they are in specialist tribunals. However, the effectiveness of special advocates has been called into question due to the limitations they face in carrying out their functions. Similarly, the operation and application of the requirement of gisting have also been subject to criticism. The remainder of this chapter addresses both these mitigating tools in further detail.

2.6. Special Advocates

Special advocates play a central role in the system of CMPs, and the appointment of a special advocate to represent the interests of the individual excluded from the CMP, was one of the driving forces behind the introduction of the SIAC procedures. Consequently, an analysis of the role of special advocates and their ability to carry out their functions is essential in an examination of any legislative framework providing for the use of CMPs. For that reason, such an analysis is an integral part of this thesis. The following section of this chapter aims to provide the necessary background on the use of special advocates since their establishment in SIAC including an outline of the key features of

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period will be referred to as, *'Response to the Green Paper*', and attributed to the relevant individual or body].

[230] Justice and Security Bill (HL Bill 27). [Hereinafter referred to as the Government's Bill].

[231] Justice and Security Bill (Bill 99). [Hereinafter referred to as the Lords' Bill].

their role and operation of the system. In doing so, this discussion will provide an analysis of the positive role that special advocates play in mitigating the perceived unfairness of CMPs, and the restrictions that special advocates are said to face which may hamper this role. This will also introduce the key themes in the existing academic literature on the operation of the system, particularly prior to the introduction of the JSA.

In the UK, a special advocate is a security vetted legal practitioner who is appointed to represent the *interests* of the excluded individual in closed sessions.[232] The Home Secretary cannot rely on closed evidence unless a special advocate has been appointed.[233] Special advocates are appointed by the relevant law officers to 'represent the interests of an appellant' in proceedings before SIAC where the appellant and their legal representation are excluded.[234] Special advocates represent the interests of the excluded individual by:

> Making submissions to the Commission at any hearings from which the appellant and his representation are excluded; adducing evidence and cross-examining witnesses at any such hearings; and making written submissions to the Commission.[235]

The special advocate will receive the open materials relevant to the appeal, and will be present along with the appellant and his legal representative during the open proceedings.[236] This is heard in public and the excluded individual's legal representation is able to make submissions regarding the open material and cross examine any witnesses. At this stage, the special advocate is able to communicate with the individual and their legal representation.[237] Once the special advocate has viewed the closed material and the CMP begins, the special advocate can only communicate about the proceedings with SIAC, the Home Secretary and the relevant law officer.[238]

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[232] SIAC Act, s.6.

[233] 2003 Rules, Rule 37(2).

[234] SAIC Act, s.6.

[235] 2003 Rules, Rule 35.

[236] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54) para 56.

[237] Rule 36(1).

[238] Rule 36(3).

Special advocates are viewed as an important safeguard mitigating the inherent unfairness in CMPs.[239] In fact, 'the substantial justification' for the establishment of SIAC was the 'scrutiny of closed material by a special advocate'.[240] The *Green Paper* describes the effectiveness of the special advocate system as 'central' to the capability of 'delivering procedural fairness' in CMPs.[241] Consequently, special advocates play a prominent role in CMPs; and, any analysis of the use of CMPs particular attention must be paid to their use, including any limitations in which they face which may call into question the effectiveness of the safeguard they can provide.

During the CMP, special advocates have two functions: 'a disclosure function and a representative function'.[242] In carrying out their disclosure function, special advocates seek to 'maximise disclosure' of the material, by examining the closed material to see if there is any material that could be disclosed.[243] This has been described by a former special advocate as one of the 'most useful functions' special advocates can perform, and the best way to do this is to ascertain that the closed material is already in the public domain.[244] Additionally, special advocates will try to ascertain whether there is any material, particularly exculpatory, which should be included; and, therefore whether any further investigations are needed.[245] Subsequently, special advocates discharge their representative function and must represent the interests of the excluded individual; and

[239] See in particular: *Secretary of State for the Home Department v MB* [2007] UKHL 46; *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; *Tariq v Home Office* [2011] UKSC 35; *R. (on the application of AKH) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) at [78] *per* Ousley J.

[240] *R (on the application of C, U, XC v The Upper Tribunal, Special Appeals Commission* [2009] EWHC 3052, [6] per Laws LJ.

[241] *Green Paper*, para 2.3.

[242] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (54) para 58.

[243] JCHR, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (2006-07, HL 157, HC 394) [hereinafter "*JCHR Counter-Terrorism Policy and Human Rights*"] at para 191.

[244] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2* (n 55) Ev 6, Q41, Neil Graham QC.

[245] Ibid.

test the case against them in the CMP as best they can without 'informed instructions' from the individual or their legal representation.[246]

In *AHK and others v Secretary of State for the Home Department*,[247] Ouseley J stated that special advocates themselves 'underestimate their own effectiveness'.[248] Correspondingly, the case of *Zatuliveter v Secretary of State for the Home Department*[249] is an example in which the closed submissions of the special advocates were particularly influential on the outcome of the proceedings. It is noted here, that in addressing the limitations placed on special advocates this thesis does not contend that they are ineffective. On the contrary, this thesis claims that in certain circumstances special advocates' ability may be curtailed as such as to inhibit their effectiveness to represent the interests of the individual, in a way that impacts the overall fairness of the proceedings.

The importance placed on the significance of special advocates as a safeguard for an individual subjected to a CMP has resulted in the limitations receiving extensive criticism in the literature.[250] In addition, the Independent Reviewer of Terrorism and the JCHR have published numerous reports highlighting the difficulties that negatively impact the ability of special advocates to carry out their functions effectively. These are referred to, as applicable, throughout this thesis. The special advocates themselves have also consistently alerted the government to the limitations.[251] However, as this thesis will demonstrate, over the years little improvements have been made to alleviate such difficulties.

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[246] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54) para 58. See also Sedley LJ in, *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015 at [17].

[247] *AHK* (n 239).

[248] Ibid, at [78].

[249] *Zatuliveter* (n 119).

[250] For example: Boon and Nash (n 144); Ip (n 80); Martin Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) *Civil Justice Quarterly* 314; Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' 73(5) (2010) MLR 836; Cian Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 KLJ 19.

[251] For example see: *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54); *JCHR Counter-Terrorism Policy and Human Rights* (n 243).

The following sections illustrate the limitations and the affect they have on the special advocates ability to represent the interests of the excluded individual. One of the main difficulties is that 'in many cases the special advocate will be hampered by not being able to take instructions from his client on closed material.'[252] This is then compounded by the nature of the national security context, and the government's approach to the proceedings. With regard to the representative function, there are three groups of issues. The first include: the relationship between the special advocate and the individual; restrictions on communication between them; and, the requirement of *AF* disclosure. These have direct consequences on the ability for the individual to give effective instructions to the special advocate.[253] Therefore, they present problems with the preliminary stages of the proceedings, which continue throughout the course of the proceedings. The second group include practical difficulties, such as: adducing evidence; calling, and cross examining witnesses. This group relate to the special advocates effective participation during the conduct of the proceedings; and, they are primarily a result of the inability to receive effective instructions. The third group of limitations arise due to the national security context, and the practice of the government. They also restrict the special advocates' ability to carry out the disclosure function. However, the first criticism of the special advocate system is their appointment.

2.6.1. The appointment of special advocates

Special advocates are appointed by the Attorney General[254] and are resourced by the Special Advocate Support Office (SASO), which is a subsidiary of the Government Legal Department. The Attorney General acts for the government, who is often party to the proceedings.[255] This leads to the argument that, from the outset, the operation of the system presents an obvious conflict of interest. The JCHR have previously recognised this as a shortcoming stating that it 'gives rise to legitimate concerns about the

[252] *Al Rawi* (n 45) at [36] *per* Lord Dyson.

[253] Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56: 4 *McGill Law Journal* 863, 892: The 'inherent weakness of the scheme' is the inability to receive instructions, because special advocates cannot challenge the closed material effectively without them.

[254] SIAC Act, s.9.

[255] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54) para 69.

appearance of fairness in the process.'[256] The Court of Appeal acknowledged this apparent undesirable position in *R v H and C*,[257] and suggested that legislation should provide for special advocates to be appointed by the court.[258] Nevertheless, when the case reached the House of Lords, on this point the Law Lords stated that reservations about the Attorney General were 'misplaced', and when appointing special advocates the Attorney General acts as an 'independent, unpartisan guardian of the public interest in the administration of justice'.[259]

2.6.2. The relationship: representative but not responsible

The use of special advocates in CMPs under SIAC was acclaimed to be modelled on the Canadian model, which the previous discussion has identified as likely to be procedures in SIRC. However, the scheme adopted in the UK had some notably different characteristics to the security-cleared counsel used in the Canadian system.[260] The first to be addressed here is the role of the special advocate in relation to the excluded individual. Under the Canadian model, the primary job of the security-cleared counsel was to assist the SIRC,[261] albeit their role included challenging the government's case and cross-examining witnesses, incidentally representing the interests of the excluded individual. In the early stages of the SIAC Act's parliamentary passage it was apparent that the preference was to model the role of the special advocate, in this sense, on that of the security-cleared counsel to the SIRC. The government originally proposed that the special advocate would:

> help in its examination of the security evidence, and in particular to look at that evidence as if on behalf of the defendant. The Commission would then give the appellant as full a summary as is possible in the circumstances of any evidence taken in its absence.[262]

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[256] JCHR, *Review of Counter-terrorism Powers* (2003-04, HL 158, HC 713) para 39.

[257] [2003] EWCA Crim 28.

[258] Ibid, at [69].

[259] *R v H and C* (n 203) at [46].

[260] Jackson (n 128), 348.

[261] Jackson (n 128) 348; Forcesse and Waldam (n 85) 9.

[262] HL Deb 5 June 1997, vol 580, col 736. Lord Williams of Mostyn.

As the SIAC Bill progressed members of Parliament departed from the notion that the special advocate would act for SIAC,[263] and certain amendments to the Bill were necessary. At the House of Lords Committee stage Lord Williams asserted that in order to 'ensure the independence of a special advocate it would be more appropriate if the person were to be appointed by the Attorney-General.'[264] He went on to state that the government's view was now that, 'the role of the special advocate should be to represent the interests of the appellant in those parts of the proceedings from which he and his legal representative are excluded.'[265] From this point, it was clear that the government's intention was that the relationship between the special advocate and the individual whose interests they represent would not mirror the solicitor-client relationship.[266] The government acclaimed that the system was considered not to be 'workable on any other basis'.[267] The necessity to severe the solicitor-client relationship was made explicit in the Commons, the Home Office Minister Mike O'Brien asserting that the special advocate would:

> Look at the evidence as if he were doing so on behalf of the appellant. There will not be the lawyer-client relationship, where the special advocate is required to disclose all information to the client. There will be a measure of confidentiality, which we think is necessary in cases involving national security.[268]

Although the Home Office Minister also asserted that the special advocate would be 'expected to help the commission to examine the security evidence';[269] it was clear at this point that special advocates would not be acting predominantly as counsel for SIAC as was the position with the security-cleared counsel in the SIRC.[270] The amendments

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[263] Jackson (n 128) 349.

[264] HL Deb 23 June 1997, vol 580, col 1437.

[265] Ibid.

[266] Ibid.

[267] Ibid.

[268] HC Dec 30 October 1997, vol 299, col 1056.

[269] Ibid.

[270] See, *BG v Secretary of State for the Home Department* [2011] EWHC 1478 (Admin), at [41]: 'the special advocate acts for the appellant, and is not a friend of the court.' Although, special advocates to owe a duty to the court (including specialist tribunals such as SIAC). See: The Bar Standards Board, *Handbook* (Third edition, 2017) Part 2, Section B 'The Core Duties', CD1 'You must observe your duty to the court in the administration of justice'.

were approved and the position in the legislation is that the special advocate represents the interests of the individual.[271] The special advocate does not act for the individual. Thus, contrary to their name they are not 'advocates' in the traditional sense because they are not responsible to the individual whose interests they represent.[272] Accordingly, their relationship can be categorised as 'representative but not responsible'.[273] In this respect, the position of special advocates is presented as one which lacks accountability to the individual whose interests they represent.[274] The implications of this are twofold. Firstly, it raises questions of professional ethics. Secondly, there are questions regarding the effectiveness of the system in terms of the ability of special advocates to carry out their function of representing the individual's interests.[275]

The issues relating to professional ethics do not arise as a result of the way in which special advocates carry out their role. In fact, their professionalism has been praised. Lord Carlisle, the Independent Reviewer of Terrorism Legislation at the time, described them as 'skilled and conscientious'.[276] Arguably, this point is academic. However, given the potential interference with fundamental human rights, it is not a point that should be ignored. This is regardless of whether the special advocates are praised for the manner in which they carry out their functions. JUSTICE notes that the lack of accountability to the person whose interests they represent is a departure from any other role in the legal profession.[277] During the SIAC Act's parliamentary passage the government sought to draw analogy with litigation friends who act on behalf of children. Nonetheless even litigation friends owe a duty to those they represent.[278]

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[271] SIAC Act, s.6.

[272] Ip (n 80) 736.

[273] Eric Metcalf, '"Representative but not Responsible": the use of Special Advocates in English Law' (2004) 1 *JUSTICE Journal* 11.

[274] Murphy (n 250) 30; JUSTICE (n 68) 206.

[275] Murphy (n 250) 30.

[276] Lord Carlile, *Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (London: Stationary Office, 2009) para 65.

[277] JUSTICE (n 68) para 392.

[278] Family Procedure Rules, Practice Direction Part 7, rule 2.1: 'It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a child or patient. He must have no interest in the proceedings adverse to that of the child or patient and all steps and decisions he take in the proceedings must be taken for the benefit of the child or patient'.

Accordingly, one of the primary implications of severing the solicitor – client relationship is that the special advocate is not accountable to the individual whose interests they represent. This raises questions as to their overall accountability, an issue that has been presented as questions of professional ethics.[279] Special advocates are practicing barristers, hence they are subject to the code of conduct required by the Bar Standards Board.[280] Furthermore, at first sight their functions do not appear too dissimilar in their role as special advocates, as opposed to their role as ordinary advocates.[281] The SIAC Rules provide that special advocate are to represent the interests of the excluded individual by:

a) making submissions to the Commission in any proceedings from which the appellant and his representatives are excluded;
b) cross-examining witnesses at any such proceedings; and
c) making written submissions to the Commission.[282]

In addition, Jackson notes that special advocates consider themselves bound by the code as they would be when acting as 'ordinary advocates'.[283] However, severing the solicitor – client relationship between the special advocate and the individual whose interests they represent means that the role of special advocates has the potential to come into conflict with their professional duties, as required by the Bar Standards Board. This is with regard to the duties that barristers owe their clients, as opposed to those they owe the court.[284] The House of Commons Constitutional Affairs Committee acknowledged in their report published in 2005 that there are, 'some significant distinctions between the work of an ordinary lawyer and that of a Special Advocate.'[285] The consequences of this were outlined by Lord Bingham in *R v H and C*:

> Such and appointment [of a Special Advocate] does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client whose relationship with

[279] Murphy (n 250) 30. Jackson (n 128). Boon and Nash (n 144).

[280] The Bar Standards Board, *Handbook* (n 270).

[281] This point is made by Jackson (n 128) 351.

[282] SIAC (Procedure) Rules 2003, r. 35.

[283] Jackson (n 128) 351.

[284] Ibid.

[285] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54) para 62. See also SASO Open Manual (n 50) para 7.

> the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession.[286]

One of the consequences of severing the lawyer-client relationship in relation to accountability is that the special advocate is said to owe no duty of care to the individual whose interests they represent.[287] Boon and Nash argue that, 'conventional legal professional ethics owe their clients an obligation of absolute and single-minded loyalty'.[288] Thus, appearing to be contradictory obligations when acting as special advocates. The Bar Standards *Code of Conduct* provides that barristers, 'must promote fearlessly and by all proper and lawful means the *client's* best interests'.[289] In this manner, it would appear that whilst in their role as special advocates, barristers are acting in conflict to their duties in accordance with the Code of Conduct set by the Bar Standards. Nonetheless, the Code of Conduct explicitly refers to the duties barristers owe their clients; and, the individual whose interests the special advocate represents is expressly not their client. Accordingly, the argument that in their role as special advocates barristers act in conflict to the duties under the Code of Conduct appears to lose its force. The words of Lord Bingham in *R v H and C*, outlined above seem to be more appropriate, namely that in their role as special advocates they are acting, 'in a way hitherto unknown to the legal profession'. In the sense that, their relationship with the individual whose interests they represent as special advocates is very different from the relationship a barrister would have with their client. This is in despite of the fact the functions of a special advocate, acting in the interests of the individual, are very similar to the functions of a barrister representing their client.

Consequently, the role of special advocates and their ethical duties are not clearly delineated. JUSTICE is critical of the position because there are not any formal safeguards in terms of their professional accountability to the individual whose interests they represent, given that the duties owed to clients stated in the Bar Code do not apply in relation to the special advocate and the individual. It is true that it is possible to be subject to a professional code of ethics and owe no duty in certain circumstances. For

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[286] *R v H and C* (n 203) at [22].

[287] SASO Open Manual (n 50) para 7.

[288] Boon ad Nash (n 144) 114.

[289] R.CD15(1).

example, in *Hill v Chief constable of West Yorkshire*[290] the House of Lords set out circumstances in which the police are excused from the duty of care despite being required to behave ethically according to the PACE Codes of Practice. However, as submitted by Jackson, it appears that special advocates do owe some duty to the individual whose interests they represent.[291] This is implicit in the fact that the provisions for special advocates state that they represent the interests of the excluded individual.[292] The difficulties ensue from the issue that this is not defined and it is not explained how this duty would be enforced.[293] Consequently, it is recommended that a separate set of expectations set out in a code of ethics must be established.[294]

The 'representative but not responsible' role of special advocates also has implications for the effectiveness of the system, in terms of the ability of them to carry out their function of representing the individual's interests. The SASO have stated that it is an important point because, 'it has implications for the special advocate in relation to the taking of what could be considered "instructions"'.[295] The concept of appointing counsel to represent the interests of a party unable to give instructions is not unfamiliar to the adversarial tradition in the UK.[296] During the SIAC Bill's reading in the House of Commons likened the role of special advocates to:

> a person who is appointed by a court to represent a minor – a child – or someone with a psychiatric or mental problem. That person does not take instructions from the client and he is not obliged to do what the client says.[297]

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[290] [1989] AC 53.

[291] Jackson (n 128), 352.

[292] Ibid.

[293] Ibid.

[294] Boon and Nash (n 144) 123; Clive Walker, *Terrorism and the Law* (Oxford University Press, 2011), [6.56].

[295] SASO Open Manual (n 50) para 7.

[296] Jackson (n 128), JUSTICE (n 68) 320.

[297] HC Deb 30 October 1997, vol 299, col 1071. See also HC Deb 26 November 1997, vol 301, col 1039: 'that is not completely unprecedented. Perhaps it has never been done on this scale and in this way, but it happens in cases involving people with psychiatric problems and with minors. Their lawyer sometimes has to exercise independent judgment in the way in which he represents that person.'

However, it is argued here that this analogy is flawed. This was also contended by JUSTICE who noted that litigation friends are appointed because the individual whom they represent is either too young or considered too unwell to provide proper instructions. On the contrary, an individual excluded from a CMP is unable to give effective instructions to the special advocate because of the government's non-disclosure of the evidence in question. Thus, the non-disclosure is the only cause of any 'disability' suffered by the individual whose interests are represented by the special advocate.[298]

One of the contributing factors to the implications to the special advocates' ability to take effective instructions due to their role in relation to the individual, is that their relationship 'lacks the quality of confidence'.[299] This has broader implications beyond the impact on the individual concerned. The importance of solicitor-client confidentiality is highlighted by Code and Roach where they argue that not only is it an individual right but that it also serves 'broad public interest functions within the justice system as a whole'.[300] Confidentiality facilitates effective legal advice and consequently supports access to justice.[301] It is therefore seen as integral to the functions of the adversarial system. To be able to discuss evidence in confidence with the client is key to the ability of a lawyer to operate in an adversarial system; and in such a system, because the judge does not have inquisitorial powers, he is dependent upon the parties.[302] Therefore, the relationship between the individual and the special advocate contributes to the special advocate not being able to receive effective instructions from the individual whose interests they represent.

Finally, there lies the possibility that whilst the special advocate may act in the best interests of the individual, this may be inconsistent with the individual's wishes.[303] JUSTICE refers to the case of Abu Qatada[304] to illustrate the potential discrepancy

[298] JUSTICE (n 63) para 324.

[299] *R v H and C* (n 203) at [22].

[300] Code and Roach (n 74) 88.

[301] Ibid, at 88.

[302] Ibid at 95.

[303] JUSTICE (n 63) para 394.

[304] *Abu Qatada v Secretary of State for the Home Department* (SC/15/2002, 8 March 2004).

between the individual's wishes and interests.[305] In the case before SIAC the appellant stated he would not participate in the proceedings because he had 'no faith in the ability of the system to get the truth'.[306] Subsequently, the special advocates appointed to represent his interests submitted to SIAC that they did not see it in the appellant's best interests for them to take part in the closed proceedings.[307] SIAC felt that their decision not to participate was 'wrong', and Lord Carlile took the same view in his review of Part IV of ATCSA 2001 in 2003.[308] He stated that 'the unusual role of the special advocate should require attendance and the willingness to act at all times'.[309] Following correspondence between the special advocates, SIAC and the Solicitor General; it was agreed that neither the Solicitor General nor the Attorney General will interfere with the professional opinion of special advocates as to what they consider in the appellant's best interests.[310] The Special Advocate Support Office (SASO) Open Manual states that, 'special advocates may therefore withdraw from an appeal if their judgment is that it is in the best interests of the appellant'.[311] SIAC did in fact accept the special advocates' decision that it was in the appellant's interests not to question witnesses or make submissions in the closed proceedings;[312] and empathised with the 'invidious position' they were faced with by the appellant's late decision not to participate in the hearing.[313] Therefore, this case could be taken as support for the proposition that in this respect the system of special advocates is working. The decision of SIAC is the more favourable approach in this situation, as there should be no opportunity for counsel to act contrary to the wishes of the person whose interests they represent.[314]

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[305] JUSTICE (n 63) para 394.

[306] *Abu Qatada* (n 304) at [5].

[307] *Abu Qatada* (n 304) at [9].

[308] Lord Carlile, *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2004* (2004) para 78.

[309] Ibid, para 80.

[310] SASO Open Manual (n 50) para 84.

[311] Ibid.

[312] *S v Secretary of State for the Home Department* (SC/25/2003, 27th July 2004) at [38].

[313] Ibid, at [39].

[314] JUSTICE (n 63) para 396.

2.6.3. The prohibition on communication

Once the closed material has been served on the special advocate, the special advocate is prohibited from communicating with the individual whose interests they represent, or their legal representation. The rationale of the prohibition on communication is to ensure that disclosure of sensitive material is not inadvertently made. This limitation is one of the most discussed shortcomings of the special advocate system, and has been considered to be 'one of the most severe disadvantages'.[315] Ip has argued that a relaxation on the rules on communication would go to the 'core of the fairness issue'.[316]

The prohibition is subject to some exceptions: the special advocate can communicate with the individual before the closed material is served;[317] and, after the special advocate has seen the closed material they can apply for SIAC for permission to communicate with the individual.[318] However, the Home Secretary is notified of this and has the opportunity to object to the proposed communication.[319] In addition, the individual is permitted to communicate with the special advocate on a one-way basis.[320] The following discussion will demonstrate that these exceptions are not significantly helpful; and further inhibit the special advocates ability to receive effective instructions and carry out their functions effectively.

First, the fact that the special advocate is permitted to communicate with the individual before the material is served is 'unlikely to be of much use'.[321] At this point the nature of the case against the individual will not be known by the special advocate or the individual as it will be in the closed material.[322] It is doubtful at this point whether the

[315] Kavanagh (n 250) 838.

[316] John Ip, '*Al Rawi*, *Tariq* and the Future of Closed Material Procedures and Special Advocates' (2012) 75:4 MLR 606.

[317] SIAC Rule 36(1).

[318] SIAC Rule 36(4).

[319] SIAC Rule 36(5).

[320] SIAC Rule 36(6).

[321] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2* (n 55) Ev 38, para 9.

[322] Ibid.

special advocate will know what questions to ask,[323] Chedware warned of the consequence of 'hit-and-miss advocacy' in relation to the arguments that should be made without being aware of the closed material.[324] This has been described as 'counter-intuitive to the basic way that lawyers are used to doing their job'[325]. It follows that allowing the individual to communicate with the special advocate on a one-way basis, after the closed material has been served, is also ineffective as the individual will not have been made any more aware of the case against him as he will not have seen the closed material.[326]

In *Rahman v Commissioner of the Police of the Metropolis*,[327] a dispute arose as to the correct interpretation of the Regulations applicable to CMPs in Employment Tribunals in relation to communication between the special advocate and the individual whose interests they are appointed to represent.[328] The Employment Tribunal Judge had ruled that, on a proper construction of schedule 2 the special advocate was, 'free to communicate on open matters' with the appellant and his legal representation.[329] This was irrespective of whether the special advocate had sight of the closed material. Therefore, there appeared to be a discrepancy between the rules of communication applicable in Employment Tribunals and the other statutory schemes provided for the use of special advocates. This demonstrates one of the difficulties with cross-context policy transfer, there does not appear to have been a justification for distinguishing the employment context as requiring different rules regarding communication. If there was a rationale behind the difference in the Employment Tribunal's Rules of Procedure this was not made apparent. However, this was overturned on appeal. The Employment

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[323] *JCHR Counter-Terrorism Policy and Human Rights* (n 243) Oral evidence Q44 (Nick Blake QC).

[324] Joseph Chedware, 'Assessing Risk, Minimising Uncertainty, Developing Precaution and Protecting Rights: an Analysis of the Prohibition Between Terrorists Suspects and Special Advocates' (2012) 12 *Oxford University Commonwealth Law Journal* 33, 41.

[325] *JCHR Counter-Terrorism Policy and Human Rights* (n 243); and Ip (n 316) 732.

[326] Ip (n 80) 733.

[327] [2012] UKEAT/0125/10/RN.

[328] At the time, the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004/1861 were in force. The provisions relating to special advocates were contained in Schedule 2 rule 8.

[329] *Rahman* (n 327) at [5].

Appeals Tribunal made reference to 'every other circumstance' in which special advocates are appointed, and noted the prohibition on communication following the disclosure of the closed material to the special advocate.[330] Subsequently the government revoked and replaced the 2004 Regulations, and the 2013 Regulations bring the rules relating to special advocates in line with the statutory provisions applicable in the other contexts.[331]

In addition, making provision for the special advocate to seek permission for communication after seeing the closed material does not sufficiently mitigate the unfairness of the situation. The Home Secretary, the opposing party, is notified of this and given the opportunity to oppose. Unsurprisingly it is reported that this exception is rarely used.[332] The reasoning for this is obvious: it would not be 'tactically desirable'.[333] It has been stated that special advocates feel 'inhibited' about even being required to draw the attention of their opponent to certain issues on which they require assistance with from the appellant.[334] The government has submitted that it accepts that this procedure 'might require the special advocate to disclose his thinking to the Secretary of State', however it appears to fail to appreciate the effects of this as it goes on to claim that the process could be relied upon more.[335]

This also demonstrates yet another ethical concern about the role of the special advocate, notifying the opposing party of the proposed communication presents a

[330] Ibid, at [13].

[331] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237, Schedule 2, rule 4(9).

[332] *JCHR Counter-Terrorism Policy and Human Rights* (n 243) para 200.

[333] Ibid, para 201. See also: David Cole and Stephen I. Vladeck, 'Comparative Advantages: Secret Evidence and 'Cleared Counsel' in the United States, the United Kingdom and Canada' in David Cole, Federico Fabbrini and Arianna Vedaschi *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing Limited: 2013) 183.

[334] *JCHR Counter-Terrorism Policy and Human Rights* (n 243) Oral evidence, 12 March 2007, Q44 (Andy Nicol QC).

[335] *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, June 2005) 8.

'drastic departure' from the standard qualities of the solicitor-client relationship.[336] The JCHR have acknowledged that unconstrained communication would usually be protected by legal professional privilege. Legal advice privilege is a sub-head of legal professional privilege;[337] the privilege is the right of the client[338] and attaches itself to what the client tells his legal representative and what the legal representative advises the client.[339] The privilege entitles the client to object 'to any third party seeing the communication for any purpose'.[340] It has been argued that legal advice privilege is necessary to enable the effective administration of justice.[341]

Therefore, it is true to say that these 'minor exceptions do not significantly improve matters'.[342] The prohibition on communication, despite the exceptions, 'limits the very essence of their function'[343] to represent the interests of the individual and test the closed material. This argument is exacerbated by the fact that the prohibition also hinders the special advocates' ability to take effective instructions,[344] and impedes the special advocate from reporting to the individual.[345] Boon and Nash refer to the principle of advocacy: that the advocates say what their clients would in full knowledge of the law.[346] Therefore, the inability to take effective instructions from the individual signifies a disregard for traditional English advocacy.[347] This thesis will also

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[336] JCHR, *Counter-Terrorism and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (2009-10, HL 64, HC 395) [hereinafter "*JCHR Sixteenth Report*"] at para 67.

[337] *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, para 105 per Lord Carswell

[338] *Wilson v Rastall* (1792) 4 TR 753.

[339] *Three Rivers* (n 337) at [61] *per* Baroness Hale.

[340] *R (Prudential plc & Anor) v Special Commissioner of Income Tax & Anor* [2013] UKSC 1, at [17].

[341] *Greenough v Gaskell* (1833) 1 My & K 98, 109 *per* Lord Brougham LC.

[342] Ip (n 80) 732.

[343] JCHR Counter-Terrorism Policy and Human Rights (n 243) para 201.

[344] Chedware (n 324).

[345] *R v H and* C (n 203) at [22].

[346] Boon and Nash p.116.

[347] Boon and Nash (n 144) 116.

demonstrate the impact that this can have on the compatibility of the use of special advocates with Article 6(1).[348]

2.6.4. Practical difficulties

When the special advocate system was initially set up, there was no ability for them to call witnesses.[349] This limitation has been the only one addressed by the government resulting in a change to the legal framework, and the SIAC Rules have now been amended to give special advocates the additional function to 'adduce evidence and to cross-examine witnesses'.[350] The disappointing truth is that this amendment has not significantly improved the situation for the special advocate or the person whose interests they represent. Severe restrictions on the special advocates' practical ability remain as the witnesses cannot be former of present security service agents. The government consider that otherwise it would be inappropriate.[351] Additionally, there is the remaining issue that calling a witness would entail disclosing closed material to them. The witness would have to be security cleared which could take a long period of time. Alternatively, the government states that the 'questions would need to be posed in an open hearing following notification being given to the Secretary of State'[352]. Lord Bingham also highlighted that there may be a difficulty with the special advocate knowing who to call given that they cannot take instructions from the appellant due to the restrictive communication provisions discussed above.[353] Therefore, any assertion that there is now nothing to impede the special advocates' ability to call witnesses is completely 'unsustainable'.[354] Consequently, a potentially serious equality of arms is presented.[355] There is the additional problem with regard to witnesses, in that the security service agents are treated as expert witnesses. However due to the restriction on

[348] Chapter 7.

[349] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54) para 52.

[350] SIAC Amendment Rules 2007, s.27 amending r.44.

[351] *Green Paper* Appendix F p.57.

[352] Ibid.

[353] *Roberts v Parole Board* (n 196) at [18].

[354] Tim Otty, 'The slow creep of complacency and the soul of justice: observations on the proposal for English courts to adopt "closed material procedures" for the trial of civil damages claims' (2012) EHRLR 267, 269.

[355] Kavanagh (n 250).

the special advocates choice of witnesses, there is no 'countervailing view' as there is no expert on the side of the appellant.[356]

Special advocates are also presented with a difficulty as they are severely restricted in their ability to conduct factual research. The judgments are closed, and it has been established that past practice evidences that the majority of the case is generally in the closed material proceedings. Consequently, the special advocate will have no access to precedent.[357]

A further difficulty that has been identified is the lack of professional support given to the particular special advocate working on a particular case. When special advocates were first introduced there was little to no professional support. Whilst they were formally instructed by the Treasury Solicitor's Department's lawyers, they did not have security clearance and could not view the closed material. In 2005 Neil Garnham QC, a special advocate, stated that in reality they were 'simply operating on their own with no substantive assistance'.[358] Following the House of Commons Constitutional Affairs Committee's report in 2005, the SASO was established to assist the special advocates. The SASO is comprised of open and closed lawyers. The open lawyers are not security cleared and therefore cannot see the closed material. They can communicate with the appellant and his legal representatives. The closed lawyers are security cleared and they can access the closed material. They may not however communicate with the appellant and his representatives.[359] The SASO Open Manual contains a list of the assistance that SASO will provide.[360] Whilst this is a positive step and improvement on the system that was first introduced, it has been reported that difficulties still remain. They do not have instructing solicitors in the same manner as a legal representative would have in open proceedings.[361]

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[356] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2* (n 55) Q61 Martin Chamberlain.

[357] Murphy (n 250).

[358] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54) para 76.

[359] SASO Open Manual (n 50) para 87.

[360] Ibid, para 90.

[361] Murphy (n 250) 15.

2.6.5. The reliance of the government to disclose

Due to the nature of sensitive material, during the proceedings both the court and special advocates are excessively dependent on the views of the security services as to what is exculpatory material, which is essential to the special advocate in order to represent the interest of the individual.[362] The special advocates have reported cases where they have coincidentally been made aware of important exculpatory material that was not disclosed due to the same special advocate appearing in two different cases.[363]

Even if the government takes its obligation to disclose any exculpatory material it is aware of seriously, the nature of intelligence is said to be problematic in itself. Van Harten demonstrates the limitations incurred with the dependence on the executive to disclose the closed material. He identifies that the way in which an intelligence assessment views evidence is very different to the legal assessment of establishing a defence.[364] In order to appreciate the difficulties faced, it is first important to understand the nature of intelligence assessment. Intelligence can be described as looking forward, it is based on risk and precaution; it is an estimation of 'what is happening and will happen'.[365] It follows that the 'mandate' of the security services is 'not to assess evidence against legal standards', their role is to assess information to enable decisions to be made about security threats, risks, and how to respond.[366] Intelligence officers will not be trained to assess evidence in light of exculpation.[367] Therefore a major issue for special advocates is whether they can depend on the executive to adapt its method of assessment.[368] Alongside the method of assessment there is a problem with how the material is presented. The police force are faced with the task of turning their information into evidence in order to establish a case against the accused. The focus of the security service is risk assessments and this does not sit well with adjudicative

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[362] *Constitutional Affairs Committee, The Operation of SIAC, Vol 1* (n 54) para 68.

[363] Forcese and Waldman (n 85)

[364] Gus Van Harten, "Weakness of adjudication in the face of secret evidence" 13 (2009) *The International Journal of Evidence and Proof* 1, 16.

[365] Fred Manget, 'Intelligence and the Criminal Law System' (2006) 17 Stan L and Policy Review 415, 416.

[366] van Harten (n 168)16.

[367] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2* (n 55) Q61.

[368] van Harten (n 168) 16.

methods complying with conventional standards of evidence.[369] Experience in SIAC demonstrates that vast amounts of information are given to the special advocate without any attempt to 'turn any of it into evidence'.[370] However, the conventional standards of evidence do not apply to all the legal processes in which CMPs are used. For instance, in relation to TPIMs, Part 80 of the Civil Procedure Rules applicable to proceedings under the Terrorism Prevention and Investigation Act 2011 modifies the general rules of evidence and disclosure.[371] To the extent that Part 31 (disclosure and inspection of documents), Part 32 (evidence) and Part 33 (miscellaneous rules about evidence) of the Civil Procedure Rules are not applicable to proceedings under the Act.[372] Therefore, to frame this objection to the system in terms of a lack of attempt to turn intelligence into evidence falls short. On the contrary, it would appear that the concern is raised in relation to the difficulty for special advocates dealing with the difference in the content and presentation to evidence. As it is evidence that special advocates who are legal professionals will be more familiar with.

On the other hand, Walker advances no fundamental objections blending of intelligence material into the evidence-based legal process.[373] He contends that, 'intelligence is information with value added analysis and no more.'[374] Similar issues will arise with intelligence material as with evidence. Such as, it must be properly tested; and, there are degrees of relevance and reliability.[375] The use of intelligence in legal process arose in the case of *A v Secretary of State for the Home Department*.[376] The House of Lords took the position that SIAC is 'tailor-made to deal with sensitive cases where intelligence material has to be considered'; and, noted that there will be a member of the court with

[369] Forcese and Waldman (n 85) at 41.

[370] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2* (n 55) Q61 Ian Macdonald.

[371] CPR, Part 80, r.80.22.

[372] See also, for example, rule 79.22 which modifies general rules of evidence in proceedings under the Counter-Terrorism Act 2008 and Part 1 of the Terrorist Asset-Freezing Act Etc Act 2010; and, rule 76.26 which was applicable in relation to control order hearings under the Prevention of Terrorism Act 2005.

[373] Clive Walker, 'Intelligence and Anti-Terrorism Legislation in the United Kingdom' (2005) 44 *Crime, Law and Social Change* 387, 409.

[374] Ibid.

[375] Ibid.

[376] [2005] UKHL 71.

the experience of handling such material.[377] Hence, the courts are not unfamiliar to intelligence material. Nevertheless, it has been established that the use of CMPs has migrated out of SIAC and other specialist tribunals into more conventional criminal and civil proceedings. The JSA now brings CMPs officially into ordinary legal processes, albeit so far this is only in civil cases. Accordingly, the question arises as to whether the use of large volumes of intelligence material in such cases will pose difficulties if the judges are lacking in the same expertise as, for example, members of SIAC.

Furthermore, it is suggested that the nature of the closed material provided to the special advocate differs.[378] In some cases full transcripts of intercepted communications have been submitted, and in others merely a summary. It is a concern that summaries may only reflect the government's position, and that where full transcripts have been received the security service's questions are designed to advance the government's assumptions. The 'mosaic' quality of the closed material was highlighted by special advocates in their submissions to the court in *AF (No 3)*.[379] Their submissions stated that the closed material comprised information, 'drawn in various combinations, depending on the particular case, from a variety of sources'.[380]

The problem of exculpatory material is also an issue in CMPs. However, one of the primary functions of the special advocate is to argue for more disclosure. They face major obstacles in this regard, as the government are reported to take a 'precautionary approach' of refusing to disclose.[381] Special advocates have stated that the consequence of a lack of requirement of the *AF* 'gisting' requirement, has contributed to the practice of 'iterative disclosure'.[382]

This iterative approach is where a bit of disclosure is given to the appellant, and then a bit more disclosure shall be given only after the special advocate or the individual's

[377] Ibid, at [134] *per* Lord Rodger.

[378] Forcese and Waldman (n 85) 41.

[379] See, Kavanagh (n 250).

[380] *AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28, at [24].

[381] Fenwick and Phillipson (n 253).

[382] JCHR, *Legislative Scrutiny: Terrorist Asset-Freezing Bill (Second Report)* (2010-11, HL 53, HC 598).

legal representatives have argued that this is insufficient.[383] This is as opposed to the Home Secretary providing an adequate summary of the allegations made against him in order to comply with the requirements of Article 6 ECHR in the first place. Special advocates have expressed concern about this approach. They feel it is unfair for the individual to respond in the first place before disclosing what 'he is entitled to know about the case'.[384] Additionally, requiring disclosure issues to be re-examined constantly causes practical problems of delay in an already long drawn out process.[385]

A further limitation, which hinders the special advocates' ability to discharge its functions, is the experience of late disclosure of material by the Secretary of State to the special advocate. The Independent Reviewer of Terrorism in his First Annual Report of TPIMs acknowledged this as he highlighted the strong views from special advocates against late disclosure, leading to case management issues.[386] The JCHR have also reported on this issue and raised awareness of the insufficient time this leaves special advocates to sufficiently scrutinise material, and construct strong arguments for more material to be heard in the open proceedings.[387] Due to the potential negative effect, this has on their ability to represent the interests of the individual the practice of late disclosure carries with it the 'risk of serious miscarriages of justice'.[388] This is not to say that the government are always deemed to have acted as a hindrance on the ability of special advocates to examine the closed material by the judiciary. In *M v Secretary of State for the Home Department,*[389] the Court of Appeal commented that they were, 'impressed by the openness and fairness with which the issues in closed session were dealt with by those who were responsible for the evidence given before SIAC.'[390]

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[383] *JCHR Sixteenth Report* (n 336) para 51.

[384] Ibid.

[385] Ibid.

[386] Independent Reviewer of Terrorism Legislation, *First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (March 2013) [Hereinafter "*Independent Reviewer TPIMs First Report*"] para 9.31.

[387] *JCHR Sixteenth Report* (n 336) paras 63-65.

[388] Ibid, para 65.

[389] [2004] EWCA Civ 324.

[390] Ibid, at [34].

In summary, whilst special advocates undoubtedly provide an important mitigating tool where a CMP is invoked, the limitations that they face will affect their ability to represent the excluded individual and carry out their functions effectively. The effect on their ability will differ according to the circumstances and the context in which they are used.[391] This is in line with the views of the judiciary, who have expressed their support to the work of special advocates and expressed confidence that they can 'help to enhance the measure of procedural justice' available to an individual excluded from a CMP.[392] Nonetheless, it is recognised that they 'cannot invariably do so'.[393]

The special advocates' themselves have stated that the positive contribution they can make is limited by the restrictions that have been illustrated in this discussion. The question has even been raised as to whether by, 'continuing to serve as special advocates, they are helping to "legitimise a bad system".'[394] However, in evidence to the House of Commons Constitutional Affairs Committee, special advocates submitted that: 'we continue to discharge our functions as special advocates because we believe that there are occasions on which we can advance the interests of the appellants by doing so.'[395]

It is argued here that special advocates play an important role, and their appointment is better than the alternative, which is that an individual excluded from a CMP is left with no form of representation. Nevertheless, the appointment of special advocates is in not in itself sufficient to meet the required standards of a fair hearing.[396] McGarrity and Santow suggest that the special advocate regime does not satisfy the doctrine of proportionality, which requires that rights restricting measures be the least intrusive available.[397] Therefore, their use needs to be combined with additional mitigating tools.

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[391] Metcalf (n 273) 27.

[392] *MB* (n 239) at [35].

[393] Ibid, at [90] *per* Lord Brown.

[394] *Independent Reviewer TPIMs First Report*, para 9.31.

[395] Constitutional Affairs Committee, The Operation of SIAC, Vol 2 (n 55).

[396] This point is also made by McGarrity and Santow in, Anti-terrorism laws: balancing national security and a fair hearing' in Victor V. Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd ed, Cambridge University Press, New York, 2012), 148.

[397] Ibid.

One of these is the requirement of 'gisting' which is explained in the following discussion.

2.7. Gisting

In *A v United Kingdom,*[398] the ECtHR considered the compatibility of the use of CMPs and special advocates with the ECHR for the first time. In this case the complaint was brought under Article 5(4).[399] The Grand Chamber asserted that the special advocate, 'could play an important role in counterbalancing the lack of full disclosure'[400] in the CMP. However, it found that the:

> special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.[401]

The court concluded that where:

> the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of art.5(4) would not be satisfied.[402]

In *AF (No 3) v Secretary of State for the Home Department,*[403] the House of Lords were required to consider whether the use of a CMP in a control order hearing was compatible with their right to a fair trial under Article 6 of the ECHR. The ECtHR's decision in *A v United Kingdom* was applied. The Law Lords was stated that they felt 'bound' by Strasbourg's ruling,[404] and decided that Article 6 ECHR requires an 'irreducible minimum' level of disclosure. Lord Phillips delivered the leading judgment in *AF (No 3)* and identified the essence of the ECtHR's ruling in *A* as follows:

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[398] *A* (n 77).

[399] The challenge was brought by the Belmarsh detainees following the landmark decision in *A v Secretary of State for the Home Department* (n 160). For analysis of the case and its journey to Strasbourg see, Sangeeta Shah, 'From Westminster to Strasbourg: *A and others v United Kingdom*' (2209) 9:3 *Human Rights Law Review* 473.

[400] *A* (n 77) para 220.

[401] Ibid.

[402] Ibid.

[403] *AF (No 3)* (n 380).

[404] Ibid, at [81] *per* Lord Hoffman. For further discussion on this point see: Mark Elliot, 'Stop Press: Kafkaesque Procedures are Unfair' (2009) *Cambridge Law Journal* 495.

> This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, 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 would be.[405]

Accordingly, in order to comply with the requirements of a fair trial, the controlee, must be given sufficient information to give effective instructions to the special advocates in relation to the case against them. This has been referred to as the 'gisting' requirement;[406] this thesis refers to this as '*A*-type disclosure'.

The rulings in *A* and *AF (No 3)* should be praised as presenting a serious opportunity to significantly improve the ability of the special advocates to carry out their functions effectively, and in turn enhancing procedural fairness. The position taken by this thesis is that *A*-type disclosure is a key tool for mitigating the perceived unfairness of CMPs. The emphasis of the ECtHR on the need for an individual to be given an, 'opportunity effectively to challenge' the basis of the case against them, is to be particularly welcomed. This is in keeping with one of the ECtHR's general principles of interpretation, namely the principle of effectiveness, which is particularly prominent in the ECtHR's Article 6 jurisprudence in its analysis of an interference with the ECHR. This will be examined in further detail in Chapter 4, and its prominence in the Article 6 jurisprudence will become more apparent in Chapters 5 to 9. In *AF (No 3)* Lord Phillips noted that the phrase 'effectively challenge' 'sets a relatively high standard'.[407] Nevertheless, the court emphasised that the '*core irreducible minimum…. that cannot be shifted*', was that the 'controlled person must be given sufficient information about the allegations against him to give effective instructions to the special advocate.'[408] Lord Brown described this as a 'rigid principle'.[409]

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[405] *AF (No 3)* (n 380) at [59].

[406] Daniel Kelman, 'Closed Trials and Secret Allegations: an analysis of the "gisting" requirement' [2016] *Criminal Law Review* 264.

[407] *AF (No 3)* (n 380) at [87].

[408] Ibid, at [81]. Emphasis added.

[409] Ibid, at [119].

The decision in *AF (No 3)* and the requirement of *A*-type disclosure should have improved the hindrance on the special advocates' ability to represent the individual's best interests. In particular, those generated by the restrictions on communication. However, the application of *A*-type disclosure has not proved straightforward in primarily two respects. The first is in relation to the circumstances in which *A*-type disclosure should apply; and, the second is the nature of *A*-type disclosure in circumstances in which it is deemed to apply. These two core issues will be dealt with in turn.

The ECtHR in *A*, was clear to state that *A*-type disclosure would need to be decided on a 'case-by-case basis';[410] and, that Article 5 (4) does not impose a 'uniform, unvarying standard to be applied irrespective of the context, facts and circumstances'.[411] This is in conformity with the ECtHR's context-specific approach to interpretation. This reasoning was adopted by the House of Lords in *AF (No 3)*.[412] However, what emerged was the question of whether *A*-type disclosure would be required in all cases that engaged Article 6 or Article 5(4) ECHR.[413] In addition, the issue arose as to whether *A*-type disclosure was required in all cases involving a CMP and special advocates, irrespective of whether the proceedings engaged Article 6 or Article 5(4).

Initially, the government demonstrated a resistance to the applicability of *A*-type disclosure.[414] For example, it sought to argue that it did not apply to bail hearings before SIAC on the basis that, 'bail applications are not final, and immigration detention (if bail is refused is essentially temporary' therefore, 'this was a context in which a less stringent procedural standard was required'.[415] This argument was rejected by the court.[416] In addition, the courts rejected the government's claims that *A*-type disclosure

[410] *A*, (n 77) para 220.

[411] *A*, (n 77) para 203.

[412] For example, see: *AF (No 3)* (n 380) at [86] per Lord Hope. See also: *BM v Secretary of State for the Home Department* [2012] EWHC 714 (Admin), at [21].

[413] John Jackson, 'Justice, security and the right to a fair trial: is the use of secret evidence ever fair?' [2013] *Public Law* 720, 728.

[414] Ip (n 316) 622.

[415] *R (on the application of Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), at [109].

[416] Ibid, [112] – [113].

did not apply to the so-called 'light touch control orders'.[417] However, in *R (on the application of BB (Algeria)) v Special Immigration Appeals Commission*,[418] it was held that *A*-type disclosure obligations were not applicable in SIAC when imposing bail conditions. In dismissing the appeal it was found that Article 6 was not engaged. Therefore, the requirement of *A*-type disclosure was considered in the context of the procedural guarantees required by Article 8. The Court of Appeal stressed the relevance of the extent of the interference with Article 8 and stated that if the interference amounts to a deprivation of liberty, then the Article 6 rights apply even in the national security context. However, 'it does not follow that an individual is entitled to the same procedural protections in a national security context where the interference with his article 8 rights fall short of a deprivation of liberty.'[419] The court distinguished between proceedings where bail conditions involve only a 'modest interference' with an individual's Article 8 rights and those where the interference is 'substantial'.[420] Similar reasoning was applied by the High Court in *R (Bhutta) v Her Majesty's Treasury*,[421] which found that Article 6 did not apply to the decision to list the applicant and consequently *A*-type disclosure was also inapplicable. Unfortunately, the inapplicability of *A*-type disclosure has also arisen within the context of Article 6, which is illustrated in the case of *Tariq v Home Office*.[422]

In *Tariq v Home Office*,[423] a majority of the Supreme Court considered that *A* as applied in *AF (No 3)* had not established an absolute rule that 'gisting must always be resorted to whatever the circumstances',[424] and to even suggest the existence of such a rigid rule

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[417] *R (on the application of the Secretary of State for the Home Department) v BC and BB* [2009] EWHC 2927 (Admin).

[418] [2012] EWCA Civ 1499.

[419] Ibid, [52].

[420] Ibid. This approach reflects that of Strasbourg in the jurisprudence that developed after the decision of the Grand Chamber in *A*. It appears that the applicability of *A*-type disclosure in CMPs differs depending on the Convention right at issue. The implications of this are addressed in detail in Chapter 7.

[421] [2011] EWHC 1789 (Admin).

[422] *Tariq* (n 239).

[423] Ibid.

[424] *Tariq* (n 239) at [83] *per* Lord Hope. See also: Lord Manse at [69], Lord Brown at [85], and Lord Dyson at [138].

was 'absurd'.[425] The decision overturned that of the Court of Appeal,[426] and the Employment Appeals Tribunal,[427] which had both concluded that *A*-type disclosure applied. Tariq had been employed as an immigration offer before his security clearance was withdrawn. He subsequently commenced proceedings before the Employment Tribunal claiming that it was withdrawn in circumstances involving discrimination on grounds of race and/or religion. The Home Office maintained that there was no such discrimination and the decision was taken in the interests of national security. The Supreme Court placed emphasis on the factual differences between the circumstances in *AF (No 3)* and *Tariq*, and the severity of the consequences.[428] It was abundantly clear to the Supreme Court that in the context of detention and control orders, hence situations where an individual may be faced with criminal proceedings or severe restrictions on personal liberty, Article 6 ECHR requires the individual to be given the *A*-type minimum disclosure requirement. The Supreme Court distinguished Tariq's circumstances, being a civil claim for discrimination whereby the question was whether he was entitled to damages, as a 'less grave incursion of a person's rights'[429] and concluded that the Home Office was not required to provide him with sufficient information about the allegations against him.[430]

The effect of the decision can be viewed as establishing a new category of cases to which *A*-type disclosure is not required.[431] The significance of this is that without the requirement to provide 'sufficient information' to enable the individual excluded from a CMP to give 'effective instructions' to the special advocate representing their interests, there is a danger that the individual could be provided with no information at all.[432] The inability to receive effective instructions is a serious hindrance on special advocates' ability to carry out their representative function. This position taken by this thesis is that

[425] Ibid, at [88] *per* Lord Brown.

[426] *Tariq v Home Office* [2010] EWCA Civ 462.

[427] *Tariq v Home Office* UKEAT 168/09, [2010] ICR 223

[428] *Tariq* (n 239) at [27] *per* Lord Manse, at [81] *per* Lord Hope, at [88] *per* Lord Brown, at [138] *per* Lord Dyson .

[429] Ibid, at [160] *per* Lord Dyson.

[430] Ibid, at [69] *per* Lord Manse, at [80] – [81] *per* Lord Hope, at [85] *per* Lord Brown.

[431] Ibid, at [133] *per* Lord Kerr (dissenting).

[432] Chamberlain (n 250) 365.

this conclusion of the majority of the Supreme Court does not fully appreciate the ruling of the ECtHR in *A*. It is contended here that the ECtHR's finding that special advocates can counterbalance the unfairness of a CMP was contingent on the provision of *A*-type disclosure.[433] Chamberlain regards the majority in *Tariq* conclusions that the essence of the right to a fair trial 'remains intact', without *A*-type disclosure, as an 'implausible proposition.'[434]

Further uncertainty is generated by the lack of guidance for establishing what will fall into this category of cases created by *Tariq*. Lord Kerr, in dissent, noted the lack of clarity of the 'eligibility criteria for inclusion in this privileged group'.[435] However, he went on to state that the speeches in *AF (No 3)* had made clear that this class would not be confined to individuals' whose liberty was at stake.[436] This point is of increasing importance given the extension of the availability of CMPs and special advocates to a wide range of contexts.[437] Outside of the context of an individual's deprivation of liberty *A*-type disclosure has been required in cases concerning certain financial restrictions. In *Bank Mellat v Her Majesty's Treasury*,[438] the Court of Appeal held that *A*-type disclosure did apply in proceedings challenging an Iranian financial restriction order; and, that Article 6 requires that the subject of a CMP in these circumstances, 'must be given sufficient information to enable it actually to refute, in so far as possible, the case made out against it'.[439] The case was ultimately lost by Bank Mellat on the merits. Nonetheless, with regard to *A*-type disclosure the case is a clear indication of the standards required in CMPs even in circumstances where an individuals' personal liberty is not at stake.[440] In the lower courts, Collins J has disputed any real difference existing between the effect of TPIMs, to which *A*-type disclosure applies, and that of

[433] For further discussion see, chapter 7, section 7.1.

[434] Chamberlain (n 250) 365.

[435] *Tariq* (n 239) at [133].

[436] Ibid.

[437] Ip (n 316) 622.

[438] [2010] EWCA Civ 483.

[439] Ibid, at [21].

[440] Murphy (n 250) 28.

Asset Freezing Orders given the fundamental interference with an individuals' rights. He went on to state:

> I recognise that it may be right to recognise that the effect is not on liberty and so perhaps is less severe. But it would at most have a very limited effect on the requirements of disclosure which must still be as produces a fair hearing.[441]

In cases involving the circumstances in which *A*-type disclosure is deemed to apply, difficulties remain as to the nature of *A*-type disclosure and what it requires. This was recognised by Lord Hope in *AF (No 3)* who stated that, '[T]he principle is easy to state, but its application in practice is likely to be much more difficult.'[442] Kelman focuses on this point about the nature of the *A*-type disclosure obligation and emphasises that it does not, 'impose requirements only in relation to the *volume* of information to be disclosed, but also in relation to *what that information must consist of*.'[443] It is argued here that Kelman's contention is correct, and that the issues raised by the application of *A*-type disclosure go further than the question as to what amount of information can be considered as sufficient. The first of these emanates from the emphasis on the need for the excluded individual to 'effectively challenge' the allegations; and, to enable to give the special advocate representing their interests 'effective instructions' in relation to the closed material. This would require the information provided in the 'gist' to the excluded individual to be of relevance to the information in the closed material.

Lord Phillips stated in *AF (No 3)* that the phrase, 'effectively to challenge', suggests that 'where detail matters, as it often will, detail must be met with detail'.[444] Lord Scott stressed that the opportunity for an individual to be able to rebut allegations against them is an 'essential requirement of a fair hearing', and that the individual excluded will not be given such an opportunity if they do not know what the allegations are. Therefore, in relation to the 'gist' of the information provided to the individual excluded

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[441] *Mastafa v HM Treasury* [2012] EWHC 3578, at [36].

[442] *AF (No 3)* (n 380) at [85].

[443] Kelman (n 406) 270. Emphasis added. Other commentators have contended that *A*-type disclosure includes questions of proportion, specificity and relevance, in accordance with the ECtHR's judgment in *A*. See: Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 78:6 MLR 913, 925; and, Anthony Gray, 'A comparison and critique of closed court hearings' (2014) 18 *The International Journal of Evidence and Proof* 230, 241.

[444] *AF (No 3)* (n 380) at [87].

from the CMP he stated that the, 'degree of detail necessary to be given must, in my opinion, be sufficient to enable the opportunity to be a real one.'[445] This 'detail' goes beyond requiring that specificity in the open material, as opposed to general assertions. There should be a link between the details in the open material and the determinative points in the closed material; this is irrespective of whether the open material contains specifics in relation to the allegations.[446] In other words the information provided to the individual excluded from the CMP must be relevant to the case they are required to meet in the closed material.

In *AT v Secretary of State for the Home Department*,[447] the Court of Appeal's reasoning did not centre on whether the open allegation that AT was 'a significant and influential member of the LIFG' was too general, and therefore lacking in a necessary specificity. In contrast, it questioned whether there had been sufficient disclosure of the closed material, which had played a significant part in the determination of the case against AT, given this general allegation in the open material.[448] In *AT* the court stated if the closed material contained determinative evidence to support the allegations against him then 'some detail needed to be given to AT to enable him to deal with it'.[449] In *CF v Secretary of State for the Home Department*,[450] the claimant sought to rely on *AT* to support his claim that there was 'insufficient particularity' in the allegations against him, in relation to the control order and TPIM he had been subjected to. However, Kay LJ noted that the decision in *AT* did not centre, 'exclusively upon the particularity of the open allegation';[451] and stressed that the 'primary concern' was whether there had been 'proper AF (No. 3) disclosure of the closed material…..which had played a significant part in the determination of the first instance judge.'[452] In relation to *CF* and the complaint regarding specificity, Kay LJ stated that the open statement 'contained

[445] Ibid, at [96].

[446] Kelman (n 406) 270.

[447] [2012] EWCA Civ 42.

[448] Ibid, at [50].

[449] Ibid.

[450] [2014] EWCA Civ 559.

[451] Ibid, at [42].

[452] Ibid.

sufficient particulars of the open case.'[453] However, that the 'more important question is whether, to the extent that closed material was relied upon (as it plainly was), there was sufficient disclosure of it to satisfy *AF (No. 3).*'[454] Thus, the Court of Appeal distinguished between specifics in the open material that relate to the determinative evidence in the closed material, and those which do not.[455] Similarly, in *Re Corey*[456] the argument that the applicant had received 'sufficient information' because the open material did not consist of purely general assertions was rejected. Treacy J, placed emphasis on the need for the open material to include 'challengeable information' and concluded that, the allegations contained in the material were insufficiently specific to enable the individual to provide effective instructions to the special advocate.[457] The applicant's claim for judicial review was overturned on appeal, however the Northern Ireland Court of Appeal stressed the same reasoning regarding the relevance of the gist provided to the case the applicant had been required to meet. Morgan LCJ, delivering the lead judgment, stated that:

> the point is that the adequacy of the specificity of disclosure will normally require consideration of the allegation made, the response to it and the closed material upon which the Secretary of State wishes to rely.[458]

This demonstrates that if the individual excluded from a CMP is not provided with such detail than they cannot be deemed to have received, 'sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations' in order to meet the *A*-type disclosure obligations. However, the issue still remains as to how much information will be enough to be considered 'sufficient information'.

On this point of the volume of material required to meet *A*-type disclosure obligations Kelman illustrates divergent approaches taken by the UK lower courts in its application

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[453] Ibid.

[454] Ibid.

[455] This point is highlighted by Kelman (n 406) at 271. Kelman also uses the example of the reasoning in *AM v Secretary State for the Home Department* [2009] EWHC 3053 (Admin); [2011] EWCA Civ 710. See also: *Re Corey's Application for Judicial Review* [2012] NICA 57, at [27],

[456] [2012] NIQB 56.

[457] Ibid, at [72].

[458] [2012] NICA 57, at [27].

of the test set out by Lord Phillips in *AF (No 3)*.[459] The relevant part of the judgment, as adopted from the ECtHR in *A*, is 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.[460]

The first approach is that where the open material does not consist of purely general assertions, the closed material will not have been relied on to a decisive degree. Therefore, the individual will have received the 'sufficient information' to meet the requirements of *A*-type disclosure obligations. Correspondingly, if the open material comprises purely general assertions it follows that the closed material must have relied upon to a decisive degree;[461] and, *A*-type disclosure will not have been satisfied. For example, in *Bank Mellat v Her Majesty's Treasury*[462] the purely general assertions in the open material was taken to demonstrate that the closed material was relied on to a decisive degree. The effect of the Court of Appeal's judgment was to define purely general assertions as those which can only enable the individual to deny the allegations.[463] It follows that the individual must be 'given sufficient information to enable it actually to refute, in so far as possible, the case made out against it.'[464]

In this manner Lord Phillips' test is viewed as a two-part test. The first part being that the open material consists of purely general assertions, and the second part is that the closed material is relied on to a decisive degree.[465] On this approach of the formulation of the test, the essence seems to be that the first and second parts are determinative of the other. This is illustrated in *CD v Secretary of State for the Home Department*,[466] in

[459] Kelman (n 406) 272, 275.

[460] *AF (No 3)* (n 380) at [59].

[461] *AT* (n 447) at [50] *per* Carnwath LJ.

[462] Bank Mellat (n 438).

[463] Ibid, at [21] *per* Lord Neuberger MR.

[464] Ibid.

[465] See Kelman (n 406) 270.

[466] [2011] EWHC 2087 (Admin).

which the court's position appears to be that provided the open material provides some specifics the requirements of *A*-type disclosure are met.[467]

In contrast, the second approach to the application of Lord Phillips' test regarding the amount of information sufficient to meet *A*-type disclosure is evident in *BM v Secretary of State for the Home Department*.[468] In that case it appears that the court was of the view that, notwithstanding the open material containing some specifics, it was still possible that the closed material was relied on to a 'decisive' degree.[469] Collins J, considered the allegations carefully, despite them comprising of more than general assertions. Although his final conclusion was that sufficient information had been provided, the judgment emphasises that the open allegations should be, 'sufficiently specific to enable the subject to provide information with which to refute them'.[470] This is in contrast to a mere denial. With respect to the allegation which cause Collins J the 'most concern', his conclusion was that sufficient information to enable the subject to 'respond to the allegation'. This can be contrasted with the language used in *CD* which appeared to suggest that *A*-type disclosure was satisfied if the open material contained some specifics. The approach of the court in *BM* corresponds with that in *AM*, and the point about the relevance of the specifics in the open material, and the allegations in the closed material that the individual needs to respond to. It is argued here that in relation to the nature of the test, the approach taken in *BM* is correct. The inclusion of specifics as opposed to purely general assertions in the open material is not automatically determinative that the closed material has not been relied on to a decisive degree. The central question should be whether the individual is able to respond to those allegations, in a way that would enable them to refute them as opposed to a bare denial.[471] Consequently, the open material must be of relevance to the allegations in the closed material. It is argued here that it is only on this basis that an individual excluded from

[467] In *CD* the court held that the suspect had sufficient information to meet *A*-type disclosure despite being provided with minimal detail. The allegations that the challenge was brought for not meeting *A*-type disclosure are at [11] of the judgment. Kelman (n 406) is critical of the lack of specifics in the open material, at 273.

[468] [2012] EWHC 714 (Admin). This was the first case to deal with TPIMs.

[469] Kelman (n 406) 275.

[470] *BM* (n 468) at [20].

[471] This is assuming that the individual has such information available to be able to refute them.

the CMP will be able to provide 'effective instructions' to the special advocate appointed to represent their interests. Therefore, this is the correct reading of *A* and *AF (No 3)*.

If the requirement of *A*-type disclosure is applied correctly, this enhances the measure of procedural fairness to an individual excluded from a CMP. This position taken by this thesis is that the effectiveness of the special advocates' representative function is dependent on the provision of *A*-type disclosure. Therefore it is important that, to begin with, the standards of *A*-type disclosure are deemed to be applicable to the circumstances; and, then that the requirements are applied in a manner that an individual is able to provide effective instructions to the special advocates appointed to represent their interests.

2.8. Concluding observations

The ECtHR's judgment in Chahal, prompted the UK government's adoption of CMPs and special advocates in the UK in SIAC. This Chapter has shown that whilst the selection of the Canadian system may not have been a poor choice of comparator the ECtHR can be criticised for their poor comparative methodology. In this sense the UK government can also be criticised for failing to conduct comprehensive research on the use of special advocates in the SIRC. The result was that the system adopted in the UK lacked important safeguards, namely the ability for the special advocate to communicate with the individual excluded from a CMP; and, the relationship between special advocates and the SIRC was not replicated. The UK government's reaction to the ECtHR's ruling in *Chahal* illustrates the potential for the ECtHR to act as a vessel for cross-border policy transfer without a nuanced analysis. This can be problematic given the trend in a post-9/11 era of legal borrowing in the national security context.[472] The discussion suggests that it is highly likely that Part 2 of the JSA will migrate to other jurisdictions if it is shown to operate effectively. Consequently, it is important to subject the JSA to the rigorous analysis taken by this thesis.

[472] This is not to say that the use of exceptional measures, including the use of secret measures, and the 'borrowing' of those did not pre-date 9/11. This is illustrated by the establishment of SIAC and the origins of CMPs and special advocates in the UK, as has been outlined in this discussion and will be expanded on in Chapter 2. See also: Daniel Alati, *Domestic Counter-Terrorism in a Global World: Post-9/11 Institutional Structures in Canada and the United Kingdom* (Routledge, 2018), 213.

This chapter has established that whilst CMPs present a departure from the fundamental common law principles of open justice and fair trials, three key tools have developed which present the potential to mitigate the perceived unfairness of the CMP. These are: the changed role of the judge including an inquisitorial role and specialist expertise; the appointment of special advocates to represent the interests of the excluded individual; and, the requirement of *A*-type disclosure. Nevertheless, there remain limitations on the extent to which these three tools can provide adequate safeguards in relation to the impact on the fairness of the proceedings caused by CMPs.

A key contributing factor is the extension of the availability of CMPs outside of specialist tribunals, such as SIAC. The use of CMPs in ordinary legal processes removes the safeguard of the changed role for judges in these types of proceedings. This makes the effectiveness of the special advocate even more important. However, the restrictions on their ability to carry out their role could have a significant effect on the conduct of proceedings depending on the circumstances. The most severe restriction, which hampers their representative function, is the inability to take effective instructions. This is largely the result of restrictions on communication between the special advocate and the individual whose interests they represent; and, the unconventional relationship between them. The lack of effective instructions then has a negative impact on the ability of the special advocate to participate properly in the proceedings. The requirement of *A*-type disclosure has the potential to alleviate some of the negative impact that the lack of effective instructions presents. However, this is dependent on whether the *A*-type disclosure is applied in the context, and how the requirements are applied. Additionally, this chapter has shown that special advocates have faced difficulties adducing evidence, and calling and cross-examining witnesses. Moreover, the national security context which includes the nature of the closed material, and the government's approach in some cases can further inhibit their effectiveness. This position is far from satisfactory and will be examined further in light of the ECHR jurisprudence. First, however, chapter 3 will examine the legislative framework for Part 2 of the JSA which extends the availability of CMPs to all civil proceedings. The chapter will illustrate whether the issues raised in this chapter have been addressed in the new legislation, or whether it is likely that the difficulties will persist or even escalate further.

Chapter 3 The Justice and Security Act: *from the Green Paper to Royal Assent*

One of the core objectives of this thesis is to provide a rigorous examination of the legislative framework for the use of CMPs under Part 2 of the JSA. Therefore, Chapter 3 provides a comprehensive overview of the drafting of the legislation. This is conducted from the point of the publication of the *Justice and Security Green Paper* (*Green Paper*)[473] containing the Coalition Government's proposals; and, tracks the Act's undulating parliamentary passage, to the commencement of the Act, which received Royal Assent on the 25th April 2013. This research was undertaken on the basis of a robust review of each stage of Part 2 of the JSA's legislative passage. This began with the *Green Paper* proposals, and the responses to those following the consultation period; the Government's Bill, as it was introduced; the Lord's Bill, as amended in the House; and, Hansard, at each stage of the JSA's parliamentary passage which included relevant amendments that were proposed, Consequently, this chapter illustrates the key themes of the debate, identifying the contentious issues with the relevant parts of the legislation concerning the use of CMPs and special advocates. The underlying aim of the chapter is to identify the contentious issues with the legislative framework, including potential human rights concerns. Thus, forming the basis for the analysis in subsequent chapters of the compatibility of the use of CMPs within the scheme of the JSA with Article 6(1) ECHR. Chapter 3 is in itself a contribution to knowledge, as there is little academic scholarship to date that provides a standalone analysis of Part 2 of the JSA's legislative framework.[474]

The key criticisms of the legislation advanced fell broadly within two categories: fairness and mission creep. In relation to fairness, in general, objections were framed in terms of the common law principle of open justice and broadly stated standards of

[473] Ministry of Justice, *Justice and Security Green Paper* (Cm. 8194, 2011) [Hereinafter the '*Green Paper*'].

[474] Existing scholarship includes: Tom Hickman and Adam Tomkins, 'National Security Law and the Creep of Secrecy: A Transalantic Tale' in Christopher McCrudden, Liora Lazarus and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart, 2014); Adam Tomkins, 'Justice and Security in the United Kingdom' (2014) 47(3) *Israel Law Review* 305; Clive Walker, 'Living with National Security Disputes in Court Processes in England and Wales' in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds) *Secrecy, Law and Society* (Routledge, 2015).

fairness. The concerns framed as mission creep were aimed at the significant extension of the availability of CMPs, to all civil proceedings. The specific criticisms that fell within these broad categories raised both constitutional and rights-based issues. However, this thesis will demonstrate that during the course of discussion that some of the controversies presented as constitutional issues were largely overlooked and also raise issues concerning human rights. It will be argued that framing debate in terms of human rights standards can help to enhance and move debate progressively forward. Throughout the thesis, ECHR standards are used as a basis for improving the legislation and the court's approach to its interpretation of the legislation.

On the subject of fairness, the critics of the Act consistently made generalised statements that the use of CMPs were inherently unfair despite the use of special advocates. Throughout the parliamentary passage, reference was made to the UK common law principles of open and natural justice; and, the conflict between CMPs and the fair trial guarantees predominately at common law. Aside from general assertions about the unfairness of CMPs, the more specific issues with the right to a fair trial were presented as CMPs undermining the principle of equality of arms. The issue of whether the use of special advocates could mitigate the perceived inherent unfairness of a CMP, became a prominent feature of the debate. The critics reasserting the well-known limitations put upon special advocates, which restrict their ability to carry out their functions effectively.

In relation to mission creep, one of the most controversial aspects of the legislation was the need for judicial control over the extent of the use of CMPs. The concerns were predominantly aimed at the initial decision-making procedure to order the use of a CMP in any given case. The critics forcefully argued of the necessity for judicial scrutiny of the need for the use of a CMP. It was considered essential that Part 2 of the JSA contained the necessary safeguards against a potentially wide discretion vested in the executive. The debates in this regard revealed two main concerns. First, was the preservation of judicial decision-making powers at the initial stage; and second, the way this power was exercised. These concerns were presented by the critics as raising constitutional issues; the focus was judicial independence and the potential for the Act to undermine the separation of powers doctrine.

This chapter will provide a comprehensive overview of each of the concerns within the two broad categories; including those presented as constitutional and rights-based issues. It will address each concern at each stage during the parliamentary passage examining the amendments, including those that did not survive the parliamentary passage, and then the final provisions of the Act. This will provide the basis for the analysis in the subsequent chapters which examines the provisions of Part 2 of the JSA, in light of their compatibility with the standards of fairness discerned from the ECtHR's Article 6(1) jurisprudence. Throughout this chapter, the relevant subsequent chapters will be referred to in the footnotes to demonstrate where they will be examined in more detail later in the thesis. However, first this chapter provides an overview for the government's rationale for, and evidence of, the need for the legislation as set out in the *Green Paper*.

3.1. The Government's rationale

The *Green Paper*, claimed that a framework which would enable the courts to consider sensitive material, in compliance with the procedural requirements of a fair hearing, was 'urgently' needed.[475] The proposals were based on the prediction of increased litigation in the national security context, specifically cases involving civil claims against the government.[476] In order to address this claim it is necessary first to examine the doctrine of public interest immunity (PII). Prior to the JSA, PII was the predominant mechanism available to protect sensitive material from being disclosed, in the types of circumstances the government proposed the use of CMPs should be available to the court as an alternative. PII is a common law mechanism which has been developed by the courts over a period of over fifty years. The law on PII permits the non-disclosure of material in evidence, where disclosure would harm the public interest. Therefore, it is an 'exclusionary rule of evidence'[477] developed by the common law in recognition of conflict that may arise, 'between the public interest and established rules of discovery

[475] *Green Paper*, para 6.

[476] The estimate in the *Green Paper* was at the time there were 27 cases before the UK courts in which the courts did not have 'tools at their disposal to discharge their responsibility to deliver justice based on a full consideration of the facts.' (Appendix J, para 1.1.). Walker explains the various reasons for the frequency of civil proceedings affected by national security considerations in: Walker (n 476) 23.

[477] *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274, 277.

and disclosure'.[478] The public interest grounds that can form the basis of a claim for PII extends beyond that of national security and has included[479] the welfare of children,[480] protecting the identity of police informants,[481] and diplomatic relations.[482] If one party to the proceedings contends that certain relevant documents cannot be disclosed, because it would be prejudicial to the public interest to do so, then an application for PII can be made. If the application is successful and PII applies, it excludes relevant evidence from being heard in court. In one of the leading cases on the modern law of PII Lord Templeman described it as 'a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal proceedings'.[483] The *Green Paper* accepts PII as a means in which sensitive material can be protected from disclosure. However, it maintains that the exclusionary nature of the doctrine can potentially undermine the fairness of proceedings.[484]

In order to appreciate government's rationale for the expansion of CMPs to all civil proceedings, it is necessary to first outline the doctrine of PII. This will enable a reasoned assessment of the government's case for the need to require that CMPs are available in all civil proceedings, as provided for by Part 2 of the JSA. Section 3.1.1 begins by giving an outline of the development of the law on PII and the applicable principles, before proceeding to address the advantages and disadvantages of PII in comparison to CMPs.

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[478] *Al Rawi*, at [140] *per* Lord Clarke.

[479] Corker and Parkinson provide an overview of recognised public interest grounds in David Corker and Stephen Parkinson, *Disclosure in Criminal Proceedings* (OUP, Oxford, 2009), paras 9.37 – 9.78.

[480] For example, files in child care cases have been held to be confidential. See, *D v NSPCC* [1978] AC 171.

[481] For example, *R v Birtles* (1969) 53 Cr App R 469. Corker and Parkinson (n 481) state that protecting the identity of the informant is the most frequent reason for asserting PII in criminal proceedings, para 9.39.

[482] For example, *R v Governor of Brixton Prison, ex p Osman (No 1)* (1991) 93 Cr App 202. The need to protect intelligence sharing relationship with international partners was the reasoning behind the Foreign Secretary's claim for PII in the *Binyam Mohamed* litigation. See section 1.2.2. below for discussion.

[483] *Wiley* (n 477) 280.

[484] *Green Paper*, para 4.

3.1.1. Public Interest Immunity

The doctrine of PII has been developed by the courts for over fifty years, predominately in civil proceedings.[485] It was previously known as Crown privilege, which was set out in the case of *Duncan v Cammell Laird*, [486] the leading decision prior to that in *Conway v Rimmer*.[487] The House of Lords in *Duncan v Cammell Laird* set out that Crown privilege applied where relevant material should not be disclosed if the public interest required them to be withheld. The House of Lords also ruled that it was not within the jurisdiction of the court to object to the executive's assertion that the material should be withheld because its disclosure would be contrary to the public interest.[488] Fortunately, the House of Lords overruled this aspect of its decision in 1968 in the case of *Conway v Rimmer*;[489] and, set out the principles applicable in claims for Crown Privilege, which was replaced by the term 'public interest immunity' in the 1970s.[490] The House of Lords confirmed that the correct approach was for the judge to examine the material in question, and decide whether the public interest in non-disclosure was outweighed by the public interest in disclosure. Lord Reid affirmed that the court is to, 'consider public interest as a whole, giving due weight both to the administration of the executive and to the administration of justice'.[491] This balancing exercise has become known as the '*Wiley* balance', following the later House of Lords decision in *R v Chief Constable of the West Midlands, ex parte Wiley*.[492]

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[485] Taylor suggests that a reason for this is it is more difficult for the State to justify withholding relevant material in criminal proceedings, in contrast to civil actions. See, Chris Taylor, 'In the Public Interest: Public Interest Immunity and Police Informants' (2001) 65 *Journal of Criminal Law* 435, 439.

[486] [1942] AC 624.

[487] [1968] AC 910.

[488] *Duncan* (n 486) 639 *per* Viscount Simon LC.

[489] *Conway* (n 487).

[490] See R v Lewes Justices ex parte Home Secretary [1973] AC 388 per Lord Reid.

[491] *Conway* (n 487) 988 *per* Lord Reid. In *R v Ward* [1993] 1 WLR 619, Glidewell LJ reviewed the leading authorities on PII in civil proceedings, including *Duncan v Cammell Laird* and *Conway v Rimmer*, and concluded that the principles were equally applicable in criminal proceedings. See: Corker and Parkinson (n 479) Chapter 9 for commentary on the development of PII, with particular reference to criminal proceedings.

[492] *Wiley* (n 477). For an overview of the development of PII up until the decision in *Wiley* see, Simon Brown, 'Public Interest Immunity' [1994] *Public Law* 579.

In *Wiley*, the law on PII was reviewed, and the House of Lords clearly stated that it must rule on whether the public interest in withholding the material outweighs the public interest in ensuring the proper administration of justice.[493] The law on PII is now well established, and involves a series of stages.[494] The first question is whether the material to which immunity is claimed is 'sufficiently relevant' to the proceedings.[495] The next stage is to determine whether disclosure would bring about a real risk of serious harm to a public interest, if so which interest.[496] Subsequently, is the question of whether the real risk of serious harm to the public interest can be protected by other means or more limited disclosure.[497] If the alternatives are insufficient, the final stage is for the court to decide where the balance of the public interest lies. If the court finds that the balance is in favour of non-disclosure and the PII claim is successful, it cannot be relied upon in the proceedings. Nonetheless, if the court rules that the material must be disclosed the party in possession is not obliged to disclose it, it could proceed without its admission, and it will not have any effect on the case.[498]

During the 1990s, the use of PII came under criticism, predominately in the context of criminal proceedings. The 1996 *Scott Report*[499] was critical of the government's excessive reliance on PII certificates, in terms of the breadth of material sought to be withheld.[500] This was in particular those based on the class of, as opposed to the

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[493] Ibid.

[494] These are clearly stated in *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), at [34]; *R (Mohamed) v The Secretary of State for Foreign and Commonwealth Affairs (No 2)(Guardian News and Media Ltd and others intervening)* [2010] EWCA Civ 65, at [229]. In the context of criminal proceedings see, R v H and C [2004] UKHL 3, at [36].

[495] *Wiley* (n 477) 280 *per* Lord Templeman.

[496] Ibid, at [36(3)] *per* Lord Bingham.

[497] *Wiley* (n 477) 288 and 306-7.

[498] *Al Rawi* (n 478) at [145] *per* Lord Clarke.

[499] Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (1998-96 HC 115) ('*Scott Report*'). For analysis of the Scott Report see, Ian Leigh and Laurence Lustgarten, 'Five Volumes in Search of Accountability: The Scott Report' (1996) 59:5 MLR 695. And, Clive Walker and Geoffrey Robertson, 'Public Interest Immunity and Criminal Justice' in Clive Walker and Keir Starmer (eds), *Miscarriage of Justice: a review of justice in error* (Blackstone Press, London, 1999).

[500] A report was also conducted by the Runciman Commission, see Walker and Robertson (ibid) 172.

contents of, the documents.[501] Following this, the Attorney General stated that the government would only claim PII, 'when it is believed that the disclosure of a document would cause real harm to the public interest'.[502] Additionally, a number of cases were taken to Strasbourg and heard before the ECtHR, these are addressed in detail in Chapter 8.[503] One of the concerns identified with the use of PII, and the breadth of material that could be withheld, is the potential for the process of claiming PII to be 'inherently one-sided'.[504] That being the process of *one* party certifying that relevant material should be withheld from the other party, and the outcome of a successful claim being that the material is excluded from the proceedings altogether. Therefore, one party will never be aware of certain relevant material. Arguably, this is now alleviated to an extent by the more recent practice of appointing a special advocate to represent the interests of the party to whom non-disclosure is sought against.[505] However, these criticisms resonate with those advanced in objection to the use of CMPs. Namely, that there cannot be equality of arms between the parties where one party is excluded from part of the proceedings to which he is a party. It has been suggested that use of the PII mechanism is preferable to the CMP because the information withheld under a PII certificate is excluded from the proceedings. The difference between the two mechanisms warrants further attention.

3.1.2. PII v. CMP

In *Al Rawi*, Lord Dyson identified CMPs and PII as, 'fundamentally different from each other'.[506] The crucial distinction between the two mechanisms is that if a claim to public interest immunity is successful the relevant material is inadmissible.[507] It cannot be relied on by either party, or the court. In comparison in a CMP the relevant material, although heard in closed session, may be relied on by the government *and* will be heard

[501] *Scott Report* (n 499). For a useful overview see, T.R.S. Allan, 'Public Interest Immunity and Minsters' Responsibilities' [1993] *Criminal Law Review* 660. See also: Joseph M. Jabob, *Civil Justice in the Age of Human Rights* (Ashgate, 2007) 173 – 184.

[502] HC Deb, 18 December 1996, cols. 949-950.

[503] Chapter 8, section 8.4. See also: Corker and Parkinson (n 494) 136 – 138.

[504] JUSTICE, *Secret Evidence* (2009) para 242.

[505] See chapter 2, section 2.5.3.

[506] *Al Rawi* (n 478) at [280].

[507] It is an 'exclusionary rule of evidence': *Wiley* (n 477) at [277].

by the court. This crucial distinction is seen either as the advantage of the PII process over CMPs, or is perceived as the principal disadvantage. This is dependent on one's starting point. For example, the government took the latter viewpoint. Their argument was essentially that because the outcome of a successful PII claim is that the material is inadmissible as evidence, CMPs are preferable because they maximise the amount of relevant material before the court for consideration. This crucial distinction between the two mechanisms is the driving force behind the *Green Paper* proposals, and the government refers to situations where they contend that they have been forced to settle or a claim has been struck out as a result of vital evidence being excluded under PII. The *Green Paper* maintained that in maximising the amount of material before the court, the use of CMPs would minimise the amount of cases that could not be tried in civil proceedings.[508] As a result, this would enhance procedural fairness. [509]

In *Al Rawi*, Lord Kerr identified this distinction between PII and CMPs finding in this regard that the government's option to use a CMP would be 'very tempting' given that the sensitive material would be heard before the court.[510] He recognised that the government would want to be able to defend itself, so would aspire to produce as much material as possible, and not be too swift to resort to PII.[511] Nevertheless, Lord Kerr described the 'dilemma' faced by the government of evidence being inadmissible under PII as a 'healthy' one.[512] Emphasise was placed on the importance of maintaining confidence in the administration of justice,[513] which arguably an increased use of CMPs could potentially undermine.

The government's emphasis on CMPs maximising the material considered before the judge, as opposed to declared inadmissible on grounds of PII is not disputed here. Likewise, it is acknowledged that the result of this difference is that the government would likely feel that it is more likely to be able to defend itself with such material adduced in the proceedings. However, the government's claim that on this basis the use

[508] *Green Paper*, para 2.2.

[509] *Green Paper*, para 2.2.

[510] *Al Rawi* (n 478) at [96] per Lord Kerr.

[511] Ibid.

[512] Ibid.

[513] Ibid.

of a CMP in these circumstances would enhance procedural fairness is misleading. The other party to the proceedings is excluded from the CMP, and whilst a special advocate represents their interests, the excluded party cannot fully participate in the proceedings. Therefore, the government's assumption appears ignorant of the importance that evidence does not go untested. Lord Kerr highlighted the difficulties that the government's line of argument runs into in *Al Rawi*:

> The central fallacy of that argument … lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.[514]

Accordingly, for those who see the distinction as the advantage of the use of PII over CMPs, the contention is that PII is preferable because the result of a successful claim is that all admissible evidence is heard in open court. Therefore, both parties are 'entitled to full participation in all aspects of the litigation'.[515] In response to the *Green Paper*, those who opposed the introduction of Part 2 of the JSA contended that PII was the more 'suitable mechanism'[516] to make decisions regarding the disclosure of sensitive material, permitting the court to strike the appropriate balance between the need to protect the public interest in the administration of justice and the need to protect national security.[517] There was seen to be no evidence questioning its effectiveness.[518]

Nevertheless, the government maintained that, whilst the common law tool of PII ensured the prevention of disclosure of security sensitive material, it also resulted in cases that could not be tried as the material was often vital to arguing the government's case. Moreover, the government asserted that it had regrettably had to settle a number of cases as it had no opportunity to defend itself. [519] They emphasised the increased litigation in the national security context in the post-9/11 era, specifically litigation brought against the government. This, in the government's view, was illustrative of the

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[514] Ibid, at [93].

[515] Ibid, at [41] *per* Lord Dyson.

[516] Public Interest Lawyers, p.7.

[517] Special Advocates, para 2(7); Dr Lawrence McNamara and Sam McIntosh, para 5.1.

[518] Guardian News and Media Response to the Green Paper; Reprieve, p.4; Bingham Centre, para 8.

[519] *Green Paper*, para 22.

necessity for the availability of a more appropriate mechanism to deal with sensitive material in the courts, to enable them to properly defend themselves.[520]

3.2. The Evidence

The evidence presented by the government in the *Green Paper* to support its assertions regarding the need for the availability of CMPs, as opposed to PII, in ordinary courts of law were presented as three examples of leading case law. The first was *Carnduff v Rock* which the government claimed as illustrative of the potential for PII to lead to cases being struck out. The second was the Supreme Court decision in *Al Rawi* which was deemed to illustrate the government's predicament of having to settle cases against them. Finally, the *Green Paper* referred to the *Binyam Mohamed* litigation as evidence that the mechanism of PII is generally unworkable, and threatens to undermine intelligence sharing between international partners. Each of these cases will be addressed in turn.

3.2.1. Cases struck out: *Carnduff v Rock*

The *Green Paper*, stresses a potential difficulty with the use of PII being that cases can be struck out' and, such an outcome meaning that 'justice seems barely to be served'.[521] The example provided is that of *Carnduff v Rock*.[522] In *Carnduff*, the claimant was a police informant who sought remuneration pursuant to an alleged agreement with the police. The police argued no contractual obligation existed and that, in any event, the claimant had not earned any remuneration. It was contended that the alleged agreement could not be investigated without risking the publication by the police of information they were entitled to protect, on grounds of PII. The claimant applied for disclosure of such information, and the defendant moved to strike out the claim.[523] The application to strike out the claim was heard before the application for disclosure, which came before the Court of Appeal on appeal from Judge Nicholl's who had refused such application.[524] The basis of the defendant's application was that, 'the action should be

[520] Ken Clarke, Forward to the *Green Paper*.

[521] *Green Paper*, para 1.52.

[522] *Carnduff v Rock* [2001] EWCA Civ 680. See *Green Paper*, 1.34 – 1.36.

[523] Ibid, at [2].

[524] Ibid, at [3].

stopped because it would be contrary to public policy, or against the public interest, to allow it to proceed'.[525] The Court of Appeal, by majority,[526] held that the case should be struck out. It was held that a 'fair trial' of the issues would necessitate disclosure of material, which would be contrary to the public interest, consequently making it 'contrary to the public interest that the trial should take place'.[527]

Accordingly, the argument advanced by the government in the *Green Paper* is that, the exclusion of relevant material under PII could lead to a case being struck out; and, in this manner render proceedings 'unfair'. On this basis, the government appears to be drawing an analogy with the position of the claimant in *Carnduff*, as opposed to the defendant. This in itself is an unusual analogy as it seems it would be more appropriate to liken its position to that of the police, not that of the police informant. The government, like the police in *Carnduff*, are likely to be the party seeking to withhold relevant material that they deem disclosure of which would undermine the public interest in protecting national security. Likewise, the extension of CMPs to all civil proceedings in the *Green Paper*, is claimed to be a necessity in order for the government to be able to defend itself in claims brought against it.[528] Therefore, akin to the position of the police in *Carnduff*, and not the claimant, whom the decision to strike out the action adversely affected.

The assumption stemming from *Carnduff*, that the exclusion of relevant material under PII can render a trial 'unfair' in the sense that an action can be struck out, is also evident in the judgements of the Supreme Court in *Al Rawi v Security Service*,[529] and *Tariq v Home Office.*[530] This is despite the fact that the correctness of *Carnduff* has not been

[525] Ibid, at [29] *per* Laws LJ. See also, at [4] *per* Waller LJ, [42] *per* Jonathon Parker LJ. Heaton rightly points out that this contention was 'extremely broad'. See David Heaton, 'Carnduff, Al Rawi, the "unfairness" of public interest immunity and sharp procedure' (2015) *Civil Justice Quarterly* 191, 193.

[526] Waller LJ dissented.

[527] [49] *per* Jonathon Parker LJ. See also, Laws LJ at [31] – [36].

[528] See for example the *Green Paper*, para 3.

[529] *Al Rawi* (n 478). For example: Lord Brown at [81] and [86]; Lord Clarke at [159], [160], [179]; Lord Mance at [103].

[530] *Tariq v Home Office* [2011] UKSC 35. For example: Lord Mance at [39] and [65]; Lord Kerr (dissenting) at [110].

directly considered by the House of Lords or the Supreme Court.[531] Heaton contends that the assumption is, 'contrary to principle and authority'.[532] Heaton's article provides an insightful critique of the reasoning in *Carnduff*, which was seemingly approved of in *Al Rawi* and *Tariq*. An in-depth analysis of *Carnduff* is outside the scope of the present discussion, which is to address the credibility of the government's assertion that the case 'exacerbates' the difficulties it faces with the use of PII. Consequently, contributing to the necessity for the availability of CMPs in all civil proceedings as provided for by Part 2 of the JSA. In this regard, the following discussion will focus on two observations made in relation to the Court of Appeal's decision in *Carnduff*. The first is the view that the case was wrongly decided,[533] the second is that it was an exceptional case and therefore questionable as to whether it should be used as a justification for the breadth of the proposals in the *Green Paper*.

On the first point, a striking feature of the Court of Appeal's decision is that it was taken before a decision had been taken on disclosure. Thus, the usual PII process had not been carried out when the majority asserted that it was necessary to strike out the action in the public interest. Waller LJ, dissenting, took the view that that decision should not have been taken before a PII exercise had been properly conducted. The PII exercise would have included the court weighing the harm to the public interest in disclosing material, against the harm to the public interest in it being withheld.[534] This would have required the police to have considered alternative means of making sufficient material available to enable the proceedings to continue.[535] In the absence of this process, the danger is the appearance that the majority's reasoning rests on assertions that the relevant material would have been excluded subject to PII, and this

[531] Martin Chamberlain, 'The Justice and Security Bill' (2012) 31:4 *Civil Justice Quarterly* 424, 425.

[532] Heaton (n 525) 191.

[533] Adam Tomkins, 'From Counter-Terrorism to National Security?' (2012) 16 *Review of Constitutional Studies* 27, 293. See also, Adrian Zuckerman, 'Closed material procedure – denial of natural justice: Al Rawi v The Security Service [2011] UKSC 34' [2011] *Civil Justice Quarterly* 345, 352.

[534] The *Wiley* balance.

[535] This point is made by the Bingham Centre for the Rule of Law in its response to the *Green Paper*, see para 23.

excluded material would have constituted most of the evidence. [536] Consequently, doubt is cast on the reliance of *Carnduff* as a robust example of the difficulties that the use of PII as a tool for dealing with sensitive material poses for the government.

In *AHK v Secretary of State for the Home Department*,[537] Ouseley J found that the claimant's situation was similar to that of the claimant's in *Carnduff*, in that the claimants were bound to lose their case following a successful claim for PII or a CMP, in absence of full disclosure.[538] However, Ouseley J held that the case should proceed on the basis of PII, 'since that was the means whereby the Court could satisfy itself that there was a proper basis for the claim to PII, before it considered whether disclosure should nonetheless be ordered.'[539] Although he considered the circumstances akin to *Carnduff*, Ouseley J did not strike the claim out and distinguished from the position where a case is 'untriable'. He described the position as, '*not so much that the case is untriable; it can be tried. It is simply that the evidence means that the Claimant cannot win.*'[540] Ouseley J rejected the Home Secretary's argument that a CMP should be ordered as he felt that the decision in *Al Rawi* precluded this option.[541] Nonetheless, he did state that, 'a CMP is the only realistic alternative to the Claimants simply losing; the *cases in other language become untriable*.'[542] In this sense, the reasoning of Ouseley J in *AHK* appears to resonate with the argument advanced by the government in the necessity for the *Green Paper* proposals. It alludes to the notion that a fair trial, or cases capable of proceedings, requires all relevant material to be before the court.[543] On this basis the reasoning in *AHK*, may have provided a sounder example for the government as opposed to *Carnduff*. Nonetheless, this would require the government to put their

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[536] Heaton (n 525) 195.

[537] [2013] EWHC 1426 (Admin).

[538] Ibid, at [79].

[539] Ibid, at [3].

[540] Ibid, at [58] (emphasis added).

[541] Ibid, at [5].

[542] Ibid, at [72] (emphasis added). In *Al Rawi* (n 478), Lord Dyson appreciated the truth in the assertion that if a CMP was available this may avoid the need to strike out an action like in *Carnduff* at [50].

[543] See Ouseley J in *AHK* (n 537) at [98]: 'a trial fair to both sides cannot take place without the court, and … the Claimant being fully appraised of *all* the material [that had been] before the [Secretary of State]'. (emphasis added).

position as analogous with the claimant. Such an analogy could be viewed as flawed for the reasons already outlined in relation to the government aligning itself with the position of the informant as opposed to the police.

Nevertheless, this is not to say that the possibility of a *Carnduff* situation is to be dismissed. It was stated by Lord Manse in *Al Rawi* that, 'no member of the Supreme Court doubts the approach in *Carnduff v Rock*….as a possibility'.[544] The possibility of situations akin to those in *Carnduff* arising are accepted in some of the responses to the *Green Paper*.[545] As a result they are to be taken seriously however, they are not 'indicative of an endemic problem'.[546] The argument advanced here is that, the evidence does not support the contention that the risk of such situations arising as more than minimal. Therefore, *Carnduff* and the possibility of claims being struck out is unlikely to justify proposals of the magnitude of those in the *Green Paper*. This claim is supported by Lord Dyson in *Al Rawi* who was of the opinion that this was not an issue that could be looked at narrowly.[547] To look at the circumstances in *Carnduff* in isolation may present the availability of a CMP as a positive, Lord Dyson noted that such cases were a 'rarity' and should not provide a basis for making such a fundamental change to the law.[548]

3.2.2. Forced to settle: *Al Rawi*

The proposals in the *Green Paper,* in relation to the extension of the availability of CMPs were, in part, a response to the government's defeat in the *Al Rawi* litigation. The applicant's in *Al Rawi*, brought a civil damages claim against the Security Service (governmental body) alleging that British intelligence agencies were complicit in their detention and ill-treatment at locations including Guantanamo Bay. The Supreme Court ruled that the provision for CMPs in the civil damages claim, brought against the

[544] *Al Rawi* (n 478) at [108]. Lord Manse refers to: Lord Dyson at [15]; Lord Brown at [86]; and, Lord Clarke at [157].

[545] Bingham Centre, para 26; JUSTICE pp. 20-21; Public Interest Lawyers, p.6; Liberty, para 16.

[546] Public Interest Lawyers, p.6.

[547] *Al Rawi* (n 478) at [50].

[548] Ibid.

government, was a 'matter for Parliament and not the courts'.[549] The government settled the case and claimed in the *Green Paper* that they were unable to defend themselves, due to a vast amount of the evidence being sensitive material. Therefore, it was likely to be excluded from the proceedings under a PII certificate. It is submitted here that the situation where the government feels forced to settle litigation is a more likely situation that that of *Carnduff*. This is the position more accurately described by Ouseley J in *AHK* that the exclusion of evidence under PII may mean that one party simply cannot win.[550] Despite the misgivings over CMPs there is no doubt that if the alternative is that a party is bound to lose, there is 'obvious scope for unfairness' toward such party.[551] The Supreme Court in *Tariq* took particular issue with the prospect of this situation arising, Lord Brown described the situation of the government's predicament of not wanting to disclose sensitive information so being faced with no choice but to settle as being, 'wholly preposterous'.[552]

The heavy reliance that the government placed on *Al Rawi* in making its case for the necessity for the availability of CMPs in all civil proceedings, in addition to PII, has been disputed. The JCHR, in particular, were critical that this was the only example provided of the government being forced to settle a case due to the alternative being key relevant material to their case was sensitive and would be excluded under PII.[553] Additionally, the JCHR claimed that *Al Rawi* is illustrative of circumstances in which the government found the CMP preferable to PII, as opposed to being forced to settle.[554] This is partly illustrated by the fact that the government settled the case before they had exhausted the PII process, and before the judgment of the Supreme Court.

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[549] *Al Rawi* (n 478) at [44] *per* Lord Dyson. See also, at [74] *per* Lord Hope; [192] *per* Lord Phillips.

[550] *AHK* (n 537) at [58].

[551] Ibid, at [77].

[552] *Tariq* (n 530) at [84] *per* Lord Brown. See also Lord Manse at [40].

[553] JCHR, *The Justice and Security Green Paper* (2010-12, HL 286, HC 1777) [hereinafter "*JCHR The Green Paper*"] at para 71.

[554] Ibid, at para 68.

3.2.3. Threat to international intelligence partnerships: *Binyam Mohamed*

The *Green Paper* insinuates that the need to protect the 'control principle' is fundamental to the government's case, advancing the necessity for the extension of the use of CMPs, as opposed to PII.[555] The outcome of the *Binyam Mohamed* litigation is presented as illustrative of this point, whereby the Court of appeal ruled that intelligence documents including those from US intelligence could be disclosed in open court.[556] The 'control principle' supports the UK's intelligence sharing relationships with other countries. Essentially, it is a presumption that intelligence provided by international partners remains under the control of the country which provided the intelligence, and should not be disclosed without their agreement. The understanding of confidentiality is that it is, 'vested in the country of the services which provides the information: it *never* vests in the country which receives the information'.[557] The importance of the 'control principle' to international intelligence relationships was outlined in the ISC's *Annual Report* for 2011-2012:

> The principle is so sacrosanct, and we must not break it. Put simply, if the UK Agencies break that 'control principle', foreign intelligence agencies will not trust us to protect any of their intelligence material and therefore will not share as much intelligence with our Agencies.[558]

Mohamed was an Ethiopian National who had been resident in the UK, he had been arrested in Pakistan in 2002 and held since 2004 by the US at Guantanamo Bay. He was charged with offences in the US which may carry the death penalty. Mohamed sought disclosure of material to assist his defence in a trial in the US, to show that the prosecution's case contained evidence obtained though torture. The relevant material contained reports made by the US government to the UK government, in relation to the detention and treatment of Mohamed whilst in the custody of the US government. He sought disclosure from the Foreign Secretary under *Norwich Pharmacal* principles, this was refused. Consequently, Mohamed applied for judicial review of that decision to the

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[555] See Hugh Bochel, Andrew Defty and Jane Kirkpatrick *Watching the Watchers: Parliament and the Intelligence Services* (Palgrave Macmillan, 2014).

[556] See Green Paper, para 1.22, and paras 1.41 – 1.46; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

[557] *Binyam Mohamed* (n 556) at [5].

[558] Intelligence and Security Committee, *Annual Report 2011-2012* (CM 8403, 2012) para 154.

Divisional Court.[559] The Foreign Secretary submitted that he was under no duty to disclose the documents, and to do so would damage national security in the United Kingdom. He contended that non-disclosure would not disadvantage Mohamed, the applicant, because the relevant material would be made available during the course of the proceedings in the US.[560]

First, the Divisional Court were required to rule as to whether *Norwich Pharmacal* principles were applicable in the applicant's case. These derive from the landmark House of Lords' decision in *Norwich Pharmacal v Customs & Excise Commissioners*,[561] and were originally established 'to bring an action to identify the name of a wrongdoer'.[562]

> At its simplest, the jurisdiction obliges a third party who is mixed up in the wrongdoing of others to disclose to a potential claimant the identity of the person against whom the claimant may wish to bring his claim. [563]

There are predominately two threshold conditions, which must be satisfied in ordering that *Norwich Pharmacal* applies: an 'arguable' case of wrongdoing; and, sufficient involvement by the respondent in that wrongdoing. In addition, the information must be necessary to meet the objective for which the relief is sought. Following this, the court has the discretion whether or not to grant relief. The *Norwich Pharmacal* jurisdiction has expanded over the years. One of the most significant developments was the discovery of the 'missing piece of the jigsaw', so as opposed to the principles applying to identify the third party 'wrongdoer', the principles can apply whereby the identify is known but something else is 'missing' which is necessary to continue with proceedings.[564] The *Binyam Mohamed* case subsequently confirmed the breadth of the

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[559] *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin).

[560] Ibid, [3].

[561] [1974] AC 133.

[562] Simon Bushnell and Gary Milner-Moore, *Disclosure of Information: Norwich Pharmacal and Related Principles* (Bloomsbury, 2013) 27.

[563] Ibid, 1. Bushnell and Milner's book provides an in depth examination of *Norwich Pharmacal* jurisdiction and related principles. Chapter 4 provides an overview of the *Norwhich Pharmacal Co and others v Customs and Excise Commissioners* litigation.

[564] Ibid, section 6.2.

Norwich Pharmacal jurisdiction, and the flexibility of the relief available. [565] Bushnell and Milner-Moore state that the significance of the court's application of *Norwich Pharmacal* here, is that the circumstances presented little similarity to the original *Norwich Pharmacal* case. Thus, the case signals a turning point in the extension of the application of the jurisdiction.

Mohamed argued that he had an 'arguable case of wrongdoing' in that he had been held by the US in Pakistan incommunicado with no access to a lawyer or a court; and, had suffered cruel, inhuman and degrading treatment, and torture, on behalf of or by the US authorities. This was undisputed by the Foreign Secretary. As for the UK's involvement in this wrongdoing the Court of Appeal found that the UK authorities had facilitated interviews, by supplying information and questions, by or on behalf of the US when Mohammed was detained incommunicado without access to a lawyer. The Court of Appeal also found that the UK continued to facilitate such interviews when it had knowledge of the circumstances of Mohamed's detention.[566] On the question of whether the information to which the applicant sought disclosure was necessary, the Foreign Secretary maintained that it was not. He argued that this was because such information would be made available during the course of the proceedings in the US. However, the Court of Appeal disagreed. It stated that without the information the applicant would not be able to put forward a defence to the very serious charges he faced, hence such information was essential to a fair trial.[567] In addition the Court of Appeal felt that it would be unlikely that the information would be published at all, or within 'proper time' during the course of proceedings in the US.[568] The more contentious point with regard to the application of the *Norwich Pharmacal* principles to the circumstances of the case, was whether the information sought was within the scope of the available relief. It was on this point, the flexibility of the remedy, in which the case is said to have confirmed the breadth of *Norwich Pharmacal* jurisdiction.

[565] The origins of this development are to be found in the House of Lords decision in *Ashworth Hospital Authority v MGN* [2002] UKHL 29.

[566] *Binyam Mohamed* (n 559) at [88].

[567] Ibid, at [105].

[568] Ibid, at [126].

The Divisional court found that Mohamed's case was 'truly exceptional' given that the material sought to be disclosed was acclaimed necessary 'to exculpate an individual facing a possible death penalty if convicted'.[569] On this basis, the court found it to be entitled to exercise the *Norwich Pharmacal* jurisdiction to order the disclosure of the relevant material 'to serve the ends of justice'. The court found that:

> A system of law under which it is permissible to order the provision of information to trace a person's property, but under which it was not permissible to order the provision of information to assist in the protection of a person's life and liberty would be difficult to justify.[570]

The court ruled that the material held by the Foreign Secretary was 'capable of providing the only real answer…..to the charges made' and accordingly it was essential for a fair trial.[571] This decision was not appealed, however the Foreign Secretary contended that to disclose sensitive material shared with the UK government by the US government would breach the Control Principle.[572] Therefore, he made applications for PII certificates in respect of the sensitive material contained in the US government's reports. The PII certificates clearly stated that the US government would re-evaluate its intelligence sharing relationship with the UK if such material were made public, with a real risk that it would reduce the intelligence provided.[573] The lengthy litigation resulted in the Court of Appeal concluding that the relevant material should be disclosed, and not excluded under PII certificates.

Consequently, on this point regarding disclosure of the material, the government contended that the litigation was indicative that the mechanism of PII was unworkable in cases of this nature. However, in terms of this assertion it is imperative to note that disclosure of the relevant material in which PII certificates were sought would not in itself of damaged national security. It was not suggested that intelligence material would be disclosed.[574] On this basis, it is argued here that the case is not illustrative of a problem with PII. The decisive factor for the Court of Appeal in ruling that the material

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[569] Ibid, at [134].

[570] Ibid, at [134].

[571] Ibid, at [105] – [107]. The reasons for the conclusion were detailed in a closed judgement.

[572] *Binyam Mohamed,* CA (n 556) at [226].

[573] Ibid, at [12].

[574] Ibid, at [113].

should be disclosed was because at that time it had already been disclosed in open court in the US; and, therefore was already in the public domain.[575] This reasoning would also apply in an application to use a CMP. It follows that the relevant material in the *Binyam Mohamed* case would unlikely have been heard in closed session, if an application had been made to use a CMP as opposed to PII. As a result, the *Binyam Mohamed* litigation is not sufficient evidence of the difficulty PII causes in cases involving these circumstances. The issues with *Binyam Mohamed* and the implications for the 'control principle' are more relevant to the operation of the *Norwich Pharmacal* doctrine which was dealt with elsewhere in the *Green Paper* proposals.[576]

The difficulties posed by the outcome of the *Binyam Mohamed* litigation to the intelligence sharing relationship with the US is not called in to question here, what is disputed is that this is illustrative that CMPs are preferable to PII. In addition, it is accepted that there may be cases where one party is unable to win due to the exclusion of sensitive material under PII, as opposed to all material before a judge under a CMP. However, it must be remembered that the Supreme Court in *Al Rawi* reached the decision not to order the use of a CMP without statutory authority, in recognition of the departure from fundamental common law principles. Therefore, it was appropriate for the government to demonstrate the same regard for those principles by established that the *Green Paper* proposals to significantly extend the availability of CMPs were justified by strict necessity.[577] The *Green Paper* estimated that at the time there were twenty-seven cases before the UK courts, in many of which the courts did not have 'the tools at their disposal to discharge their responsibility to deliver justice based on a full consideration of the facts'.[578] However, it is been claimed that this figure overstated the extent of the problem,[579] and the Independent Reviewer of Terrorism stated that he was

[575] Ibid, at [295].

[576] *Green Paper*, paras 2.83 – 2.97.

[577] JCHR, *Legislative Scrutiny: Justice and Security Bill* (2012-13, HL 59, HC 370) [hereinafter "*JCHR JSA First Report*"] para 17.

[578] *Green Paper*, Appendix J, para 11.

[579] Liberty's response to GP, para 16.

unable to form a firm view of the size of the problem given the lack of information provided to him.[580]

In summary, this Chapter contends that the *Green Paper* did not demonstrate that the extension of the availability of CMPs to all civil proceedings was strictly necessary. It is of concern that the cases presented in evidence to support the government's arguments highlighted serious wrongdoings on the part of State authorities.[581] Accordingly, Fordham has referred to CMPs as, 'secret trials to deal with inconvenient truths'.[582]

A three month consultation exercise followed the publication of the *Green Paper*, and the Justice and Security Bill was introduced into the House of Lords in May 2012. This is referred to from hereafter as the Government's Bill.[583] The remainder of this chapter examines the legislative drafting of the relevant provisions of Part 2 of the JSA. This will assist in an understanding of the contentious issues that have arisen in the legislation and is an important starting point in examining the provisions within the framework of the Article 6(1) jurisprudence.

3.3. The Parliamentary Passage

Section 3.3 is divided into subsections in relation to the key aspects of Part 2 of the JSA, of relevance to an examination of the compatibility with Article 6(1).

3.3.1. Special advocates

Chapter 2 presented the limitations that special advocates face in carrying out their functions in representing the interests of the excluded individual. Therefore the introduction of new legislation could have provided an opportunity to reduce some of the restrictions, especially given the significant extension of the use of CMPs and special advocates across all civil proceedings. The government stated in the *Green Paper* that that the effectiveness of the special advocate system is a, 'critical factor' in

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[580] Memorandum to JCHR, *The Justice and Security Green Paper* (2010-12, HL 286, HC 1777), para 7.

[581] Michael Fordham, 'Secrecy, Security and Fair Trials: The UK Constitution in Transition' (2012) 17:3 *Judicial Review* 187, 188.

[582] Ibid.

[583] Justice and Security Bill (HL Bill 27): the Government's Bill.

[583] Justice and Security Bill (Bill 99). Hereafter referred to as the Lords Bill

the success of the expansion of CMPs. The government asserted that special advocates are, 'effective in representing the interests of the individuals excluded'.[584] This assertion can be said with a, 'rose tinted view of the cases' where CMPs have been challenged.[585] However, it has been recognised that the views of the special advocates are a 'true reflection of the effectiveness they bring'[586]; and, the special advocates have persistently expressed their concerns about their effectiveness.[587]

The main problems were outlined in Chapter 2. They included the fact that they are representative but not responsible; the bar on communication results in an inability to take effective instructions; their appointment; a lack of professional support; training; and expertise.

The *Green Paper* acknowledged that improvements could be made including providing additional training to enable a 'more rigorous challenge of closed material'; and 'better arrangements for communication' with the individual whose interests they represent.[588] The government claimed that they would make more training available where required,[589] and provide 'sufficient resources in terms of independent junior legal support' which would ensure the ability to carry out their function, 'as effectively and thoroughly as possible'[590].

The Government's Bill did not address the problematic areas with regard to the ability of special advocates to carry out their function effectively. The House of Lords introduced a number of amendments that were intended to improve the relationship between the special advocate and the excluded individual, and to improve the ability of the special advocates to carry out their duties effectively.[591] They drew attention to the

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[584] *Green Paper*, para 2.24.

[585] John Ip, 'The Rise and Spread of the Special Advocate' [2008] *Public Law* 717, 619.

[586] *AHK* (n 537) at [78] *per* Ouseley J.

[587] For example, evidence given by special advocates to the JCHR included in: *JCHR Sixteenth Report* (n 335).

[588] *Green Paper*, para 2.24.

[589] *Green Paper*, para 2.26.

[590] Green Paper para 2.27.

[591] HL Deb, 17 July 2012, vol 739, col 145. Marshalled list of amendments to be moved in Committee of the whole house as at 5 July 2012: Ams 56, 63,64,65,66, and 67.

issues of their appointment, and how they carry out their functions. Amendments 64, 66 and 67 were intended to strengthen the relationship between the special advocate and the excluded individual, including making statutory provision for the special advocate to be able to withdraw from a case.

Amendment 66, would have replaced the phrase that the special advocates are 'not responsible to' the excluded individual with, 'responsible for representing the interests of'. This was seen as a 'warmer and more positive phrase'[592]. Baroness Berridge expressed the view that it was, 'very harsh for the Bill to say that the advocate is not responsible for the interests of the person they represent', and felt that providing for a 'more positive duty' in the Bill would address the concern.[593] This amendment would have been a positive improvement disposing of the 'distant' nature of the clause without implying 'normal professional duty and relationship'.[594] However, it would not necessarily have answered concerns in relation to the lack of accountability outlined in chapter 2, section 2.6.1.

Amendments 56, 64, and 65 concerned the nature of the appointment of a special advocate and ensuring this is done in a timely fashion. This recognised the importance of the necessity that the special advocate is given sufficient time for preparation and consultation.[595] The amendments sought to ensure that the claimant was represented at the time of his application and during the proceedings.[596] This would have gone some way towards addressing the problem identified by special advocates of 'prejudicially late disclosure by the government'.[597]

Additionally, with regard to the appointment, amendment 64 sought to change the wording of clause 8(1) which stated that, 'the appropriate law officer may appoint a person to represent the interests of a party'. It was proposed that 'may' should be

[592] HL Deb, 17 July 2012, vol 739, col 147.

[593] HL Deb, 17 July 2012, vol 739, col 148.

[594] HL Deb, 17 July 2012, vol 739, col 146.

[595] HL Deb, 17 July 2012, vol 739, col 145.

[596] HL Deb, 17 July 2012, vol 739, col 146.

[597] HL Deb, 17 July 2012, vol 739, col 147. Also acknowledged by the Independent Reviewer of Terrorism in his First Annual Report of TPIMs para 9.31; and, *JCHR Sixteenth Report* (n 336) paras 63 – 65.

replaced with 'must'. Unfortunately, these amendments were either withdrawn or not moved. Section 9(1) states that the appropriate law officer 'may' appoint the special advocate. Rule 82.9 also does not make the appointment mandatory. Additionally, section 9(2) retains the phrase that the special advocate is not responsible to the excluded party. With regard to the Rules of Court there are also no provisions that would improve the position of the Special Advocate.[598] The Rules are almost a direct model of the SIAC Rules. One of the Lords' safeguards was retained and section 6(10) provides that: notice of the intention to make an application for a closed material procedure must be communicated to every other person, and that the applicant is to inform every other person of the outcome of such application.[599] However, it must be noted that the Rules of Court do not provide that the excluded party or the special advocate be informed of the date, time or place for any hearing.

3.3.2. National security or public interest?

The mechanism for triggering a CMP in the *Green Paper* proposals was the Home Secretary's application that the disclosure of the relevant sensitive material would damage the 'public interest'.[600] The *Green Paper* also provided a wide definition of what constituted the public interest in its glossary.[601] The broad scope of such proposals attracted criticism.[602] Given that one of the primary justifications stated by the government for its proposals in the *Green Paper* was national security, it was unacceptable that a closed material procedure would be used in relation to relevant sensitive material that could actually be unrelated to national security.[603]

Therefore, the narrower focus in the Government's Bill was welcomed and clause 6(2)(b) stated that the CMP would only be triggered if disclosure of sensitive material would be damaging to the interests of 'national security'. 'National security' was not defined in the Bill and this became subject to debate in the Committee stage of the

[598] JUSTICE, *Justice and Security Act 2013: Civil Procedure (Amendment No 5) Rules 2013* (5 July 2013) paras 7-8.

[599] See also CPR Rules of Procedure, 82.21, 82.23, 82.24

[600] *Green Paper*, para 2.7.

[601] *Green Paper*, Glossary p.71.

[602] *JCHR The Green Paper* (n 553) paras 36-47.

[603] Special Advocates, *Response to the Green* Paper, 9.

House of Lords, where an amendment was introduced to provide a statutory definition. The arguments in favour were based on the wide discretion the term gives to the Home Secretary, and its potential for misuse.[604] Apprehension was shown as to whether national security would be used in a narrow sense, or whether it may concern factors such as the economic well-being of the country.[605] Nevertheless, strong arguments were advanced against imposing a statutory definition. These included a JCHR recommendation.[606] The arguments were presented on the basis of the need for an element of flexibility to respond to changing circumstances and threats,[607] and the amendment was withdrawn.

The JCHR recommended that clarity on the sort of material intended to be covered should be provided.[608] However, this is not provided in Part 2 of the JSA and section 6(11) merely states that: 'sensitive material' means 'material the disclosure of which would be damaging to the interests of national security'.

3.3.3. The initial decision to order the use of a CMP

The role of the court and the Home Secretary in relation to decision making powers in Part 2 of the JSA, were controversial from the publication of the *Green Paper*, and continued throughout its parliamentary passage. This controversy was primarily directed at the initial decision to order the use of a CMP in each case. At this stage the primary concerns for the Lords, which transpired into key amendments to the Government's Bill were: the lack of judicial discretion and consequential wide-ranging powers to the Home Secretary; the lack of judicial balancing; and, the apprehension that the use of CMPs would not be confined to exceptional circumstances. These three aspects will be addressed in turn.

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[604] HL Deb 17 July 2012, vol 739, col 120-121, Lord Hodgson

[605] HL Deb 17 July 2012, vol 739, col 131, Lord Lester states this with reference to the distinction made by the ECtHR.

[606] JCHR JSA First Report (n 577) para 24.

[607] HL Deb 17 July 2012, vol 739, col 120-121, Lord Hodgson.

[608] *JCHR JSA First Report* (n 557) para 24. para 25.

3.3.3.1. Judicial discretion

The *Green Paper* stated that CMPs under Part 2 of the JSA would be triggered by a decision made by the Home Secretary, that the disclosure of relevant sensitive material would damage the public interest.[609] If challenged, this decision would be reviewable on judicial review principles.[610] This is merely judicial oversight, which was regarded as unacceptable and described as a mere 'rubber stamping of an executive decision'.[611] The responses to consultation were almost unanimous in stating their rejection of this proposal arguing the necessity of judicial discretion at this stage. Judicial oversight merely enables the court to review the executive's decision, whereas judicial discretion vests a decision-making power on the courts. It is important to clarify that discretion in this context is referring to the courts having a decision-making power, as opposed to a discretion in the subjective sense which entails a decision to be made based on personal judgment.[612] The responses stated the importance of affirming that it was for the courts to make the decision to make the decision to impose a CMP, not the Home Secretary.[613]

The JCHR, in response to the *Green Paper*, took evidence before publishing its report on the proposals. One of the questions put forward to some of the respondents was, 'Should the availability of a closed material procedure be a decision for the court, or for the Executive subject only to judicial review?'[614] These responses were also unanimous in stating that the decision should be taken for the court.[615] The reasons for this included the need for accountability and transparency.[616] Dr Lawrence McNamara proposed that executive control was one of the 'key issues' surrounding secret evidence, and therefore to expand the Executive's discretion to decisions concerning the management of

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[609] *Green Paper*, para 2.7.

[610] Ibid.

[611] Public Interest Lawyers, *Response to the Green Paper*, p.5.

[612] This choice of language may not have helped the case of those who took issue with this aspect of the proposals.

[613] *JCHR The Green Paper* (n 553).Written evidence by the Equality and Human Rights Commission, p.9 at [25].

[614] Ibid.

[615] Ibid, including: The Equality and Human Rights Commission, p.9 [25]; Lawrence McNamara, p.85 [13]; JUSTICE, p.32 [20].

[616] Ibid, Lawrence McNamara, p.85 [13].

evidence would merely increase the problem.[617] The Independent Reviewer of Terrorism Legislation stated that, the decision was within the role of the court in exercising its case management functions.[618] He also warned against the danger of 'public mistrust of "secret evidence."'[619] In addition, he emphasised the importance of an 'impartial decision maker' for the 'appearance and reality of justice.'[620]

Following the objections to this aspect of the *Green Paper*, the government asserted in its reply to the consultation that, 'the final decision that a closed material procedure could be used will be a judicial one.'[621] When the government introduced its Bill in the Lords, they acclaimed that the power to order a CMP would rest with the judge.[622] The Government's Bill, however, did not reflect this assertion; so whether this was political rhetoric or a benevolent misunderstanding, the claim was mistaken. The Government's Bill stated that following the Home Secretary's application, the court 'must' make a declaration for use of a CMP if disclosure of the material would be damaging to national security, and a party would be required to disclose the material in the course of the proceedings.[623] The government's mistaken view could be explained by the fact their provision claiming the court retained the decision-making power conflated two questions:

1) whether disclosure of the relevant sensitive material would be damaging to national security;

2) if it is should a closed material procedure be used?

The mandatory wording of the provision in the Government's Bill (use of the word must) meant that if the court found that disclosure of the material would be damaging to national security (so a yes to question 1), then the court was under a statutory duty to grant the Home Secretary's application. The effect is that judicial discretion is unduly

[617] Ibid.

[618] Ibid, David Anderson at [77].

[619] Ibid, at [78].

[620] Ibid.

[621] Ministry of Justice, *Government's Response to the public consultation on Justice and Security* (CM 8364, 2012).

[622] HL Deb, 11 July 2012, vol 738, col 1205.

[623] Government's Bill, clause 6(2).

fettered, given that if the material is national security sensitive the courts cannot disagree with the Home Secretary's decision to order the use of a CMP. [624] The consequence of this was that the executive retained wide discretion in respect of the decision to use a CMP in each case. Thus, it is incorrect to assert that the Government's Bill gave the power to the court.

This aspect of the Government's Bill was heavily criticised when the Bill was heard in the Lords, consequently it was amended. As opposed to imposing a statutory duty to grant the application for a CMP the amendment provides that the court 'may' make such a declaration.[625] When the amendment was discussed in the Commons, it was acknowledged that the Lords' support for the legislation was subject to the provision for an increased judicial discretion.[626] The result being that it survived the parliamentary passage, and remains as section 6(2) of the JSA. Section 6(2), is one of two conditions that need to be satisfied before the declaration to use a CMP can be granted, the second is outlined below.

However, this thesis contends that the change from 'must' to 'may' did not sufficiently address the problems regarding judicial control at this initial stage. Therefore, section 6 of the JSA does not sufficiently address the danger of a wide executive discretion. This will be discussed in Chapter 5, which demonstrates that the problem is inherent in the failure to delineate the two questions.[627] This is considered in light of the ECtHR case law on the importance of the independence of the judiciary, including judicial decision-making powers.

The Government's Bill contained another provision presenting issues of judicial oversight and broad powers vested in the executive. Clause 6(5) provided that before making the application for a CMP the Home Secretary must consider whether to make a claim for public interest immunity. There was no provision for the court to consider public interest immunity, or question the Home Secretary's decision. This essentially placed the executive in control of the judicial procedure to be followed where sensitive

[624] HL Deb, 21 November 2012, vol 740, col 1828, Lord Marks.

[625] Lords Bill, clause 6(2).

[626] HC Deb, 18 December 2012, vol 555, col 721.

[627] Chapter 5, Section 5.3.

material is relevant.[628] This is at odds with the separation of powers, and even more worrying in the context of a CMP given that the executive is likely to be party to the proceedings. This provision is not contained in Part 2 of the JSA. However, there is also no requirement that the court must consider a claim for PII. Instead Part 2 of the JSA provides that the court must be, 'satisfied' that the Home Secretary has considered a PII claim. Once again, this provision gives the appearance of a judicial decision-making power. Nevertheless, it leaves open the possibility for the court to have to defer to the executive's decision on a matter which is really a judicial one. This point will be also be examined in further detail in Chapter 5, in relation to how the court exercises its decision-making power and whether this can give rise to issues with the Article 6(1) requirement of independence.

3.3.3.2. Judicial balancing

The need for the insertion of judicial balancing at the initial stage of ordering the use of a CMP was stressed by the critics in response to the *Green Paper*, and continued as a prominent topic throughout the JSA's parliamentary passage. The Lords introduced balancing into their Bill by inserting Clause 6(2)(c), which was considered as a crucial safeguard of judicial control of the initial decision-making procedure. It provided that the court would have to consider whether, 'the degree of harm to national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice.'

The Lords amendment followed a JCHR recommendation proposing that there should be full judicial balancing in making the decision whether to order the use of a CMP.[629] The reasoning behind it was that it was considered vital in securing the necessary 'wide procedural discretion'.[630] The wording reflected the wording of the *Wiley* balance used by the courts in decisions regarding public interest immunity.[631] On behalf of the government, Lord Wallace argued against the insertion of this balancing test, stating that the CMPs that already existing at the time did not balance these competing interests

[628] HL Deb, 11 July 2012, vol 738, col 1183, Lord Pannick.

[629] *JCHR The Green Paper* (n 553) paras 102-103.

[630] HL Deb, 18 November 2012, vol 740, col 1823, Baroness Berridge.

[631] *Wiley* (n 477) at [289]-[290].

and had been 'upheld by the courts as being fair and complaint with Article 6.'[632] He asserted that the lack of precedent illustrated that the insertion of judicial balancing was unnecessary.[633] Whilst he was correct to assert that the *Wiley* balance had not been used in the CMPs that existed prior to the JSA, this rationale does not provide good enough reason not to incorporate it into this legislation. It must be remembered that the extension of the availability of CMPs into all civil proceedings is such an encroachment on fundamental principles and our rights, that the necessity to ensure the legislation contained adequate safeguards could not be understated. There are other proceedings which are arguably regarded as a greater encroachment on our rights, such as those involving a potential loss of liberty. The radical nature of the Justice and Security Bill emanates from the increased availability into more contexts generating the danger of mission creep. Judicial balancing of competing interests is well established in our law. It has been 'traditionally not just a principle but a very strong instinct running through our law'.[634]

Nevertheless, the government's amendments removed the judicial balancing, which was endorsed in the House of Commons and is not incorporated into Part 2 of the JSA. Instead section 6(5) states that in making the declaration the court must be satisfied that it is, 'in the interests of the fair and effective administration of justice'. The government maintained that this endorsed the spirit of the Lords' and JCHR amendment, and illustrates the necessity of the judges' discretion.[635] This line of argument is unconvincing. The safeguard inserted by the House of Lords encompassed the wording emanating from the Wiley balance, a well-established balancing exercise and 'product of judicial development'.[636] The wording of s.6(5) is ambiguous, specifically the reference to the 'effective' administration of justice. Firstly, there is the ambiguity of who it should be effective for.[637] Additionally, the replacement of the Lords' wording of the 'open' administration of justice was said to disregard this aspect of the public

[632] HL Deb, 18 November 2012, vol 740, col 1847.

[633] HL Deb, 18 November 2012, vol 740, col 1847.

[634] HL Deb, 18 November 2012, vol 740, col 1836, Lord Carswell.

[635] HC Deb, 31 January 2013, vol 556, col 127.

[636] HC Deb, 31 January 2013, col 129.

[637] HL Deb, 26 March 2013, vol 744, col 1027.

interest vital to ensure the enhancement of procedural fairness given the importance of the principle of open justice.[638] The counter argument to this is that open is one aspect of effective. This thesis will demonstrate that the problem with section 6(5) may not lie in the wording, but in the court's interpretation.[639]

3.3.3.3. Confining the use of CMPs to 'exceptional circumstances'

The danger of mission creep and the 'normalisation of secret justice' have been a prevalent disquiet associated with the use of CMPs.[640] To begin with there was the apprehension that the use of closed material procedures would not be confined to exceptional circumstances with regard to the different contexts they are used. This apprehension proved to be warranted as the previous chapter demonstrated the expansion of their use from SIAC to, for example, the Employment Tribunal and Parole Board Hearings. Alternatively, there is the apprehension of the confinement of closed material procedures to 'exceptional circumstances' with regard to the number of cases that they will be used across the wide range of contexts they are available. So, in other words, the concern that their use would not be confined to a small number of cases. This section begins by addressing these two aspects of the concern with mission creep. Subsequently, it considers whether Part 2 of the JSA should have made provision requiring that the PII procedure be conducted before the use of a CMP is contemplated. This section then presents the last resort provision which was considered a key amendment made by the Lords. This discussion will demonstrate the necessity of this provision as a safeguard against mission creep and sets out its place in the proposed decision-making framework. The issues with mission creep are presented on two levels. First, is the amount of contexts they are used. Second, is the number of cases across those contexts.

On the first level, the trepidation of mission creep in the context of counter-terrorism has been a prominent feature of debate in the area for some time. The UK Government's reaction to the 9/11 attacks saw an influx of preventative measures incorporated into anti-terrorism legislation. However, these extraordinary measures introduced as a response to the threat of terrorism have expanded and remain prominent in our

[638] See HC Deb, 5 February, vol 558, col 206.

[639] Chapter 5, Section 3.

[640] *Response to Green Paper*: Amnesty p.10; Special Advocates, para 22.

jurisdiction. It has been argued that the government have abused use of the term 'national security', and these measures have been resorted to outside the remit of exceptional circumstances. [641] One example is, in response to the Global Financial Crisis, section 4 of the ATCSA was used to seize Icelandic assets.[642] The dangers were recognised by the Supreme Court in *Al Rawi* with Lord Hope expressing his concern that procedures adopted for use only in exceptional circumstances 'often become common practise'.[643]

The previous chapter has already demonstrated the expansion of the use of CMPs and special advocates. In 2009, JUSTICE reported that the government had legislated fourteen times since SIAC Act to make provision for their use. Part 2 of the JSA goes significantly further and makes CMPs available in *any* civil proceedings before the High Court, the Court of Appeal, the Court of Session or the Supreme Court.[644] Therefore, in terms of the contexts the proceedings can be resorted to, their use is not confined to exceptional circumstances.

At the second level of mission creep, the government's promise was to ensure that CMPs would only be used in a small number of cases.[645] Consequently, the question here is whether or not the necessary safeguards were inserted into the JSA in order to ensure their use will be only in exceptional circumstances, in terms of how often they will be used across *all* civil proceedings. In evidence given to the JCHR Dr McNamara emphasised the necessity for such safeguards to resist the trend of normalising CMPs which would, 'fundamentally alter the nature and operation of open justice principles in national security cases'.[646]

Despite the concerns made abundantly clear in the responses to the *Green Paper*, the Bill introduced into the House of Lords did not include necessary safeguards to confine

[641] See for example: R (Miranda) v Secretary of State for the Home Department and Commissioner for the Metropolitan Police [2016] EWCA Civ 6.

[642] See: House of Commons Library, *Iceland's financial crisis* (SN/IA/5032, 27 March 2009).

[643] *Al Rawi* (n 478) at [73]. See also *Scott v Scott* [1913] AC 417, 477-78 *per* Lord Shaw.

[644] S.6(1)(11).

[645] *Green Paper*, para 2.4.

[646] *JCHR The Green Paper* (n 553) para 17, Dr Lawrence Mcnamara.

the use of closed material proceedings to exceptional circumstances. A test of strict necessity for their use was notably absent.[647]

The Government's Bill included a provision requiring the court to ignore whether the material would be withheld on grounds of PII when deciding whether a party to the proceedings would be required to disclose the material.[648] Clause 6(5), did provide that the Secretary of State must consider whether to make a claim for PII.[649] The effect of the Government's Bill was that the judge would be obliged to order a CMP, even if he was of the opinion that the case should be tried under PII rules.

The issue of whether there should be a requirement that the PII procedure should be conducted before a CMP could be contemplated, was considered by the Lords. It has already been highlighted that judicial opinion on CMPs has been that where they may be regarded as acceptable is where the determination of PII would mean that the case would be struck out, as in *Carnduff v Rock.*[650] This is in the situation where the strike out of the case would benefit the non-state actor. The Lords introduced amendments to the effect of introducing PII into legislation and requiring that either party could only proceed to a CMP after a public interest immunity exercise had been carried out; and, the judge considers that a CMP is, 'the only way forward'.[651] It was thought that this provision would insert a necessary safeguard into the legislation that CMPs would only be resorted to if strictly necessary.[652] Additionally, it would enable the court to reach a balanced conclusion.[653] In *Al Rawi*, Lord Clarke contemplated that the PII process should be carried out first, and once it is concluded the judge should decide how to proceed considering a CMP as a possibility.[654] However, Lord Dyson in the same case felt that this would merely add to the, 'complexity and expense of the whole process'

[647] *JCHR JSA First Report* (n 577) para 64.

[648] Government's Bill, cl 6(3)(a)(ii)

[649] Government's Bill, cl 6(5).

[650] *Carnduff* (n 522).

[651] See HL Deb, 11 July, vol 738, col 1171, Lord Faulks

[652] HL Deb, 11 July, vol 738, col 1175, Lord Lester.

[653] HL Deb, 21 November 2012, vol 740, col 1812.

[654] *Al Rawi* (n 478) at [159] and [178] and [181] *per* Lord Clarke. This approach was also envisaged by the Court of Appeal in *Al Rawi* [2010] EWCA Civ 482, at [51].

resulting in 'satellite litigation'.[655] Furthermore, the fact that PII is an ex parte hearing, therefore not having much of an advantage over a closed material procedure as one party is still unable to participate, was plausibly pointed out by Lord Mackay.[656]

The view that prevailed in the Lords was that there should not be a provision prior to clause 6 introducing PII, and such amendments to that effect were rejected. The current flexibility attributed to PII as a common law mechanism was understandably noted as important, making the desire to reduce it to statute questionable.[657] The Lord's Bill made provision that before making a declaration to use a CMP the court must consider whether a public interest immunity claim could have been made. The latter amendment was not retained and Part 2 of the JSA merely provides that the court must be, 'satisfied' that the Secretary of State has considered a PII claim, prior to the application for the use of a closed material procedure under section 6.[658]

Following recommendation from the JCHR[659] the House of Lords inserted a safeguard that meant that CMPs would only be used as a matter of last resort. Clause 6(d), stated that they would be resorted to only if a 'fair determination of the proceedings is not possible by any other means'. This became known as, and is referred to in this thesis as, the 'last resort provision'.

The debate of the Bill in the House of Lords demonstrated the importance that was attached to ensuring CMPs would be seen as a last resort. Lord Manse expressly stated that it, 'should be made absolutely clear'.[660] It was suggested that a 'set of step-hurdles' should be gone through first as a preventative measure against mission creep.[661] Additionally, Lord Pannick recognised the importance of the measure to ensure balance and fairness. He noted the necessity for such judicial control given that closed material procedures present a fundamental departure from common law principles, and have the

[655] *Al Rawi* (n 478) at [43] *per* Lord Dyson.

[656] HL Deb, 26 March 2013, vol 744.

[657] HL Deb, 11 July 2012, vol 738, col 1188, Lord Woolf.

[658] Section 6(7).

[659] *JCHR JSA First Report* (n 577) para 67.

[660] HL Deb, 21 November 2012, vol 740, col 1828.

[661] HL Deb, 21 November 2012, vol 740, col 1812, Lord Hodgson.

ability to damage the integrity of the judicial process.[662] Lord Phillips referred to the ECHR stressing that Article 6 is not an absolute right, and therefore does not state that certain things 'can never be done' but rather sets 'standards that should be generally applied'.[663] Consequently, he implied that Strasbourg will recognise that closed material procedures may be needed but as a last resort under judicial discretion.[664]

The last resort provision amendment survived the Lords meaning that the court could only make a declaration to order a closed material procedure if it considers that 'a fair determination of the proceedings is not possible by other means'.[665] This would entail alternative ways of protecting the sensitive material that would be less intrusive on fundamental rights and principles than a closed material procedure, for example a confidentiality ring.[666] This appears to be the more appropriate provision to make the safeguard that there needs to be a test of strict necessity for the order of a closed material procedure. Additionally, the amendment is appropriate given the government's primary rationale for their proposals: fairness. If fairness can be achieved through another means, then where would the necessity be to order a closed material procedure? The Independent Reviewer of Terrorism Legislation also took this view in his response to the *Green Paper* stating that the closed material procedure should only be adopted if, 'the just resolution of the case cannot be obtained by other procedural means'.[667] This amendment would also have answered the concerns for the lack of a requirement for the court to consider a claim for public interest immunity, yet at the same time not destroying the flexibility of the common law mechanism by reducing it to statute. The last resort provision would imply that the court would consider whether a claim for public interest immunity would be more appropriate to the circumstances.

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[662] HL Deb, 21 November 2012, vol 740, col 1814-15.

[663] HL Deb, 21 November 2012, vol 740, col 1836.

[664] HL Deb, 21 November 2012, vol 740, col 1836.

[665] Lords Bill cl.6(2)(d).

[666] Confidentiality rings permits the material to be made available on a lawyer only basis allowing them to advise based on the merits of the case. Using confidentiality rings in PII claims was approved in principle in: *R (on application of Mohammed) v Secretary of State for Defence* [2012] EWHC 3454 (Admin) at [27] Moses LJ. Cf Ouseley J in *AHK* (n 537).

[667] *Response to the Green* Paper, The Independent Reviewer of Terrorism Legislation, David Anderson, para 22.

Nevertheless, whilst including this safeguard there was a consensus amongst the Lords, not everyone was in agreement. It was suggested by Lord Faulks that the amendments set the threshold too high. He also expressed concerns about how the amendments would work in practice.[668] Mr Kenneth Clarke (MP)[669] went further and implied that by setting out factors the court should be taking into consideration the amendment demonstrated that the Lords did not place enough trust in judges. However, he stated that he believed the Lords had got 'carried away with discretion'.[670] These arguments which are made in the same speech in the Commons are contradictory. The former suggests that establishing a set of factors was unnecessary as the judges were more than capable to make decisions without such a provision, thereby implying they had a wide discretion to do so. Yet the latter argument states that in his opinion the Lords accorded too much discretion to the judiciary.

Unfortunately, the amendment did not survive the House of Commons and section 6(5) of the JSA was seen as the answer to the absence of a test of strict necessity for a declaration of a CMP. It states that before a section 6 declaration can be made it must be satisfied that it is in the 'fair and effective administration of justice'. Tomkins suggests that in consideration of the emphasis places on the fundamental importance of open and natural justice principles in the Court of Appeal and Supreme Court in *Al Rawi*, it will be unlikely that the courts will find that s.6(5) will be satisfied unless they believe there is no alternative to a closed material procedure in the circumstances.[671] Therefore, he believes that whilst the last resort amendment did not survive the passage of the Bill, in practise this is how the courts will proceed.[672] Chapter 5 will show that the court's interpretation of 'fair and effective' may significantly affect the practice of the courts in this regard.

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[668] HL Deb, 21 November 2012, vol 740, col 1836.

[669] At the time the Green Paper was published Kenneth Clarke was the Secretary of State for Justice and Lord Chancellor. At present he is Minister without Portfolio.

[670] HL 2nd Reading Lord Clarke col 723.

[671] Tomkins (n 474) 326.

[672] Tomkins said assisted by principle of legality and HRA 1998.

3.4. Once the CMP is triggered

Lord Wallace claimed that once a court had declared the use of a CMP the judge would then consider the treatment of each individual piece of material and the Government's Bill provided the courts with a number of important tools.[673] However the effect of section 8 of the JSA is to remove the discretion of the court once the CMP has been triggered.[674] It is at this stage that the lack of judicial balancing has its most detrimental effect. Notably, neither does section 8 reiterate, 'in the fair and effective administration of justice'.[675] During the JSA's parliamentary passage the JCHR, the Lords, and the opposition, sought to make provision for judicial balancing at this stage in the CMP.[676] Nevertheless, section 8 of the Act states that, 'the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to national security'. The effect of this is that at this stage the court loses its power to order disclosure if it is required in the interests of the open or natural administration of justice.

3.3. *AF* disclosure requirement

In the *Green Paper*, the government proposed a provision in the legislation to clarify the contexts in which *AF* disclosure does not apply.[677] This suggestion was rejected in the responses to the *Green Paper* with the consensus of the opposition being that it would just generate further litigation as opposed to increasing certainty.[678] There lies strength in this argument, the *AF* disclosure requirement is rooted in the requirements of a right to a fair trial under Article 6 ECHR.[679] The application of the principle is currently tested on a case by case basis in the UK, Strasbourg and Luxembourg Courts.[680] If the

[673] HC Deb, 18 December 2012, vol 555, col 1205, Lord Wallace.

[674] Tomkins and Hickman (n 474) 157; Daniel Kelman 'Closed trials and secret allegations: an analysis of the "gisting" requirement" [2016] *Journal of Criminal Law* 264, 269.

[675] Walker (n 474) 31.

[676] *JCHR JSA First Report* (n 577) para 71.

[677] *Green Paper*, para 17.

[678] *Responses to the Green Paper*: Liberty para 27; Reprieve p.3; Amnesty International p.11; Bingham Centre para 57-8; ALBA para 13.

[679] *Response to the Green Paper*: Special Advocate, p.16-17.

[680] *Response to the Green Paper*: Bingham Centre for the Rule of Law, para 57. In relation to Strasbourg this is discussed further in Chapter 7.

government introduced a statutory presumption providing the situations in which the *AF* disclosure requirement will not apply, it will seek to avoid the application of the principle being examined by the courts.[681] The view is that the legislation will generate further litigation, in particular in the Strasbourg and Luxembourg courts as the UK legislation will not prevail over judicial ruling on the requirements of Article 6.[682] The Government did not incorporate this proposal into the Bill as introduced in the Lords.

The Government's Bill provided that the court should 'consider' requiring a summary of the disclosed material to be given to other party,[683] and that the court be required to ensure that the summary does not contain material that may damage national security.[684] This followed recommendations following the publication of the Green Paper that the requirement of *AF* disclosure should always apply.[685] The issue was raised in the Bill's passage in the Lords where an amendment to replace 'consider requiring' with 'require' was proposed.[686] This amendment would have brought the Bill in line with the JCHR's recommendations. Lord Hodgson asserted that the aim of this was to 'widen the use of gisting'.[687]

JUSTICE, recommended the removal of clause 7(1)(e) which states that 'the court is required to ensure a summary does not contain material disclosure of which would be damaging to national security'.[688] The starting point of this provision is non-disclosure – it begins from the premise that the court is prevented from ordering a summary which may damage national security. This is opposed to the starting point being the right to a fair trial and the excluded party being given as much information as possible. JUSTICE did welcome the inclusion of clause 11(5), which emphasises the courts' duty under the HRA 1998 and provides that nothing in the Act shall be read as acting incompatibly

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[681] Ibid.

[682] *Responses to the Green Paper*: Liberty para 27; Reprieve p.3 Q5; Bingham Centre for the Rule of Law, para 58; Amnesty International p.11,

[683] Clause 7(d)

[684] Clause 7(1)(e).

[685] *JCHR The Green Paper* (n 553) para 106, and Lord Carlile's evidence Q89. See also JUSTICE, *Response to the Green Paper*, para 74.

[686] Amendment 60.

[687] HL Deb, 17 July, vol 739, col 162.

[688] JUSTICE, HL Committee Stage Briefing July 2012, para 28.

with Article 6. So, the court should provide summaries necessary where Article 6 applies.[689] However, JUSTICE still considered the effect of clause 7(1)(e) to be too restrictive and in need of removal so the court would not be required to consider a summary beginning with the premise of the protection of national security, as opposed to the right to a fair hearing.[690]

Nevertheless, the amendments to these provisions were not moved in the Lords and section 8 of the JSA provides that, the court considers requiring a summary of the closed material and the summary must not contain material damaging to national security.[691] Consequently, there is no requirement of a summary and *AF* disclosure is not incorporated into the Justice and Security Act.[692] The fact that the government did not incorporate their original proposal to state the contexts in which *AF* would not apply can be seen as a positive. However, it is unfortunate that instead of requiring the court to consider providing a summary, the court should only have to require a summary to be given to the excluded party. Additionally, the assertion by JUSTICE with regard to the starting premise of such a summary is that it does not contain material which would be damaging to national security should have been considered. It is regrettable that the starting point is not the right of a fair trial which would be in line with the case law.

3.5. Inequality of arms

The equality of arms is a key element of due process and is inherent in the notion of a fair trial as guaranteed by Article 6(1) ECHR.[693] It is the idea that both parties must be treated in a manner which ensures they are in an equal position to make their case. There are a number of reasons that were advanced as to why the Government's Bill did not respect the equality of arms. First, it provided that only the Home Secretary could make the application for the use of a CMP.[694] Furthermore the Government's Bill merely made provision for the Secretary of State to be notified of the declaration that a

[689] Ibid, para 29.

[690] Ibid, para 29.

[691] s.8(1)(c).

[692] See section 8(1)(d) and (e). see also Rule 82.14.

[693] The meaning of the principle of equality of arms in accordance with ECHR standards is addressed further in chapter 8.

[694] Government's Bill, clause 6(1).

closed material procedure would be used. [695] It did not provide for the excluded party or their special advocate to be notified. Additionally, it stated that an application for a closed material procedure must always be considered in absence of every other party and their legal representative, including the special advocate.[696] This results in the Secretary of State automatically being placed in a position of litigation advantage. It has been stated that Article 6(1) implies that each party should not be placed at a substantial disadvantage *vis-a-vis* his opponent.[697]

An additional issue concerning the equality of arms identified refers back to clause 6(5) in the Bill, introduced into the House of Lords, that is that the Secretary of State must consider making a claim for public interest immunity. This gave the Secretary of State the choice as to which procedure to follow, and there is the possibility that he may choose to claim public interest immunity to exclude material which may help the claimant's case and not his own. Therefore, attributing litigation advantage to the government.[698] Section 6(7), provides that the court must be satisfied that the Secretary of State has considered making a claim for PII. However, this may have the same effect with regard to litigation advantage as the Secretary of State may still choose to proceed with a PII claim, for the same reasons. It will remain to be seen whether the court will pick up on this point.

The Bingham Centre for the Rule of Law recognised this potential issue and raised it as a concern in their response to the *Green Paper*,[699] and referred back to the government's objective of fairness in its proposals. The Centre stated that if the government was serious about addressing, 'exceptional cases of fundamental unfairness', in PII procedures by permitting relevant material to be heard before a court under a CMP; then it must be considered by the court in a case where prejudice is caused not to the government but to another party.[700] Similarly, in evidence given to the JCHR David

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[695] Cl.6(6)(a).

[696] Cl.7(b).

[697] *Dombo Beheer BV v Netherland* (App 14448/88) (1994) 18 EHRR 213, para 35.

[698] Acknowledged by The Bingham Centre for the Rule of Law in its *Response to the Green* Paper, para 41.3.

[699] *Responses to the Green Paper*, Special Advocates, para 23; and, Public Interest Lawyers p.6 (vii).

[700] *Response to the Green Paper*, Bingham Centre for the Rule of Law, para 27.

Anderson QC explicitly stated that the Bill plainly does not guarantee equality of arms or equal treatment.[701]

The House of Lords contended the Secretary of State's litigation advantage provided for in the Government's Bill and introduced the amendment, on recommendation of the JCHR, [702] that any party could apply for a CMP.[703] An individual may wish to apply for a CMP where the sensitive material would assist their case but not the Governments. In this situation, the Government may opt for a claim for PII so the court does not reach its decision based on such sensitive material. Whilst the government initially opposed this reasoning, that only the minister could apply for public interest immunity, the provision was retained and is expressed in s.6(2)(ii) of the JSA. It was pointed out during the passage of the Bill that, equality of arms means more than merely being in a position to apply for a closed material procedure as the equality can only be, 'as good as the ability to make that application meaningful'.[704] Mr Slaughter stated that CMPs can never meet the common law standards of the equality of arms.[705] This was explained by the Public Interest Lawyers in their response to the *Green Paper* as being due to the fact that CMPs prevent an adequate challenge to the evidence of the government, because the special advocates cannot take effective instructions from the other party. Therefore, the proceedings are unjustly weighted in favour of the executive, undermining equality of arms.[706]

Nevertheless, the fact that both parties can apply can be seen as a positive development compared to the Government's Bill as introduced. Similarly, Part 2 of the JSA retains the provision inserted by the Lords that all parties shall be notified of an application for a CMP, and the outcome. This is an important improvement on clause 7(b) in the Government's Bill, excluding the other parties from the application, as it means that the excluded party's special advocate may be present in order to be able to advice the other party whether to apply for a CMP based on the sensitive material. Lord Marks described

[701] *JCHR JSA First Report* (n 577) Q12 para 49.

[702] Ibid, para 51.

[703] Cl.6(1) Lords Bill.

[704] HC, 31 January 2012, vol 556, col 113.

[705] HC, 31 January 2012, vol 556, col 113.

[706] *Response to the Green Paper*, Public Interest Lawyers, p.4.

this as being 'equality of arms'.[707] The JSA, section 8(1)(b) still provides that the application is to be considered in the absence of every other party including their legal representative. However, section 14(1) states that references to a party's legal representative does not include a person appointed as a special advocate. This indicates some improvement on what was originally proposed. Nevertheless, there is no provision that a special advocate *must* be appointed following notification of the application. The effect of this is that it remains possible that the party may not be represented at the hearing.

3.6. Review, revoke, report

Section 7 of the JSA provides for a duty on the court to keep the section 6 declaration of a CMP under review, and to revoke it once the pre-trial disclosure exercise has been completed. It will be revoked if it is no longer in the, 'interests of the fair and effective administration of justice in proceedings'.[708] Section 7 was a late Government amendment introduced to attempt to address some of the many concerns with the legislation and this Section outlines the background to section 7's insertion.

In the Supreme Court in *Tariq*, Lord Hope emphasised that the necessity that the material remain closed should be kept under review, with the assistance of the special advocate.[709] Congruently, in *Wiley* Lord Templeman asserted that, 'in civil proceedings…pleadings may be amended'.[710] In their response to the *Green Paper* the Bingham Centre for the Rule of Law referred to these comments as indicative of why it is appropriate that the judge makes the decision as to whether a CMP will be followed. The Centre went on to affirm that in order to meet the test of strict necessity for their use, CMPs must be kept under review throughout proceedings.[711]

The importance of a provision to keep the need for the use of a CMP under review throughout the proceedings is illustrated by the case of *Al Sweady.*[712] The case

[707] HL Deb, 21 November 2012, 740, col 1828.

[708] S.7(3)

[709] *Tariq* (n 530) at [82] *per* Lord Hope.

[710] *Wiley* (n 477) 281.

[711] para 43.

[712] [2009] EWHC 1687 (Admin).

concerned a claim for PII and demonstrates how a lack of an efficient review mechanism can be problematic. In that case the Secretary of State for Defence relied on a PII certificate with regard to certain material. However, it transpired during the course of the proceedings that a significant portion of such material had already been disclosed in public hearings.[713] The court asserted that it was not suggesting that the minister was aware of this at the time of the proceedings.[714] However, the result of their inefficiency had resulted in the court making a number of rulings on non-disclosure of material that were 'wholly wrong'.[715]

The provision in the legislation for the power of the court to keep the need for a CMP under review during the course of the proceedings, and the power to revoke it was discussed in the Commons Committee 5th sitting. It vested a new power to the court to be able to revoke a declaration at any point if the judge 'does not believe its continuation to be in the interests of a fair and effective administration of justice in the proceedings'.[716]

There were mixed views of the new clause. It was felt by some that it would assist in preventing the danger of mission creep[717] ensuring CMPs were not 'over used'.[718] Lord Wallace claimed that putting the court under a duty of review and revoke at the end of the pre-trial disclosure phase would address the concerns of those wishing to incorporate a last resort test into the statute.[719] The duty to review and revoke CMPs is a necessity in the legislation. Nevertheless, these statements also raised concerns. During the JSA's parliamentary passage in the Commons the new clause was described as merely a 'fig leaf in relation to what would otherwise be a draconian process'.[720] The worry being that the insertion of these powers were viewed as an answer to the lack of

[713] Ibid, at [6].

[714] Ibid, at [7].

[715] Ibid, at [10].

[716] HC Deb, 31 January 2013, vol 556, col 128.

[717] HC Deb, 7 February, vol 558.

[718] HC Deb, 31 January 2013, vol 556, col 128 James Brokenshire.

[719] HL Deb, 26 March 2013, vol 744.Lord Wallace.

[720] HC Deb, 7 February, vol 558.

judicial balancing and provision that CMPs should only be used as a matter of last resort.

It is argued here that section 7 is a welcomed addition to the JSA. However, the wording of the review provision is the same as section 6(5). This chapter has already stated that the court's interpretation of 'fair and effective' will determine the future of CMPs under the Act.[721]

The new clause also provided for renewal of CMPs after 5 years, stating that the Home Secretary's powers under Part 2 of the Act would expire after 1 year from the commencement of the Act.[722] This provision is contained in section 13 of the JSA. This is an important provision, particularly in relation to the concerns regarding mission creep. The Special Rapporteur for counter-terrorism and human rights at the time, Martin Schennin, observed in relation to TPIMs that:

> Regular review and the use of sunset clauses are best practices helping to ensure that special powers relating to the countering of terrorism are effective and continue to be required, and to help avoid the "normalisation" or de facto permanent existence of extraordinary measures.[723]

Additionally, section 12 of the Act contains provisions that the Home Secretary must report to Parliament on the number of applications for CMPs that are made; the number of declarations made by the court; and the number of final judgments given in section 6 proceedings. This section is welcome. The importance of maintaining a coherent database cannot be understated, particularly due to the controversial nature of the legislation. It necessitates close monitoring which is most effectively carried out by establishing an effective database.[724] The necessity is evident from the lack of evidence the Government managed to provide in the *Green Paper* and the history of a lack of a coherent method on their part to keep track on public interest immunity claims.

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[721] See Chapter 5, Sections 5.3 and 5.4 for analysis of the court's interpretation on the meaning of 'fair and effective' to date and how this has impacted on the use of CMPs.

[722] Public Bill Committee Amendments as at 29 January 2013, NC2.

[723] JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (second report) (HL 204, HC 1571), para 1.26 [hereinafter "*JCHR TPIMs Second Report*"].

[724] HC Deb, 4 March 2013, vol 560, col 722.

Since the legislation came into force in 2013, there have so far been three reports presented by the government on the extent of the use of CMPs.[725] However, a study carried out by the Bingham Centre for the Rule of Law illustrates the deficiencies in the first published report.[726] They highlighted the lack of information in the report which failed to afford transparency and accountability, because it was of little assistance to the public discerning the circumstances that the use of CMPs are sought, and why declarations for their use are made.[727] The second report was an improvement on the first, in which only figures were provided, as the report provides the names of the defendants and claimants in each application. However, this information has proved inadequate in order to identify every judgment in relation to each application stated. Nevertheless, it is argued here, that whilst the government should not be expected to provide every detail, as a minimum the report should identify the cases, the date applications were made, and the judgments that determined the proceedings. This is required in order to ascertain the types of circumstances in which CMPs are sought, and to establish whether the report is accurate.[728] The third report, published in October 2016, is an improvement again. It contains the name of both the defendants, and the claimants. This makes it easier to identify the cases and makes the open judgments more accessible.

Nevertheless, regardless of the lack of detail in the first two reports, they do reveal much to do with the trends in the cases. In the first year following the enactment of the JSA the report reveals that five applications were made for a declaration that a CMP may be used in proceedings. Each of these were made by a Secretary of State. The first report states that only two section 6 declarations were made during the reporting period. However, the second report shows that two further declarations were made in relation to the applications that were made during the first reporting period. The second report

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[725] Ministry of Justice, *Report on use of closed material procedure (from 25 June 2013 to 24 June 2014)* (July 2014); Ministry of Justice, *Report on use of closed material procedure (from 25 June 2014 to 24 June 2015)* (October 2015); Ministry of Justice, *Report on the use of closed material procedure (from 25 June 2015 to 24 June 2016)* (November 2016).

[726] 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, August 2014).

[727] Ibid.

[728] Ibid.

illustrates an increase in the amount of applications made for a declaration that a CMP may be used. There were a total of eleven during the second reporting period. Nine of these were made by a Secretary of State, and two were made by the Chief Constable of the Police Service of Northern Ireland. In relation to these applications, only three section 6 declarations were made, and another four were made during the third reporting period. The third reporting period shows that twelve applications for a declaration that a CMP were made, and in relation to these four section 6 declarations have been made. Similarly, these applications were made by either a Secretary of State or the Police Service of Northern Ireland.

Therefore, the three reports do demonstrate an increase in the number of applications made for a declaration that a CMP may be used in proceedings, during each reporting period. In addition, it would appear that the court has not made a section 6 declaration in respect of all applications made. For example, in respect of the applications made during the first reporting period it seems that there is one where a declaration was not made in either the first or second reporting period. However, it is difficult to discern whether a declaration was made during the third reporting period because of the lack of detail in the first report, including a lack of the names of claimants in order to track the case law. With respect of the applications, the reports reveal that so far no application has been made for a section 6 declaration from a non-state party. All the applications have been made by a Secretary of State, or the Police Service of Northern Ireland. Interestingly, the reports demonstrate that to date there has been no revocation of the section 6 declarations. Nevertheless, it is stated in the third report that in respect of one claimant the special advocates have made an application to revoke the declaration made.

In March 2015, the Independent Reviewer of Terrorism Legislation, David Anderson QC, reported that the government had accepted his previous recommendation to set up a working group chaired by a High Court judge to review concerns about the use of CMPs. The aim being to, 'seek solutions and/or make recommendations for improvements'.[729] However, this group has now been disbanded having completed its

[729] Independent Reviewer of Terrorism Legislation, *Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (March 2015) at [3.4].

work.[730] It was reported that the working group produced draft court directions, and that it was 'already within the court's remit to address some of the perceived issues.'[731] An emphasis was placed on the court's discretion not to order a CMP if it was not deemed appropriate, and that the court may require specific pieces of material to be disclosed in an open hearing.[732] In relation to general oversight mechanisms, in 2015 during the Counter-Terrorism and Security Act's parliamentary passage an amendment was put forward to extend the Independent Reviewer of Terrorism Legislation's remit by adding Part 2 of the JSA. Nevertheless, the government submitted that this was unnecessary and stated that CMPs provided for by the JSA were 'already by their very nature subject to robust oversight.'[733] Reference was made to the scrutiny that each application for the use of a CMP is subjected to by the court, and the power to keep that application under review. In addition, the annual reports published by the Ministry of Justice under section 12 were referred to.[734]

3. Conclusion

In conclusion, section 7 is to be a welcomed provision in the legislation vesting a power in the court to keep the use of the CMP under review throughout the proceedings, and the power to revoke its use. Additionally, the removal of the mandatory wording, and insertion of judicial discretion in section 6(4) is a welcomed improvement from the Government's Bill. Nevertheless, Chapter 5 will illustrate the effect of the provisions as interpreted by the court so far in cases heard under Part 2 of the JSA.

Section 8 is a troubling part of the legislation, it would appear the consequence of the provision is that the court's discretion is removed once the CMP has been triggered. In addition, the failure for the legislation to improve the position of the special advocates is disappointing.

Section 12 and the duty to report on the use of CMPs is one of the most important aspects of the legislation. This thesis will demonstrate in the remaining chapters that the

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[730] Home Office, Memorandum to the Home Affairs Committee, *Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011* (Cm 9348, 2016), para 52.

[731] Ibid.

[732] Ibid.

[733] HL Deb, 4 February 2015, vol 759, col 760.

[734] Ibid,

challenges posed by secrecy to applying the fair trial guarantees to CMPs makes efficient general oversight mechanisms crucial. The government's annual reports have been considered unsatisfactory with regard to the level of detail which can cause problems in accessing the judgments and tracking individual's cases progression. However, the reports do reveal certain trends in cases with regard to who is making the applications for a declaration, how many section 6 declarations are made in respect of these applicants, and how many final judgments are delivered.

Chapter 4 Article 6(1): *and introduction*

The objections to the use of CMPs are not exclusively conveyed within the framework of human rights. Instead, criticisms are often expressed in terms of broader concepts such as open justice and basic standards of fairness; and, usually within the meaning of the common law as opposed to the ECHR.[735] The controversy surrounds both the CMP itself and the extension of its availability.[736] This thesis highlights the implications of the JSA, and its extension of the availability for CMPs in all civil proceedings. This presents new challenges, one of which is the requirement that CMPs within the scheme of the legislation are compatible with the civil limb of Article 6 ECHR. This thesis demonstrates that the use of CMPs as provided for by the JSA are potentially incompatible with Article 6 (1) ECHR. However, the ECtHR's approach in its application of Article 6(1), coupled with the innate secrecy of CMPs and the national security context, potentially presents difficulties in a successful challenge of the JSA at Strasbourg. The ECtHR's Article 6 jurisprudence provides the framework for the examination of the legislation and the research is rooted in the ECtHR and its interpretative principles. It follows that one of the core thesis objectives, stemming from the central premise that Part 2 of the JSA is potentially incompatible with Article 6, is to provide an analysis and critique of the ECtHR's Article 6 jurisprudence with reference to national security and sensitive issues in civil proceedings.

Chapter 4 provides the starting point for the examination of CMPs, as provided for by Part 2 of the JSA, within the framework of the ECtHR's Article 6 jurisprudence. This chapter presents an introduction to the main features of Article 6, including: its structure, the fair trial guarantees it enunciates, and key themes in the ECtHR's interpretation and application of the Convention right which have been identified in the analysis of the jurisprudence. In addition, it will outline the fair trial guarantees of relevance to the compatibility with Part 2 of the JSA, and explain the choice of these guarantees for the analysis undertaken by this thesis. The remainder of this thesis will demonstrate that the outcome of cases in this context can be dependent on the ECtHR's

[735] Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 78:6 MLR 913, 917.

[736] David Kelman, 'Closed Trials and Secret Allegations: An Analysis of the 'Gisting' Requirement' (2016) 80:4 *The Journal of Criminal Law* 264.

use of its interpretative principles, and its approach to reconciling tensions that exist between and within these principles. Therefore, this chapter provides an overview of the ECtHR's interpretative principles. The ECtHR utilises these principles in its application of all the Convention rights, and therefore case law that does not directly concern Article 6 will be referred to where appropriate. This is necessary to gain an understanding of the operation of the principles and their rationale. However, this chapter does not purport to engage in an in depth analysis of the ECtHR's interpretative principles since this is beyond the scope of this thesis. Rather the aim of this chapter is to outline the principles to assist in an understanding of how Article 6(1) could be applied to CMPs under the JSA.

4.1. Article 6: an introduction

The ECtHR has consistently proclaimed the fundamental importance of Article 6:

> [I]n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision.[737]

In addition, the right to a fair trial is a basic element to the notion of the rule of law, and the rule of law is deemed to be as part of the common heritage of the member-States.[738] The ECtHR has stated that, the right to a fair trial, as guaranteed by Article 6(1,'must be construed in light of the rule of law'.[739] Therefore, Article 6 assumes a prominent place in the Convention system. Correspondingly, more than half of the judgments in which the ECtHR found a violation of the Convention, between 1959 and 2009, included a violation of Article 6.[740] In 2016, in judgments delivered by the ECtHR, nearly a quarter of the violations concerned Article 6 which is more than for any other Article of the

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[737] *Delcourt v Belgium* (App 2689/65) (1979-80) 1 EHRR 355. See also for example: *Airey v Ireland* (App 6289/73) (1979-80) 2 EHRR 305; *Moreira de Avevedo v Portugal* (App 11296/84) (1991) 13 EHRR 721; *Ryakib Biryukov v Russia* (App 14810/02) (ECtHR, 17 January 2008), para 37.

[738] Preamble to the ECHR.

[739] *Běleš and Others v. the Czech Republic* (App 47273/99) (ECtHR, 12 February, 2003), para 49. See also: *Brumărescu v. Romania* (App 28342/95) (ECtHR, 28 October 1999), para 61; *Nejdet Şahin and Perihan Şahin v. Turkey* (App 13279/05) (ECtHR, 20 October 2011), para 57.

[740] European Court of Human Rights, *The European Court of Human Rights: Some Facts and Figures: 1959-2009* (Council of Europe, 2009) 6.

Convention.[741] Nevertheless, this is not to say that the interpretation and application of Article 6 is straightforward.

Some of the predominant criticisms of the use of CMPs and the introduction of Part 2 of the JSA have been framed in terms of 'fairness', which appears primarily to be within the meaning of the common law. Strasbourg itself has asserted that, 'the key principle governing the application of Article 6 is fairness.'[742] Nevertheless, 'fairness' is a relative concept and therefore difficult to define. To attribute a common definition of 'fairness' or the 'right to a fair trial' applicable throughout the Signatory States of the ECHR is difficult, and the complexity is intensified due to the differences in their common law and civil law systems.[743] Consequently, close examination of the ECtHR's Article 6 jurisprudence is necessary to establish the standard of fairness applicable at an ECHR level in order to provide an aid to its interpretation and application to Part 2 of the JSA. This can be difficult in practice, and attention to the ECtHR's use of its interpretative principles is particularly important to appreciate the ECtHR's application of these standards to different circumstances and contexts. First, discussion will outline the fair trial guarantees protected by Article 6 before establishing those most relevant to an analysis of the compatibility of CMPs under the JSA. The chapter will then proceed to illustrate the general trends in the ECtHR's Article 6 jurisprudence, and the interpretative of principles that are most prominent and relevant for that analysis.

Article 6 sets out a number of guarantees which are summarised as the 'right to a fair trial' providing protection in civil and criminal proceedings. It provides essentially procedural, as opposed to substantive, rights protection. Thus, whether the national courts have come to the right or wrong conclusion is insignificant as Article 6 is concerned purely as to whether an individual has received a fair trial. The guarantees include those explicitly listed in the text of the Convention, and those which are

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[741] European Court of Human Rights, *The European Court of Human Rights in Facts and Figures: 2016* (Council of Europe, 2017) 7. These are the most recent statistics available.

[742] *Laskowska v Poland* (App 77765/01) (ECtHR, 13th March, 2007), para 54.

[743] Piero Leanza and Ondrej Pridal, *The Right to a Fair Trial* (Kluwer Law International, 2014) 5. This is particularly so in criminal proceedings given the difference between the adversarial system of common law jurisdictions, and the inquisitorial system of civil law jurisdictions. See, David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (3rd ed, OUP 2014) 203, on this point.

recognised by the ECtHR as implicit in the text.[744] In other words the rights provided for by Article 6 can be divided in to two categories: express and implied rights.[745] In this way, Article 6 is structured differently from most of the Convention provisions, and this can make an examination of the application of the right more complex. The first paragraph of Article 6 applies to both criminal and civil proceedings. The text of Article 6(1) can be broken down into three categories of requirements. The first is the requirement of publicity, which consists of two elements: a public hearing, and the public pronouncement of the judgment. The second is the requirement that the hearing is brought within a reasonable time. The third is that the hearing must be heard before an independent and impartial. In addition Article 6(1) states that everyone is entitled to a "fair hearing". The notion of a fair hearing has been interpreted by the ECtHR to include a number of implied rights. These include the right to access a court; the right to adversarial proceedings, and the right to equality of arms. These also apply to both civil and criminal proceedings. By contrast, the guarantees provided by Article 6(2) and 6(3) are applicable only to criminal proceedings. Article 6(2) guarantees the presumption of innocence. Article 6(3) lists a number of guarantees afforded to the accused including: the right to be informed promptly and in detail of the nature and cause of the accusation against him; the right to have adequate time and facilities for the preparation of his defence; the right to defend himself in person or through legal assistance; and the right to examine witnesses. Therefore, the protection provided by Article 6 is wide in scope in terms of the number of guarantees. This thesis does not engage in an in-depth analysis of each of these guarantees, instead it examines those of most relevant to the examination of CMPs under the JSA. The following discussion outlines those relevant guarantees and explains the choices made to focus on these in order to meet the thesis objectives.

4.2. The relevant Article 6(1) guarantees

Part 2 of the JSA extends the availability of CMPs to all civil proceedings, therefore the focus of this thesis is the civil limb of Article 6. However, at times an analogy is drawn with the relevant aspects of Article 6(3) where this is necessary to enhance the analysis.

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[744] Ryan Goss, *Criminal Fair Trial Rights* (Hart Publishing, 2014) 1.

[745] Richard Clayton and Hugh Tomlinson, *Fair Trial Rights* (2nd ed, Oxford University Press, 2010) 120 – 121.

Therefore, the relevant guarantees are selected from those provided for by Article 6(1), and these were selected based in the concerns with the use of CMPs and the introduction of the JSA which were illustrated in Chapters 2 and 3.

One of the predominant concerns with the legislation was with judicial decision-making powers, and the potential to undermine the separation of powers doctrine. The majority of these criticisms were directed at section 6 of the JSA which contains the provisions for the initial decision-making procedure whereby the use of a CMP is ordered in each individual case. These were largely overlooked as human rights issues, however whilst the independence and impartiality of the judiciary is a fundamental constitutional principle it is also guaranteed by Article 6(1). Therefore, this thesis identifies the requirements of independence and impartiality as one of the relevant fair trial guarantees to the examination of CMPs within the scheme of the JSA. This is addressed in depth in Chapter 5. CMPs are neither heard in public, nor are the judgments pronounced in public. Therefore, both aspects of the Article 6(1) requirement of publicity are identified as relevant fair trial guarantees applicable to Part 2 of the JSA. The legislation's compatibility with the requirement of publicity is addressed in Chapter 6.

Much of the existing scholarship on the use of CMPs, prior to the JSA, concerned the limitations on special advocates which inhibit their ability to carry out their functions effectively. It is argued here that the restrictions placed on special advocates are problematic with regard to both initiating proceedings, and the conduct of the proceedings. The difficulties in initiating proceedings, which includes the operation of *A*-type disclosure, directed the choice to examine the right to access a court in Chapter 7. Chapter 8 then focuses on the effect on the compatibility of CMPs under the JSA with Article 6(1) with regard to the conduct of the proceedings. The relevant fair trial guarantees identified in this respect are the principle of equality of arms, and the right to adversarial proceedings. The challenges to Strasbourg have been within the framework of these fair trial guarantees; and, critics of the JSA argued that by their very nature seriously undermined the principle of equality of arms.[746] Hence, these guarantees were selected as relevant to the examination of the compatibility of Part 2 of the JSA with

[746] *Responses to the Green* Paper: Special Advocates, para 23; Public Interest Lawyers, p.4; Bingham Centre for the Rule of Law, para 19.

Article 6(1). It is worth noting here that the right to adversarial proceedings within the meaning of the Convention is not the same as the common law 'adversarialism'. At the ECHR level it means that,

> the concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service with a view to influencing the court's decision.[747]

In summary, it is argued here that the relevant fair trial guarantees to the examination of CMPs as provided for by Part 2 of the JSA are as follows: the requirements of independence and impartiality;[748] the requirement of publicity;[749] the right to access a court;[750] the equality of arms;[751] and the right to adversarial proceedings.[752]

4.3. Difficulties in the application of Article 6

The application of Article 6 has presented Strasbourg with some difficulties. It is argued here that there are a number of interpretative principles which the ECtHR has developed over the years, specifically applicable in its Article 6 jurisprudence which effectively restrict the scope of the right. For example, the ECtHR will generally not rule on the compatibility of a particular law, or particular element of the proceedings in the abstract.[753] In contrast, the ECtHR takes a context-specific approach to interpretation of which the focus is on whether in the particular circumstances the application of these raised questions of compatibility with Article 6. Such an approach is generally welcomed by rights-activists, however in the context of secrecy the context-specific approach to interpretation can become problematic. The context-specific approach to interpretation entails the examination of the circumstances of each individual case, in order to assess whether there is an interference with the Convention. Given the innate

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[747] *Kress v France* (App 39594/98) (ECtHR, 7th June 2001), para 74.

[748] Chapter 5.

[749] Chapter 6.

[750] Chapter 7.

[751] Chapter 8.

[752] Chapter 8.

[753] *Adolf v Austria* (App 8269/78) (1982) 4 EHRR 31, para 36; *Minelli v Switzerland* (App 8660/79) (1983) 5 EHRR 554, para 35. See Goss (n 744) 40-42, who is critical of the ECtHR's claims of 'avoiding abstract challenges'.

secrecy inherent in CMPs it will often be difficult to ascertain the full picture of the circumstances because these may have occurred in closed session. Hence, it can be difficult to ascertain an interference. This demonstrates that one of the key challenges in examining the compatibility of Part 2 of the JSA with Article 6, is the application of Article 6 in itself.

Moreover, in their examination of the fairness of the proceedings the ECtHR bases their decision on their entirety.[754] For example in certain circumstances, any defects at First Instance may be remedied by subsequent review by the appeal courts.[755]Similarly, Article 6 may be relevant pre-trial if, and in so far as, the fairness of the trial is likely to be prejudiced by an initial failure to comply with it.[756]

Along the same lines is the ECtHR's application of the so-called 'proceedings as a whole test'. In the context of Article 6, the ECtHR has frequently restricted the scope of the fair trial guarantees by purporting to take into consideration whether the proceedings as a whole are fair.[757] For example in the context of the equality of arms, the ECtHR will first examine whether there has been an imbalance of the treatment of the parties to the proceedings. Rather than this determining the outcome of their decision, the ECtHR has then taken into consideration the proceedings as a whole, which has resulted in the subsequent finding that there is no violation of Article 6(1).[758] The application of this test has been criticised in the literature, for instance, Summers claims that it overshadows the notion of a fair trial.[759] Goss illustrates the inconsistent application of the test in the ECtHR's case law; and the incoherence between this principle and other interpretative methods, such as the fourth-instance doctrine.[760] The use of the test

[754] *Axen v Germany* (App 8273/78) (1984) 6 EHRR 195; *Stran Greek Refinieries* (App 13427/87) (1995) 19 EHRR 293; *Magee v UK* (App 28135/95) (2001) 31 EHRR 35.

[755] *ILJ, GMR and AKP v United Kingdom* (App 29522/95, 30056/96, 30574/96) (2001) 33 EHRR 11.

[756] *Ocalan v Turkey* (App 469221/99) (2003) 37 EHRR 10.

[757] *Ankerl v Switzerland* (App 17748/91) (2001) 32 EHRR 1, para 38; *Centro Europa 7 S.R.L. and Di Stefano v Italy* (App 38433/09) (ECtHR, 7 June 2012), para 197.

[758] Chapter 8, Section 8.1.2.

[759] Sarah Summers, *Fair Trials: the European criminal procedural tradition and the European Court of Human Rights* (Hart: 2007) 103.

[760] Goss (n 744) 124 -139.

suggests a restrictive portrayal of the purpose of the right to a fair trial on the part of the ECtHR. Hoyano argues that this restrictive conception is that the ECHR is only designed to ensure justice in the national courts overall judicial procedure, 'rather than justice in the result'.[761] On the other hand, the use of the proceedings as a whole principle could assist in the finding of a breach in the context of CMPs. It is possible that it would be applied as such to render the proceedings as a whole unfair based on cumulative deficiencies.[762] This could be useful given the issue with pinpointing a particular issue within the CMP in light of the context-specific approach to interpretation. Chapter 8 will consider whether the overall effect of the limitations placed on special advocates could constitute an interference with Article 6(1), in light of the application of the ECtHR's proceedings as a whole principle.

Despite the fundamental importance of the right to a fair trial it is not an absolute right and certain elements of Article 6(1) may be limited in certain circumstances. Therefore, it is a qualified right.[763] The text of Article 6(1) only refers to restricting the right with regard to the requirement of publicity. It explicitly states that restrictions may be permitted in the pursuit of certain legitimate aims, namely:

> in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The legitimate aim of most relevance to this thesis is the interests of national security, because under the JSA a CMP is only available in these circumstances. The text of Article 6 does not generally require that the interference with the right be necessary in a democratic society.[764] Rather, Article 6 only explicitly imposes a test of necessity for

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

[762] Ola Johan Settem, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency* (Springer: 2016) 131.

[763] Some commentators split qualified rights into two categories: qualified and limited rights. Articles 8 to 11 are considered to be qualified; and Article 6 is considered to be a limited right. For the purpose of this thesis the term qualified rights includes all rights that are not considered absolute in the Convention.

[764] On this basis, Ashworth would argue that Article 6 is not a qualified right. Although, he does not argue that it can never be curtailed. See, Andrew Ashworth, 'Security, Terrorism and the

the last legitimate aim listed, namely 'where the special circumstances require the exclusion of the press and public in the interests of justice.' Note that the test is one of 'strict' necessity, suggesting a higher level of scrutiny.

It is worth noting the difference in the text, with regard to examining whether an interference with the Convention rights are justified, between Article 6(1) and the qualified rights found in Articles 8 to 10. The text of the Convention, in relation to Articles 8 to 10, stipulates that the particular right may be restricted if the restrictions are 'prescribed by law and are necessary in a democratic society', in pursuit of one of the legitimate aims stated. The ECtHR's judgment in *Sunday Times v United Kingdom*,[765] which built upon its earlier decision in *Handyside v United Kingdom*,[766] laid down an important set of principles regarding the general approach to be followed in restricting qualified rights. It was established that interferences must be in proportionate in pursuit of a legitimate aim. In addition, they clarified the use of the margin of appreciation doctrine especially in the context of whether the interference is necessary in a democratic society. In contrast, how the rights contained in Article 6 can be restricted, in what circumstances, and the approach the ECtHR takes in its assessment, differs slightly depending on the particular right at issue.

Article 6(1) only states circumstances where the right to a public hearing may be limited. However, the ECtHR also conceives that the implied rights included under the umbrella of notion of fairness may also be lawfully interfered with in certain circumstances. Nanopoulos is critical of the ECtHR's approach to qualifying the principles it has developed within the notion of fairness, and contends that the effect is that these principles have become gradually 'qualified'.[767] This is in despite of the ECtHR's assertions of the principles as essential aspects of Article 6(1). The truth behind Nanopoulos' assertions, will unfold as the thesis progresses and an examination of the individual Article 6(1) guarantees is carried out in more depth. At this point, it is necessary to give an overview of the ECtHR's approach.

Value of Human Rights' in Benjamin J. Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart, 2007).

[765] (App 6538/74) (1979) 2 EHRR 245.

[766] (A/24) (App 5493/72) (1979-80) 1 EHRR 737.

[767] Nanopoulos (n 735) 929.

The ECtHR has asserted that as an implied right, the right to access a court may be subject to implied limitations.[768] However, any limitations must not restrict or reduce the right in such a way that the very essence of the right is impaired, the limitation must pursue a legitimate aim; and, there must be a reasonable relationship of proportionality between the means employed and the legitimate aim.[769] In addition, the ECtHR has asserted that the right to adversarial proceedings and equality of arms may be restricted if 'strictly necessary'[770] for the protection of a 'strong countervailing interest'[771]; and any limitations must be 'sufficiently counterbalanced by the procedures followed the procedures followed by the judicial authorities.'[772] There is potentially practical significance of the imposition of a test of 'strict necessity', as this would suggest a higher level of judicial scrutiny of the permissibility of a restriction of a right.

The remainder of this chapter will examine further the general approach of the ECtHR in its application of Article 6(1), with regard to both the finding of an interference with the ECHR and the approach taken to assessing whether interferences are justified. This is done within the framework of the discussion of the ECtHR's use of its interpretative principles which are applicable to its application of all the Convention rights. This chapter will focus on those most relevant to the application of Article 6, and the context of national security and sensitive issues. ECHR case law is referenced as appropriate to illustrating the meaning and operation of each principle, which is followed by the relevance of the use of the principle to the study carried out by this thesis.

4.4. The ECtHR's interpretative principles

One of the central claims of this thesis is that the ECtHR's approach to interpretation can result in indeterminacy in its jurisprudence, and that this is a result of the use of its interpretative principles and approach to reconciling tensions that exist between these principles. Section 4.4. of this chapter seeks to provide a comprehensive overview of those main interpretative principles, and to begin to highlight tensions that exist

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[768] *Golder v United Kingdom* (A/18) (App 4451/70) (1979-80) 1 EHRR 524, para 38.

[769] *Ashingdane v United Kingdom* (App 8225/78) (1985) 7 EHRR 528, para 57; *Al-Fayed v United Kingdom* (App 17101/90) (1994) 18 E.H.R.R. 393, para 65.

[770] *Rowe and Davis v United Kingdom* (App 28901/95) (2000) 30 EHRR 1, para 61.

[771] Ibid.

[772] Ibid.

between and within them. In this manner, Chapter 4 provides the starting point for the analysis in the remainder of this thesis which seeks to demonstrate the effect of the ECtHR's approach to resolving tensions can have on the outcome of cases in the context of CMPs. The predominant principles covered here are presented as falling in to two categories: the enhancing principles, and the deferential principles. The enhancing principles, including the principle of effectiveness, evolutive interpretation, and autonomous concepts, generally work to enhance the level of rights protection. This contributes to one of the fundamental aims of the ECHR, which is the further realisation of human rights. On the other hand, there are a number of interpretative principles used by the ECtHR to enable it to undertake a deferential standard of review in certain circumstances. These include: the principle of subsidiarity, the fourth instance doctrine and the margin of appreciation. In its use of these principles the ECtHR demonstrates the willingness to defer to the decisions of national authorities in relation to their assessment of their obligations under the Convention.[773] One of the contexts in which the ECtHR often engages in the deferential standard of review is national security. This approach of the ECtHR is a means of retaining democratic legitimacy as a piece of transnational law applicable to a group of diverse member-states.

Therefore, the aims of the two categories of interpretative principles are different. In this regard this thesis contends that tensions exist between the two groups, and indeterminacy emanates from the ECtHR's approach to reconciling these tensions. At present the ECtHR takes a mechanistic approach in this context. Article 6(1) is a qualified right. Accordingly, the ECtHR takes a two-stage method to its assessment of whether there is a violation of the right. The first stage, is to examine whether there is an interference with Article 6(1). If there is such interference then the ECtHR proceeds to the second stage which is to assess whether the interference is justified. The systematic review of the ECtHR's Article 6(1) case law has revealed that in this context, generally, the use of the enhancing principles are prominent at the first stage, whereas the deferential principles are prominent at the second stage. This is described here as a mechanistic approach to resolving the tensions between the two categories. The result is that the deferential principles have the last word. This thesis advances the argument that the dangers of this approach could be the normalisation of rights-restricting measures.

[773] See: Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487.

The risk being that rights protection in the long term is debased rather than enhanced. This will be illustrated further in Chapters 5 to 8, with the effect of the mechanistic approach on the outcome of a case involving CMPs under the JSA highlighted in Chapter 9. The present discussion will introduce the interpretative principles, including their origins and continued operation in the case law of the ECtHR.

4.5. The enhancing principles

4.5.1. Teleological interpretation

The ECHR is an international treaty and therefore in interpreting the Convention the Strasbourg organs must take into account Articles 31 – 33 of the Vienna Convention on the Law of the Treaties, which enunciates generally accepted principles of international law.[774] Whilst the Vienna Convention was not in force when the Convention was concluded, its applicability to the ECHR was confirmed in *Golder v UK*.[775] Article 31 of the Vienna Convention provides that a treaty shall be interpreted in 'light of its object and purpose'. Jacobs has stated that the inclusion of the phrase in the final draft of the VCLT 'may be regarded as introducing an element of the teleological approach'.[776] Hence, in accordance with the Vienna Convention, the ECtHR takes such a teleological approach to the interpretation of the Convention, directing the court to the 'object and purpose' of the ECHR when interpreting a particular provision.[777] This method of interpretation is particularly evident in its interpretation of Article 6. The importance of the teleological method is emphasised by the ECtHR's characterization of the ECHR as

[774] Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (OUP 2000) 264.

[775] *Golder* (n 768) para 29.

[776] F. Jacobs "Varieties of Approach to Treaty Interpretation with Special Reference to the Draft Convention on the Law of the Treaties before the Vienna Diplomatic Conference" (1969) 19 ICLQ 318, 337.

[777] Harris, O'Boyle and Warbrick (n 743) 7.

a 'law-making treaty',[778] which necessities the interpretation 'most appropriate in order to realise the aim and achieve the object of the treaty'.[779]

The case law demonstrates that the ECtHR regards the object and purpose as being generally an 'instrument for the protection of individual human beings',[780] and the maintenance and promotion of 'the ideals and values of a democratic society'.[781] The teleological method of interpretation was distinctly followed in *Golder v UK* where the court read the right to access a court into Article 6(1) predominately with reference to the 'object and purpose' of the Convention, turning to the Preamble and its strong focus on the rule of law.[782] The flexibility of this approach has facilitated the ECtHR's ability to develop its own methods of interpretation.[783] For example, the use of the principle of effectiveness; the doctrine of evolutionary interpretation; and the Court's notion of autonomous concepts.

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[778] *Wemhoff v Germany* (1979-80) 1 EHRR. 55, para 8; *Golder* (n 768) para 36; *Loizidou v Turkey* (App 15318/89) (1995) 20 EHRR. 99, para 84. As opposed to a treaty that 'comprises more than mere reciprocal engagements between contracting States.' *Ireland v UK*, 58 ILR (1980) 188, at 291. See Alexander Orakhelashvili "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights" (2003) 14(3) EJIL 529, 531; Shai Dothan, 'In defence of expansive interpretation in the European Court of Human Rights' (2014) CJICL 508, 513, and Francois OST, 'The Original Canons of Interpretation of the European Court of Human Rights' in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights pp. 283-318* (Netherlands: Kluwer Academic Publishers: 1992).

[779] *Wemhoff* (n 778) para 8.

[780] *Soering v United Kingdom* (1989) 11 EHRR 439, para 87.

[781] *Kjeldsen, Busk Madsen and Pedersen v* Denmark (1979-80) 1 EHRR 711, para 53; *Soering* (n 780) para 87.

[782]*Golder* (n 768) para 34. See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP: 2007) for a concise and comprehensive evaluation of the ECtHR's judgment in *Golder v UK.*

[783] Daniel Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Genreis*' 29 *Nordic Journal of International Law* (2010) 245, 255: regards these methods as 'sub-forms' of the teleological interpretation.

4.5.2. Principle of effectiveness

The ECtHR describes the teleological method of interpretation in terms of the principle of effectiveness.[784] The ECtHR has consistently affirmed the importance of this principle by stating that the Convention was intended to guarantee rights that are 'practical and effective' as opposed to 'theoretical or illusory'.[785] The principle is not provided for in the Convention itself, rather it was introduced by the court and has developed in the court's jurisprudence. By employing the principle of effectiveness, the court seeks to ensure the continued relevance of the Convention rights in an ever changing society. The approach is also justified by the law-making nature of the Convention, necessitating an interpretation which realises its object and purpose and effectively safeguards the rights it enunciates. In the context of Article 6 the importance of this approach to interpretation is emphasised due to the 'prominent place held in a democratic society by the right to a fair trial'.[786]

The meaning of the principle is best demonstrated by reference to some examples from the ECtHR's jurisprudence. One of the most striking examples is the ECtHR's pronouncements in *Golder v UK* that Article 6(1) 'embodies the right to a court', in that everyone has the 'right to have any claim relating to his civil rights and obligations brought before a court or tribunal'.[787] The justification being that in order for fair trial guarantees to be effective it is necessary that individuals are in fact able to benefit from such guarantees by protecting the right of access: 'fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings'.[788]

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[784] Hanneke Senden, *Interpretation of Fundamental Rights in a Multi-level Legal System: an Analysis of the ECtHR and CJEU* (Cambride: Intersentia: 2011) Chapter 10.

[785] *Airey* (n 737) para 24; *Artico v* Italy (App 6694/74) (1981) 3 EHRR. 1, para 33; *Imbrioscia v Switzerland* (App 13972/88) (1994) 17 EHRR. 441, para 38; *Wos v Poland* (App 22860/02) (2007) 45 EHRR. 28, para 99; *Salduz v Turkey* (App 36391/02) (2009) 49 EHRR. 19, para 51; *Stanev v Bulgaria* (App 36760/06) (2012) 55 EHRR. 22, para 231.

[786] *Airey v Ireland* (n 737) para 24; *Artico* (n 785) para 33; *Stanev* (n 786) para 231.

[787] *Golder* (n 768) para 36.

[788] Ibid, para 35.

This emphasis on maximising the effectiveness of the Convention rights leads the ECtHR almost automatically to an expansive interpretation.[789] Following *Golder* the focus on the necessity for States to effectively safeguard Convention rights enabled the ECtHR to develop positive obligations; requiring states to take active or positive steps to ensure the enjoyment of Convention rights.[790] This notion was established in the case of *Marckx v Belgium* where the court stated that 'there may be positive obligations inherent in an effective "respect" for private life.'[791] The consequence being that the ECtHR placed a positive obligation to legally recognise the family relationship between a mother and her illegitimate child. A more controversial case and one that has been described as an 'extreme application'[792] of the principle of effectiveness is *Airey v Ireland.*[793] The applicant complained that the lack of legal aid available to her when she pursued a decree of judicial separation in the High Court violated Article 6(1).[794] The ECtHR agreed and Ireland was found in breach of the right to access a court.[795] The case is an example of the court's use of the principle of effectiveness to require Contracting States to provide practical safeguards to ensure the enjoyment of the rights guaranteed by Article 6(1) ECHR. It was irrelevant that the applicant was free to go before the High Court without legal representation according to Irish Law. The focus for the ECtHR was whether the applicant's appearance before without the assistance of a lawyer 'would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.'[796] The ECtHR emphasised the complexities of the case in reaching their conclusion that it was highly unlikely a person in the position of the

[789] J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, 1998) 102.

[790] Alistair Mowbray, 'The Creativity of the European court of Human Rights' (2005) 5:1 H.R.L.Rev. 57, 78; Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights* (Oxford: Hart Publishing: 2004) 2

[791] *Marckx v Belgium* (1979-80) 2 EHRR. 330, para 31.

[792] Merrills (n 789) 93.

[793] *Airey* (n 737).

[794] Also complained her rights under 8, 13 and 14 ECHR had been violated by the lack of legal aid.

[795] *Airey* (n 737) para 28.

[796] Ibid, para 24.

applicant could 'effectively present his or her case.'[797] Following *Airey* the ECtHR also utilised the principle of effectiveness to impose a positive obligation on Contracting States, requiring the provision of practical safeguards, to secure the enjoyment of Article 6 in *Artico v Italy.*[798] The court held that the mere nomination of a legal aid lawyer did not ensure effective legal assistance as guaranteed by Article 6(3)(c) of the Convention.[799] The ECtHR found Italy in breach of Article 6(3)(c);[800] and, stated that compliance with the Convention entailed some positive action on the part of Italy.[801]

The ECtHR has also asserted that the principle of effectiveness also applies when assessing State interference with a qualified right. Thus, in order for an aim that interferes with a Convention right to be considered legitimate, the arguments put forward to justify the interference must pursue the aims in a practical and effective manner.[802] Moreover, adopting a 'practical and effective' approach to interpretation can potentially lead to a restrictive interpretation of the exceptions and consequently an extensive interpretation of the rights.[803]

In the context of CMPs and special advocates, the principle of effectiveness is of great significance and, in theory, could assist in a successful challenge at Strasbourg. It is argued here that this is particularly with regard to the use of special advocates. Chapter 2 established the concern that the limitations they faced affected their ability to carry out their functions *effectively*. The prohibition on communication is particularly problematic in relation to the individual being able to give *effective* instructions to the special advocate appointed to represent their interests. This can inhibit the ability of the individual to present their case, or challenge the case against them. In *Al Rawi*, Lord Kerr took the view that the restrictions special advocates operated under resulted in, 'the challenge that the special advocate can present is, in the final analysis, of a theoretical,

[797] Ibid.

[798] *Artico* (n 785).

[799] Ibid, para 33.

[800] Ibid, para 37.

[801] Ibid, para 36.

[802] *Stoll v Switzerland* (App 69698/01) (2008) 47 EHRR. 59, para 128; *Emonet v Switzerland* (App.395051/03) (2009) 49 EHRR. 11, para 77.

[803] Ost (n 778) 292.

abstract nature only.'[804] These issues will be assessed in detail in Chapter 8 within the framework of the principle of equality of arms and the right to adversarial proceedings. Clear examples of the ECtHR's use of the principle of effectiveness are evident in the case law concerning these fair trial guarantees in its emphasis on the importance of the individual having the opportunity to 'participate properly' in the proceedings.

4.5.3. Evolutive interpretation

The teleological approach to interpretation has also enabled the ECtHR to develop the principle of evolutive interpretation; meaning that treaty terms may evolve over time in accordance with societal changes. Evolutive interpretation is directly linked to the principle of effectiveness, as explained in *Stafford v United Kingdom*:

> Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.[805]

The ECtHR affirms the use of evolutive interpretation by stating that the Convention is a 'living instrument' which 'must be interpreted in the light of present-day conditions.'[806] The idea is that the Convention evolves through the interpretation of the Court. The ECtHR is also interpreting the Convention evolutively when it refers to a 'dynamic approach'.[807] The first reference to the Convention as a 'living instrument' by

[804] *Al Rawi v Security Service and others* [2011] UKSC 34, at [93].

[805] *Stafford v United Kingdom* (App 46295/99) (2002) 35 EHRR. 32, para 68. See also *Goodwin v United Kingdom* (App 28957/95) (2002) 35 EHRR 18, para 74.

[806] See, among other authorities: *Tyrer v United Kingdom* (App 5856/72) (1979-80) 2 EHRR. 1, para 31. *Soering* (n 780) para 102*; Selmouni v* France (App 25803/94) (2000) 29 EHRR. 403, para 101; *Vo v France* (App 53924/00) (2005) 40 EHRR. 12, para 82; *Mamatkulov v Turkey* (Grand Chamber) (App 46827/99 46951/99) (2005) 41 EHRR 25, para 121.

[807] For example *Pretty v United Kingdom* (App 2346/02) (2002) 35 EHRR. 1, para 54; Goodwin (n 805) para 74; *Societe Colas Est v France* (App 37971/97) (2004) 39 EHRR. 17, para 41.

the ECtHR was in the case of *Tyrer v United Kingdom*,[808] and the notion of the Convention as a living instrument is now 'firmly rooted in the Court's case law.'[809]

It can be said that it is the teleological method that facilitates the use of evolutive interpretation as it directs the ECtHR to the object and purpose of the Convention. The Preamble states that one of the means by which the Council of Europe aims to achieve 'greater unity between its members', is the 'maintenance and further realisation of Human Rights and Fundamental Freedoms'. The reference to 'further realisation' could be said to actually 'compel' an evolutive interpretation of the Convention.[810] This is significant as the wording suggests that developments concerning human rights should be on an upward trajectory in the sense of enhancing rather than reducing the level of rights protection. The ECtHR has itself linked evolutive interpretation with increasing the level of rights protection in accordance with changing societal attitudes. In *Selmouni* the Grand Chamber affirmed that the 'Convention is a "living instrument" which must be interpreted in the light of present day conditions'[811] and went on to state that:

> it takes the view that increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[812]

In *Demir and Baykara v Turkey* the Grand Chamber linked evolutive interpretation to increasing the level of rights protection more clearly:

> it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus

[808] *Tyrer* (n 806).

[809] *Matthews v United Kingdom* (App 24833/94) (1999) 28 EHRR. 361, para 39; *Loizidou* (n 778) para 71.

[810] F Matscher "Methods of Interpretation of the Convention" in R.St.J. Macdonald, F. Matscher and H. Petzold *The European System for the Protection of Human Rights* (1993), 69. See also Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' 12:10 (2011) *German Law Journal* 1730, 1739.

[811] *Selmouni* (n 806) para 101.

[812] Ibid.

> necessitating greater firmness in assessing breaches of the fundamental values of democratic societies.[813]

The idea behind the principle is to enable the ECtHR to keep the Convention rights up to date, and to permit the court to take into consideration circumstances that were not foreseen by the drafters in the late 1940s.[814] This ability is essential in order to maintain the effectiveness of the Convention given the inevitable societal changes and the evolution of attitudes and ideologies in the Contracting States.[815]

The ECtHR has used the principle of evolutive interpretation to update certain Convention rights in line with a change in societal attitudes in different situations. For example in *Tyrer* the court rejected the argument of the Attorney General that judicial corporal punishment could not be considered 'degrading treatment' within the meaning of Article 3 ECHR given that the punishment at issue in this case 'did not outrage public opinion' on the Isle of Man.[816] Instead, the Court invoked the 'living instrument' doctrine and stated that it could not but be 'influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.'[817] As a result the ECtHR, by majority, found the United Kingdom in violation of Article 3 ECHR. Additionally the principle has been utilised by Strasbourg to expand the meaning of what constitutes torture.[818]

The ECtHR's decision in *Goodwin v United Kingdom*[819] is also a significant decision and demonstrates the relationship between the principle of evolutive interpretation, and

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[813] *Demir and Baykara v Turkey* (App 34509/97) (ECtHR, 12 November 2008), para 146. See also: *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (Grand Chamber) (App13178/03) (2008) 46 EHRR 23, para 48.

[814] Dzehtsiarou (n 810) 1732; Rietiker (n 783) 261.

[815] Dzehtsiarou (n 810) 1732; Letsas (n 782) 79; Rietiker (n 783) 261.

[816] *Tyrer* (n 806) para 31.

[817] Ibid.

[818] *Selmouni* (n 806). The principle has had a particularly positive impact in terms of enhanced protection of human rights in the area of private life guaranteed by Article 8 ECHR. For example in *Marckx v Belgium* (n 791), the ECtHR eliminated the distinction between the legal position of children of married parents and children of unmarried parents. In reaching their conclusion reference was made to the evolution of the domestic law of the great majority of the ECHR member-states. See also *Dudgeon v United Kingdom* (App 7525/76) (1982) 4 EHRR 149.

[819] *Goodwin* (n 805).

the margin of appreciation which is one of the ECtHR's deferential interpretative principles.[820] The applicant complained that the UK's failure to legally recognise the new identity of post-operative transsexuals violated a number of Convention rights.[821] In reaching its decision the ECtHR looked at 'the situation within and outside the Contracting State to assess "in light of present-day conditions" what is now the appropriate interpretation and application of the Convention.'[822] The ECtHR took into consideration the, 'continuing international trend' in favour of legal recognition of the new sexual identity of post-operative transsexuals,[823] and stated that it could not overlook these 'marked changes'.[824] The result was that it could no longer be claimed that the matter falls within the member-State's margin of appreciation.[825] This demonstrates the interplay between evolutive interpretation, European Consensus, and the margin of appreciation. In *Goodwin*, evolutive interpretation was invoked because of changing societal attitudes, which led to a common consensus in the member-States. This, in turn, narrowed the margin of appreciation. The overall effect being to enhance the level of rights protection.

The decision of the ECtHR in *Stafford v United Kingdom*,[826] although in the context of Article 5(4), concerned an issue of direct relevance to Part 2 of the JSA. *Stafford v United Kingdom*[827] concerned the role of the Home Secretary in setting tariff periods for offenders sentenced to life imprisonment. It therefore concerned the power of the executive to make decisions that may be considered a matter for the judiciary, an issue of direct relevance to the Justice and Security Act. The ECtHR emphasised the need to re-assess the appropriate interpretation and application of the Convention, 'in light of present-day conditions'.[828] The ECtHR felt that with regard to the 'right to liberty and its underlying values' recent developments had demonstrated an evolving attitude

[820] Margin of appreciation is explained in Section 4.6.3 of this chapter.

[821] Article 8, Article 12, Article 13 and Article 14.

[822] *Goodwin* (n 805) para 75.

[823] Ibid, para 85.

[824] Ibid, para 60

[825] Ibid, para 93.

[826] *Stafford* (n 805).

[827] Ibid.

[828] *Stafford* (n 381) para 69.

toward the role of the Home Secretary and life sentences.[829] The wider recognition of the separation of powers between the executive and the judiciary, and the consequential importance of high standards of independent and fair judicial procedures was taken into consideration by the ECtHR. The result being that there had been a violation of Article 5(1) of the ECHR.[830] Interestingly, the ECtHR departed from its previous decision in *Wynne v United Kingdom*.[831] There was no material distinction between the facts of the two cases, however in *Wynne v United Kingdom* these circumstances had amounted to a violation of Article 5. The ECtHR is not bound by a doctrine of precedent, however it has stated that 'it should not depart, without cogent reason, from precedents laid down in previous cases.'[832] This is in the 'interests of legal certainty, foreseeability and equality before the law'.[833] In *Stafford*, the 'cogent reason' for departing from its previous decision was the changing societal attitudes in the member-States. The ECtHR affirmed that:

> It is of crucial importance that the Convention is interpreted and applied in a manner which renders it rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.[834]

In addition to taking into account changing societal attitudes in the member-states in an evolutive interpretation, there may also be evolution by taking into account later national interpretations.[835] In 2009 in the case of *Al-Khawaja and Tahery v United Kingdom*[836] the ECtHR found that there was a violation of Article 6(1) read in

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[829] Ibid, para 78.

[830] Ibid.

[831] *Wynne v United Kingdom* (App 15484/89) (1995) 19 EHRR 333.

[832] *Stafford* (n 805) para 68.

[833] Ibid.

[834] Ibid.

[835] Kent Roach refers to this practice as 'dialogue'. For example, see: Kent Roach 'Comparative Constitutional Law and the Challenges of Terrorism Law' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, 2011). See also, Kent Roach, 'Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States' (2006) 4:2 *International Journal of Constitutional Law* 347; and, Kent Roach, 'Constitutional Reengineering: dialogue's Migration from Canada to Australia' (2013) 11:4 *International Journal of Constitutional Law* 870.

[836] (App 26766/05, 22228/06) (2009) 49 EHRR 1.

conjunction with Article 6(3) on the basis of the use of hearsay evidence as the 'sole or decisive' evidence against a defendant.[837] The UK Supreme Court declined to follow this Strasbourg ruling in its decision in *R v Horncastle*[838] and unanimously rejected the defendant's submissions that, in reliance on the 'sole or decisive rule', there had been a violation of their Article 6 rights. The defendant's argued that their convictions had been based solely or to a decisive extent on the statements of absent witnesses. The Supreme Court reasoned that the ECtHR's decision in *Al-Khawaja* had failed to appreciate specific safeguards in the domestic legislation. This case law demonstrates an interesting dialogue between the UK domestic courts and the ECtHR as subsequently *Al-Khawaja* was referred to the Grand Chamber of the ECtHR,[839] who upheld the finding of a violation of Article 6 in Tahery's case. It reiterated that where a conviction was based solely or to a decisive degree on hearsay evidence this would generally be considered incompatible with the requirements of fairness under Article 6. However, the Grand Chamber retreated from this decision in *Horncastle v United Kingdom*[840] and accepted the principle set out in the UK Supreme Court's *R v Horncastle* judgment. Thus, the Grand Chamber found no violation of Article 6 despite the use of hearsay evidence leading to the defendant's conviction. This dialogue between the ECtHR and the UK Supreme Court is interesting, it illustrates a 'bottom-up' approach as the scope of human rights protection at the national level impacts on convention rights.[841] Additionally, the question arises as to whether the ECtHR's retreat from its earlier decision is illustrative of the principle of evolutive interpretation. On the other hand, this case law could be taken to actually be indicative of the ECtHR's deferential standard of review, namely the principle of subsidiarity.[842] This is in the sense that whilst the ECtHR is interpreting the ECHR as a living instrument, the adoption of the domestic courts' principle demonstrates an element of deference to the national

[837] Ibid, para 38.

[838] [2009] UKSC 14.

[839] (App 26766/05, 22228/06) (2012) 54 EHRR 23.

[840] (App 4184/10) (2015) 60 EHRR 31.

[841] See, Eirik Bjorge, 'Bottom-up Shaping of Rights: How the Scope of Human Rights at the National Level Impacts upon Convention rights' in Eva Brems and Janneke Gerards, *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013).

[842] See section 4.6.1 of this chapter.

authorities. Therefore, it is not always straightforward to discern the ECtHR's use of its interpretative principles; and, there is often a fine line in the distinction between them.

Describing the Convention as a 'living instrument', and adopting an evolutive approach to its interpretation, captures the idea of the Convention as a constitutional instrument akin to a Bill of Rights for Europe.[843] The cases outlined above demonstrate that interpretation of the Convention is capable of resulting in legal reform in certain areas. However critics of the principle fear this kind of 'judicial activism',[844] and have expressed the argument that the court has encroached into the realm of policy making.[845] Lord Hoffman argues that the 'living instrument' metaphor is merely 'the banner which the Strasbourg Court has assumed power to legislate what they consider to be "European public order".'[846] It has also been pointed out that the founders of the ECHR did not anticipate an evolutive interpretation.[847]

Nevertheless, there are cases evidencing the ECtHR's desire to restrict the use of the principle in certain circumstances, which could be taken as support for the ECtHR reasserting its democratic legitimacy. For example, in *Pretty v UK* where whilst the court expressed the utmost sympathy for the applicant's situation, it would not utilise an evolutive interpretation to place a positive obligation on member States to sanction assisted suicide under Article 3 ECHR.[848] The ECtHR reiterated that the Convention is a 'living instrument', however on the other hand the Convention must be coherent as a system of right protection.[849]Additionally, in *Soering v UK* the court refused to update Article 2(1) of the Convention so as to introduce a new obligation to abolish capital punishment using evolutive interpretation, as this fell within the ambit of Protocol No.

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[843] Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human* Rights (Oxford University Press: 2010), 329.

[844] Merrills (n 789) 69. Defined by Merrills as an ideology which 'emphasises using and developing –legal rules to achieve results'.

[845] Matscher (n 810) 70.

[846] Lord Leonard Hoffman, 'The Universality of Human Rights' (2009) LQR 416, 428-429.

[847] Elizabeth Wicks, 'The United Kingdom Government's Perceptions of the European Convention on Human Rights at the Time of Entry' (2000) *Public Law* 438, 447.

[848] *Pretty* (n 807) paras 54-55. Also *Vo* (n 806) no European consensus.

[849] *Pretty* (n 807) para 54.

6.[850] The notion of the search for a 'European Consensus' has also placed restraints on the ECtHR's on the use of evolutive interpretation. In *Sheffield and Horsham v United Kingdom*, the ECtHR took the view that there was insufficient evidence at the time to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status.[851] This was a significant factor in reaching its conclusion that the United Kingdom was not in breach of Article 8 ECHR.[852] The case illustrates a further example of where the ECtHR is willing to depart from its previous case law, in accordance with changing societal attitudes in the member-States. The circumstances subject to the challenge in *Sheffield and Horsham* were the same in the later case of *Goodwin*, as outlined above, where the ECtHR came to a different conclusion and found the UK in breach of Article 8. This was on the basis of the change of consensus across the member-States.

As highlighted by Mowbray, one of the criticisms of the ECtHR's use of evolutive interpretation is the lack of reasoning provided by the court for its application.[853] The first pronouncement by the Court that the Convention was a "living instrument" was in *Tyrer,* yet the ECtHR did not adequately explain the justification for its use, its origins, or its limitations.[854] To do so, would have been helpful in addressing the concerns of the critics and emphasising the importance of the principle in maintaining the effectiveness of the Convention. A further difficultly with the apparent incoherence in the rationale for the principle is illustrated in the subsequent section, with regard to the relationship between its application in accordance with a consensus across the member-States.

The key point to take from an examination of the principle of evolutive interpretation for the purpose of this piece of doctoral research, is that the ECtHR is not bound by its previous decisions and the outcome of cases with similar circumstances can change over time. This thesis advances an alternative framework by which to examine the use of special advocates in CMPs which differs from the current approach of the ECtHR.

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[850] *Soering* (n 780) para 103.

[851] *Sheffield and Horsham v United Kingdom* (App 22885/93 23390/95) (1999) 27 EHRR 163, para 57.

[852] Ibid, para 61.

[853] Mowbray (n 790) 71.

[854] Ibid, 71. See also, Dzehtsiarou (n 810) 1744.

Therefore, the potential of the principle of evolutive interpretation is significant to supporting the objectives of this thesis. It is argued here that there is the potential for the development of jurisprudence, even in relation to security laws.[855]

4.5.4. European consensus

The ECtHR's jurisprudence demonstrates that the ECHR will often rely on the common practice of the member-States in interpreting the Convention, hence the search for a 'European consensus'. This has already been illustrated in relation to the principle of evolutive interpretation where the ECtHR has stated that the Convention is to be interpreted in light of 'present day conditions'. In these cases the search for a European consensus thus provides the evidence for the evolutive interpretation attributed to the Convention by the ECtHR.[856] The Convention's preamble provides some justification for this interpretative method where it states that it is:

> resolved as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.

This technique is also referred to as the principle of 'comparative interpretation'.[857] The search for a European consensus is also often used by the ECtHR in its application of the margin of appreciation doctrine, a point which will be returned to below. At this point the relationship between evolutive interpretation and a European consensus is significant in relation to the 'further realisation' of the Convention rights. It has already been indicated that the ECtHR's case law clearly indicates that the ECtHR envisages evolutive interpretation as an enhancing principle. This is evidenced in its pronouncements regarding the increasingly high standards required in human rights

[855] Following the decision in *Klass v Germany* (App 5029/71) (1979-80) 2 EHRR 214 terrorism has been recognised as a distinct and growing threat to life and democracy (see para 50).

[856] Laurence R. Hefler, 'Consensus, Coherence and European Convention on Human Rights' 26 *Cornell International Law Journal* (1993) 133, 134-135; Senden (n 784) 137.

[857] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th ed, Oxford University Press, 2014) 78.

protection.[858] The ECtHR has also stated that, 'a failure to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.'[859]

Nevertheless, it is not inconceivable that such an approach could also result in an 'evolution downwards', particularly when the evidence justifying the application of the principle is a European consensus.[860] Senden, poses the question as to whether it could be expected that 'the ECtHR uses the principle as a basis for taking a more restrictive approach towards individual rights protection, if that reflects the state of affairs in Europe as it has evolved over time?'[861] The contention in this thesis is that this is a realistic possibility, particularly in the context of national security, in light of the increased challenges pose to member-States in response to terrorism. Post 9/11, member-States have increased their use of restrictive measures in the name of countering terrorism. This poses the danger of a normalisation of such restrictive measures, a key theme that underpins the arguments of this thesis, which will evolve in the subsequent chapters. It is possible that the normalisation of restrictive measures across the member-States is taken as the European consensus. Consequently, this consensus could provide the evidence for the interpretation of the Convention as a 'living instrument'. The result being, an 'evolution downwards'.

4.5.5. Autonomous concepts

The teleological method also facilitates the principle of autonomous interpretation. According to this concept certain terms of the Convention will not be interpreted in accordance with the meaning given to them by the individual respondent State. Rather some terms are given an autonomous or special meaning from a European perspective.[862] This method is in accordance with Article 31(4) VCLT which states that 'a special meaning shall be given to a term if it is established that the parties so

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[858] See among others, *Selmouni* (n 806) para 101; *Siliadin v* France (App 73316/01) (2006) 43 EHRR. 16, para 121; *Mayeka v Belgium* (Grand Chamber) (App 13178/03) (2008) 46 EHRR 23, para 48; *Rantsev v Cyprus* (App 25965/04) (2010) 51 EHRR 1, para 277; *A v Croatia* (App 55164/08) (2015) 60 EHRR 26, para 67.

[859] *Goodwin* (n 805) para 74; *Stafford* (n 805) para 68; *Scoppola v Italy* (App 10249/03) (2010) 51 EHRR 12, para 104.

[860] Senden (n 784) 168.

[861] Ibid.

[862] Ost (n 778) 305, Senden (n 784) 77, Clayton and Tomlinson (n 774) 267.

intended.' The principle is well explained by Judge Maschter in his separate opinion in *König v Germany*:

> In my view, autonomous interpretation means, above all, that the provisions of international conventions must not be interpreted solely by reference to the meaning and scope which they possess in the domestic law of the contracting State concerned, but that reference must be made, "first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.[863]

Judge Maschter, refers to the need to look for a 'common denominator' behind the provisions, which may be found, 'in a comparative analysis of the domestic law of the Contracting States.'[864] In this regard the connection between the principle of autonomous interpretation, and the principle of evolutive interpretation are clear in their search for a European consensus.

It follows that one of the ideas behind the principle of autonomous interpretation is the 'harmonization' of the standard of enforcement of the Convention rights and guarantees across the member States; which, as stated in the preamble, is an objective of the Convention.[865] The ECtHR itself has explicitly stated the need for such an approach to ensure equal treatment of individuals across the Contracting States.[866] Additionally, the effectiveness of the Convention would be endangered if the level of protection it affords were to differ across the Contracting States due to differing domestic meanings of certain Treaty terms. The court has tended to use the principle of autonomous interpretation in cases where the domestic classification of a treaty term would have the effect of denying an applicant the protection of the Convention. This was the case in *Engel v Netherlands*,[867] the leading authority, whereby the ECtHR first explicitly applied the principle and explained its application. The Netherlands Government sought to argue that Article 6 was not applicable as the proceedings brought against the applicants were disciplinary and therefore did not involve the determination of 'civil

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[863] *König v Germany* (App 6232/73) (1979-80) 2 EHRR 170.

[864] Ibid.

[865] Matscher, 73.

[866] *Pellegrin v France* (App 28541/95) (2001) 31 EHRR 26, para 63.

[867] *Engel v Netherlands* (App 5100/71, 5101/71, 5102/71, 5354/72, 5370/72) (1979-80) 1 EHRR 647.

rights and obligations' nor 'any criminal charge'.[868] The ECtHR asked the question whether Article 6 ceases to be applicable 'just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification?'[869] The court concluded that it did not, because otherwise it would leave the operation of fundamental Convention clauses 'subordinated to their sovereign will'; which would be incompatible with the object and purpose of the Convention.[870] Instead, the ECtHR established a framework to determine whether any given 'charge' counts as 'criminal' within the meaning of Article 6. This has become known as the *Engel* criteria.[871] The effect is to prevent member-States from using the domestic classification of proceedings to avoid the guarantees of Article 6. Therefore, the aim is the further realisation of rights protection hence the use of autonomous concepts as an enhancing principle.

4.6. The deferential principles

The ECtHR's deferential standard of review is particularly relevant in the context of CMPs, and therefore significant to this piece of doctoral research. The use of its deferential interpretative principles in certain contexts assists the ECtHR in maintaining democratic legitimacy, within the diverse range of Signatory States to the Convention. The deference to the national authorities is recognition of this diversity, and that there are particular circumstances in which they are better placed to make judgment with regard to their ECHR obligations. One of the contexts in which the ECtHR will generally employ a more deferential standard of review is in circumstances involving national security considerations. Consequently, this second category of interpretative principles are fundamental in an examination of the ECtHR's Article 6(1) jurisprudence; and, the assessment of compatibility of CMPs within the scheme of the JSA.

[868] Ibid, para 79.

[869] Ibid, para 80.

[870] Ibid, para 81.

[871] Ibid, para 82.

4.6.1. The principle of subsidiarity

The principle of subsidiarity relates to the ECtHR's deferential standard of review of the member-States' compliance with the Convention.[872] It means that, 'the prime responsibility for ensuring respect for the rights enshrined in the Convention lies first and foremost with the national authorities rather than with the Court.'[873] The ECtHR consistently reiterates the 'fundamentally subsidiary role of the Convention.'[874] This is in recognition of the limitations on the role of an international judge and that:

> by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions.[875]

In *Sher v United Kingdom*, the ECtHR reiterated its role as supervising the implementation of the Convention by the member-States; and, that the ECtHR 'cannot, and must not, usurp the role' of the member-States 'whose responsibility it is to ensure' that Convention rights are respected.[876] The member-States recently affirmed the shared 'responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity'[877] at the Brighton Conference,[878] which resulted in the Brighton Declaration.[879] The outcome of the

[872] See: Alistair Mowbray, 'Subsidiarity and the European Convention on Human Rights' 15 *Human Rights Law Review* (2015) 313, for a comprehensive study of the principle's application across three time periods encompassing the 'original part-time court, the first decade of the full-time Court and the post-Interlaken era.'

[873] High Level Conference on the Future of the European Court of Human Rights, Brighton, 19-20 April 2012.

[874] *Belgian Linguistic Case* (App 1474/62) (1979-80)1 EHRR 252 , para 10; *Handyside* (n 766) para 48; *Hatton v United Kingdom* (App 36022/97) (2003) 37 EHRR 28; *Maurice v France* (Grand Chamber) (App 11810/03) (2006) 42 EHRR 42, para 117; *S.A.S. v France* (App 43835/11) (2015) 60 EHRR 11, para 129.

[875] *Frette v France* (App 36515/97) (2004) 38 EHRR 21, para 41.

[876] *Sher and others v United Kingdom* (App 5201/11) (ECtHR, 20 October 2015), para 130.

[877] High Level Conference on the Future of the European Court of Human Rights, Brighton, 19-20 April 2012.

[878] Ibid.

[879] Ibid.

Conference was that the principle of subsidiarity was added to the ECHR's preamble.[880] The principle of subsidiarity is particularly relevant in this thesis due to its application in the ECtHR's interpretations on the restrictions on Convention rights. It is due to its subsidiary role that the ECtHR utilises the doctrine of the margin of appreciation, and the fourth instance doctrine. Both of these methods of interpretation are particularly evident in the national security context, and the questions of admissibility of evidence. Therefore, they are important in the examination of the compatibility of CMPs with the ECHR. With regard to Article 6(1) the subsidiary role of the ECtHR is evident in some of the limits the ECtHR has placed on the construction of the Article. For example the ECtHR has established that it is beyond the role of the Convention to dictate how the member-States should organise their justice systems.[881] They consequently 'enjoy considerable freedom in the choice of the appropriate means' to do so, in order to comply with the requirements of Article 6. [882] The court's task is to ensure that the method adopted is compatible with the Convention.[883]

4.6.2. The 'fourth-instance' doctrine

In accordance with the principle of subsidiarity, right from the beginning the Commission established that Strasbourg was not a further court of appeal.[884] This is known as the 'fourth instance' doctrine and has been diligently followed in the application of Article 6 as the court repeatedly affirms that:

> it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.[885]

Consequently, the ECtHR has asserted that the right to a fair trial 'does not lay down any rules on the admissibility of evidence' as this is 'primarily a matter for regulation

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[880] Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 213, 24th June 2013. See: Alistair Mowbray, 'European Court of Human Rights: May 2013-April 2014' (2014) 20 *European Public Law* 579.

[881] *Tolstoy Miloslavsky v the United Kingdom* (App 18139/91) (1995) 20 EHRR 442, para 59.

[882] *Hadjianastassiou v Greece* (App 12945/87) (1993) 16 EHRR 219, para 33.

[883] Ibid.

[884] *X v FRG* (1957) 1Yearbook 150, 152.

[885] *Garcia Ruiz v Spain* (App 30544/96) (2001) 31 EHRR 22, para 28; *Schenk v Switzerland* (App 10862/84) (1991) 13 EHRR 242, para 45

under national law'.[886] The ECtHR's approach is to examine the decision-making procedure relating to the issue with the admissibility of evidence, as opposed to scrutinising that evidence at issue.[887] Likewise, it is not within the ECtHR's role to re-establish the facts.[888] The application of the doctrine in relation to the admissibility of evidence may raise an issue in challenging the use of CMPs at Strasbourg, because they concern the assessment of evidence. This thesis argues that the deferential approach regarding admissibility of evidence, coupled with that taken in the context of national security, are problematic for the potential of a successful challenge to the use of CMPs under the JSA at Strasbourg.

4.6.3. Margin of appreciation

The margin of appreciation is a doctrine that has been developed by the European Commission and the ECtHR. Neither the travaux préparatoires nor the Convention itself expressly make reference to the concept.[889] The doctrine refers to the latitude accorded to the Contracting states in their observance of the Convention.[890] It originates in the jurisprudence of the Commission in cases involving derogations by the Contracting states from Convention rights pursuant to Article 15 ECHR. The doctrine of margin of appreciation was used with regard to the government's assessment of the existence of an emergency. [891] The doctrine has subsequently been extended by the court and is now applied to the majority of qualified Convention rights.

The first case whereby the ECtHR confirmed the nature and justification for the doctrine is *Handyside v United Kingdom.*[892] The doctrine reflects the subsidiary role of the ECtHR in relation to the protection of human rights in the Contracting States: the

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[886] *Schenk* (n 885) para 46. Loucaides disagrees with this position, see: Loukis Loucaides, 'Questions of a Fair Trial under the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 27.

[887] *Uzukauskas v Lithuania* (App 16965/04) (ECtHR, 6th July 2010).

[888] *Edwards v United Kingdom* (Grand Chamber) (App 39647/98 40461/98) 40 EHRR 24, para 34.

[889] Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (Intersentia, 2002) 14.

[890] Clayton and Tomlinson (n 774) para 6.31.

[891] *Lawless v Ireland* (App 332/57) (1979-80) 1 EHRR 15.

[892] *Handyside* (n 766).

initial and primary responsibility for securing the Convention rights lies with the Contracting states themselves.[893] In addition, the ECtHR is of the opinion that the national authorities are in a better position by 'reason of their direct and continuous contact with the vital forces of their countries' to decide whether an interference with a right is necessary.[894] The result being that a margin of appreciation is accorded to the Contracting state. It has become clear that, as the concept has evolved in the case law, the:

> scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.[895]

In this regard the concept can be seen to interact with the principle of evolutive interpretation, and the principle of autonomous interpretation.[896] The margin of appreciation can have the decisive effect on the outcome of a case. Its significance should be particularly noted in examining that the restriction be necessary.[897]

In the context of Article 6, the margin of appreciation has only been explicitly referred to by the court with regard to the right to access a court.[898] The ECtHR recognises that the right of access to a court in particular imposes a positive duty on the Contracting states and therefore by its very nature 'calls for regulation by the state, regulation which may vary in time and in place according to the needs and resources of the community. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation.'[899]

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[893] *Belgian Linguistic Case* (n 874) para 10; *Handyside* (n 766) para 48.

[894] *Handyside* (n 766) para 48.

[895] *Sunday Times* (n 765) para. 59; *Rasmussen v Denmark* (App 8777/79) (1985) 7 E.H.R.R. 371, para 40.

[896] Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27(1) *Human Rights Quarterly* 294, 241.

[897] Rainey, Wicks and Ovey (n 857) 332.

[898] Brems (n 896) at 252.

[899] *Ashingdane* (n 769) para 57.

Nevertheless the logic of the court's reasoning in its application of the doctrine is evident in Article 6 cases despite no explicit reference to a margin of appreciation.[900] With regard to cases heard before the ECtHR concerning the non-disclosure of relevant evidence in the public interest or national security, restricting an individual's right to adversarial proceedings and equality of arms, the ECtHR has declined to make an assessment as to whether the means used to restrict the right were 'strictly necessary'.[901] This reasoning illustrates the same approach as the application of the margin of appreciation. The ECtHR views the national authorities as better placed to make the decision and therefore accords them a wide discretion. Instead, the ECtHR sees its role as being to make an assessment of the national court's decision making procedure. It examines whether the difficulties imposed on the defendant must be counterbalanced by the procedures followed by the judicial authorities. This is akin to the principle of proportionality.

Traditionally, a wide margin of appreciation has been given to States where the restrictive measures are said to be justified in the interests of national security.[902] The ECtHR has stated that a decision made by national authorities that there is a danger to national security is 'one which the court is not well equipped to challenge'.[903] . For example, in *Leander v Sweden* the ECtHR accepted that the State should enjoy a wide margin of appreciation both in assessing the necessity of the restriction, and in choosing the means for achieving the legitimate aim of the protection of national security.[904] Nevertheless, the ECtHR has shown that it is prepared to scrutinise the Government's reliance upon national security more closely. This was evident in *Nolan v Russia*,[905] whilst the court accepted that the 'executive's assessment of what poses a threat to national security will naturally be of significant weight' the individual 'must be able to challenge the decision that national security is at stake.'[906] The ECtHR found that there

[900] Brems (n 896): *Delcourt* (n 737), *Piersack v Belgium* (App 8692/79) (1982) 5 EHRR 169, *Pretto v Italy* (1984) 6 EHRR 182*; Axen* (n 754); *Sutter* (n 754).

[901] See Chapter 8.

[902] *Leander v Sweden* (App 9248/81) (1987) 9 EHRR. 433.

[903] *Liu v Russia* (App 42086/05) (2008) 47 EHRR 33, para 85.

[904] *Leander* (n 902) paras 58-59.

[905] *Nolan v Russia* (App 2512/04) (2011) 53 EHRR 29.

[906] Ibid, para 72.

were insufficient findings of fact to support the Government's argument that the applicant's religious activity posed a threat to national security.

Given the potential impact of the margin of appreciation in cases it is important to determine whether the concept, or some variation, applies at a domestic level in the United Kingdom. This issue has been addressed in a series of cases before the British courts.[907] At a domestic level the doctrine developed by the courts is the margin of discretion, also known as judicial deference.[908] The concept involves the court attaching an appropriate amount of weight to the views of the decision maker.[909] This is similar to the use of the margin of appreciation. The effect of the ECtHR's margin of appreciation, and the UK's margin of discretion is largely the same. If there is a wide margin then effectively the judges are ascertaining whether the decision maker was entitled to conclude the restriction was necessary. If it is narrow then the courts will be more inclined to look at the relevant circumstances of the case to ascertain whether the restriction was necessary. However the rationale underlying each of the concepts differs. The margin of appreciation recognises the cultural difference between Strasbourg and the States organs. However domestic judges are not subject to that particular consideration. On the contrary, they have recognised that other factors might make it appropriate to attribute particular weight to a particular decision maker's views. This can be relative to their constitutional or institutional competences; and judicial restraint may be explained by the fact that judges do not have the same level of expertise as the decision maker. On the other hand the margin of appreciation can be explained by the nature of the Convention system and the role of the international judge.

4.6.4. Proportionality

The principle of proportionality is not necessarily a deferential principle, it is included in this discussion as it is of most relevance in the second stage of the ECtHR's assessment as to whether an interference with a Convention right is justified, and in this

[907] See for example: *R v DPP ex parte Kebeline* [1999] 4ll ER 801; *R (on the application of ProLife Alliance v British Broadcasting Authority* [2002] 2 All ER 756; *R (on the application of Farrakhan v SSHD* [2002] 4 All ER 289.

[908] Aileen Kavanagh, 'Defending deference in public law and constitutional theory' (2010) LQR 222.

[909] Chapter 5, Section 5.2.

sense it is closely related to the margin of appreciation. The margin of appreciation, in the context of this study, is of most significance in the second stage of the ECtHR's assessment of a violation. The principle of proportionality is not mentioned in the text of the Convention or the additional protocols. It has nevertheless become a fundamental principle in the ECtHR's interpretation and application of the Convention.[910] Proportionality requires a reasonable relationship between a particular objective and the means used to achieve that objective. It provides a framework by which to define the relationship between rights and considerations that may justify limitations upon such rights.[911] In the context of the ECHR, the Strasbourg organs have carried out two types of proportionality evaluation. In a broad sense it is deployed in an evaluation of the right of the individual and the general public interest. In this regard proportionality requires that a fair balance must be attained between those countervailing interests.[912] This is referred to as the 'fair balance' principle that the ECtHR has itself proclaimed to be 'inherent in the whole of the Convention'[913]. The second meaning of proportionality is a narrower and more specific version of the first, and is used by the ECtHR as an ingredient of the test of necessity when assessing wither an interference with a qualified right is justified.[914] It requires that a reasonable relationship of proportionality must exist between the means employed to restrict the right, and the aim sought to be

[910] For discussion of proportionality in the ECHR generally see M.-A Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in R. St J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht, Martinus Nijhoff, 1993); Jeremy McBride, 'Proportionality and the European Convention on Human Rights' in E. Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999); Arai-Takahashi (n 889); Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff, 2009).

[911] Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4:1 *Law & Ethics of Human Rights* 4. See Christoffersen (n 910) Chapter 2.2.1 for a brief outline of the legal history of proportionality.

[912] Arai Takahashi (n 889) 14. Proportionality in this regard is said to have been applied in the ECtHR's first judgment in *Lawless* (n 891), and then expressed more clearly in *Belgian Linguistics* (n 874)

[913] *Sporrong and Lönnroth v Sweden* (App 7151/75 7152/75) (1983) 5 EHRR 35, para 69; *Soering* (n 780) para 89.

[914] Harris, O'Boyle and Warbrick (n 743) 13.

realised,[915] and that the individual must not have suffered an 'excessive burden' or expense in achieving the legitimate aim.[916]

This thesis is predominately concerned with the narrower version of proportionality, which is most frequently used in the examination as to whether an interference with a qualified right is necessary. This is because, the right to a fair trial as guaranteed by Article 6 ECHR is not an absolute right; and, as will become evident through subsequent chapters, the question of the compatibility of the relevant provisions of the Justice and Security Act may rest on whether the interference is necessary. Thus, requiring a test of proportionality in the narrow sense. Ashworth contends that, because the ECHR does not declare Articles 5 and 6 ECHR to be qualified rights the concept of proportionality is not relevant in the same way as it is to Articles 8 to 10. His argument is predominately based on the text of the Convention. In particular the phrase, 'necessary in a democratic society', which does not appear in the text of Article 6(1) in the same way as Articles 8 to 10.[917] However, it is argued here that even though Article 6 does not expressly provide exclusion clauses akin to those in Articles 8 to 11, the fair trial guarantees it encompasses are frequently subjected to a proportionality analysis.[918] Nevertheless, there is no consistent approach to its use in the application and interpretation of the Article 6 guarantees, a point which is revisited in chapters 5 to 8 which examines each guarantee in turn.

There are a number of factors that the Strasbourg organs have taken into account when applying this narrower test of proportionality. For example consideration will be given as to the overall effect of the particular restriction, whether it extinguishes the right or leaves some scope for its exercise.[919] In addition, the ECtHR has considered whether less intrusive means were available to achieve the same legitimate aim in its assessment of proportionality.[920] It was on this analysis, that the ECtHR made reference to the

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[915] *James v United Kingdom* (App 8795/79) (1986) 8 EHRR 123, para 50.

[916] Ibid, para 50, *Sporrong and Lönnroth* (n 913) para 73.

[917] Ashworth (n 764).

[918] Benjamin J. Goold, Liora Lazarus and Gabriel Swiney, *Public Protection, Proportionality, and the Search for Balance* Ministry of Justice Research Series 10/01 (September 2007).

[919] McBride (n 910).

[920] Arai-Takahashi (n 889) at 190.

Canadian model of special advocates in its judgment in *Chahal*.[921] Closely connected to this is whether there is a sufficient basis for believing a particular interest was in danger.[922] Strasbourg will also have regard to the nature of the burden placed on an individual. So for example, if the nature of the penalty is the loss of liberty then a considerable justification for imposing the restriction is required.[923]

4.7. Concluding observations

Chapter 4 has presented an introduction to the main features of Article 6(1). This includes its structure, the fair trial guarantees, and the key themes in the ECtHR's interpretation and application of the Convention rights which have been identified in the analysis of the ECtHR's jurisprudence. In this manner, chapter 4 has provided a comprehensive overview of the ECtHR's general principles of interpretation, which are useful to the examination and application of the Article 6(1) guarantees. The ECtHR deems the right to a fair trial to be of fundamental importance in a democratic society. The examination of the Article 6(1) case law in subsequent chapters will illustrate the emphasis placed on principles such as, maintaining public confidence in the administration of justice, and transparency. The nature of the secrecy of CMPs, appear at first sight to undermine these fundamental principles. However, this chapter has also highlighted the ways in which the ECtHR restricts the scope of Article 6(1). Therefore, this chapter already provides an insight regarding the difficulty of stating definitive conclusions, and generalised assertions in relation to compliance with Article 6(1).

This chapter also demonstrates that there are tensions, within and between, the rationales of the ECtHR's interpretative principles. For example, the principle of effectiveness, autonomous concepts, and evolutive interpretation generally enable an expansive interpretation of the Convention. The effect being to enhance the level of rights protection. On the other hand, section 4.6 presented the ECtHR's deferential principles of interpretation, such as the principle of subsidiarity, the fourth instance doctrine, and the margin of appreciation. The principles conform to the ECtHR's role as an international court, and therefore the unwillingness to take an interventionist stance on issues it deems best resolved by the national courts. These tensions will be apparent

[921] See chapter 2. Section 2.2.

[922] McBride (n 910).

[923] Ibid.

in the analysis of the fair trial guarantees in Chapters 5 to 8, and this will demonstrate the influence the ECtHR's use of its interpretative principles can have on the outcome of a case.

Chapter 5 The Independence of the Judiciary: decision making powers in the Justice and Security Act

This chapter will address the importance of the initial decision-making procedure in a CMP, whereby the use of a CMP is ordered in each particular case. The provisions for this stage in the proceedings are to be found in Section 6 of the JSA. One of the overarching objectives of this thesis is to demonstrate the difficulties in applying the Article 6(1) guarantees to CMPs, due to their secret nature. Therefore, in the interests of transparency and accountability – both crucial aspects of the rule of law – it is vital for the pubic to be reassured that a rigorous process has been conducted before a CMP is used. This part of the JSA proved controversial from the publication of the *Justice and Security Green Paper* (*Green Paper*), and the debate continued throughout the Act's undulating parliamentary passage. Critics of Part 2 of the JSA, expressed concerns about the potential of the legislation to confer wide ranging powers to the executive, and consequently the failure to preserve the decision making power of the judiciary.[924] The concerns were advanced as presenting the potential to undermine the separation of powers doctrine, and were largely overlooked as human rights issues. However, this chapter will illustrate that this aspect of the legislation could raise issues with Article 6(1) ECHR.

The decision-making powers of the judiciary were the predominant concern surrounding this initial stage of CMPs under Part 2 of the JSA. The independence and impartiality of the judiciary is a fundamental constitutional principle in the UK, and is also guaranteed by Article 6(1). A crucial element of the independence of the judiciary is their decision-making powers, even in the national security context. This chapter will illustrate that the ECtHR's jurisprudence reveals the emphasis the ECtHR places on the independence of the courts from the executive, particularly in the application of the right to a fair hearing before an 'independent and impartial' tribunal. Therefore, section 6 of the JSA will be examined in light of the Article 6(1) requirements of independence and impartiality. This will contribute to the overarching aim of this thesis, which is to demonstrate that CMPs under Part 2 of the JSA are potentially incompatible with Article 6(1).

[924] See chapter 3, section 3.3.3.

Furthermore, this chapter is important because the initial decision-making process is relevant to discussion in the subsequent chapters. Chapter 4 established that some of the Article 6(1) guarantees are not absolute; and, in assessing whether interferences with those guarantees are justified the ECtHR purports to apply a test of strict necessity. In the application of this test the ECtHR has scrutinised the domestic authorities' reasons for imposing restrictive measures, and the process taken in making the decision to use the measures that amount to the interference. Therefore, it is important to assess this decision-making procedure at the national level. Consequently, the Chapter will examine whether the Justice and Security Act contains the requisite safeguards to preserve judicial independence and ensures CMPs will only be used when strictly necessary.

5.1. The Separation of powers in the ECHR: the requirements of independence and impartiality

With regard to the separation of powers doctrine, the ECtHR has explicitly stated that the Convention does not require compliance with 'any theoretical constitutional concepts regarding the permissible limits of the powers' interaction.'[925] Nevertheless, the notion of the separation of the executive, the legislature and the judiciary has acquired a 'growing importance' in the ECtHR's case law.[926] In *Benjamin v United Kingdom*,[927] the ECtHR went as far as to refer to the separation of powers as a 'fundamental principle'.[928] Additionally, the ECHR's commitment to the rule of law reflects the Convention's adherence to the 'spirit of checked and limited government.'[929]

Whilst the Convention does not generally require the separation of the institutions the effect in practice is that the Convention has required a '*de* facto separation of particular government powers.' For example, Article 6 clearly envisages certain functions for the

[925] *Mcgonnell v United Kingdom* (App 28488/95) (2000) 30 EHRR 289, para 51; *Kleyn v The Netherlands* (App 39343/98, 39651/98, 43147/98, 46664/99) (2004) 38 EHRR 14; *Pabla KY v Finland* (App 47221/99) (2006) 42 EHRR 34, para 29.

[926] *Stafford v United Kingdom* (App 46295/99) (2002) 35 EHRR 32, para 78.

[927] (App 28212/95) (2003) 36 EHRR 1.

[928] Ibid, para 36.

[929] Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press, 2011) 60.

courts;[930] and the right to an 'independent and impartial tribunal' requires a separation of judicial power from the executive and the legislature.[931] In the ECtHR's interpretation of the requirements of independence and impartiality, recognition is given to the importance of separation between judicial and executive power. Hence, the specific relevance of the guarantees to this thesis. This section will outline the meaning of each requirement including the ECtHR's general approach to application and interpretation in its case law. In so doing it will highlight the necessity for the separation of judicial power. This will provide the basis for an analysis of the compatibility of the Part 2 of the JSA, in relation to provisions for judicial decision making with the Convention.

Article 6(1), embeds the right to a fair hearing before an 'independent and impartial tribunal'. It is specifically provided for in the text of Article 6(1) and is applicable to both criminal and civil proceedings. These requirements are absolute and therefore they are not subjected to tests of necessity and proportionality; the question is simply whether the national court has the requisite independence and impartiality to satisfy Article 6(1). The two requirements are inter-related and the tenuous distinction between the two has resulted in the ECtHR treating them synonymously, and using the same reasoning in some cases.[932] Nevertheless, this section seeks to show the meaning and distinction between the two, highlighting the relevant aspects for the purpose of examining the compatibility of Part 2 of the JSA, with Article 6(1).

5.1.1. Impartiality

Impartiality usually signifies the 'absence of prejudice or bias',[933] which can be tested in different ways. Thus, the court applies both a subjective and an objective approach, and there is a clear distinction between the two. The distinction rests on the difference between personal impartiality (the subjective aspect), and functional impartiality (the objective aspect). Subjective impartiality relates to a judge's personal conduct, and

[930] Ibid, 61.

[931] Ibid, 73 – 78.

[932] *Findlay v United Kingdom* (App 22107/93) (1997) 24 EHRR 221, para 73; *Lanborger v Sweden* (App 1179/84) (1990) 12 EHRR 416, para 32; *Bryan v United Kingdom* (App 19178/91) (1990) 12 EHRR. 416, para 37.

[933] *Kyprianou v Cyprus* (App 73797/01) (2007) 44 EHRR 27, para 118.

requires the Convention organs to ascertain the 'personal conviction or interest of a given judge in a particular case.'[934] Subjective impartiality is presumed unless there is proof to the contrary.[935] An example of such proof may be if a judge has displayed hostility to the applicant; or for personal reasons has arranged that a particular case be assigned to him.[936] In *Kyprianou v Cyprus* the court was required to conduct an examination into the judges' personal conduct and came to the conclusion that the applicant's doubts as to their impartiality were justified under the subjective test.[937] The court felt that the judges had not succeeded in 'detaching themselves sufficiently from the situation', an example being a statement that the applicant had 'deeply insulted' them 'as persons'.[938] Whether there is a question of personal partiality will be down to the conduct of the individual judge in a particular case, and the ECtHR has acknowledged that establishing a breach of Article 6(1) on the basis of subjective partiality is difficult.[939] Therefore, a decision on compatibility with Article 6(1) in this regard will be down to the circumstances in each case and it cannot be inferred that the legislation itself will result in a violation. Consequently, impartiality in the objective sense is of more relevance.

The majority of cases raising issues of impartiality, focus on the objective test.[940] Under the objective test the question is whether, aside from personal conduct, there are any ascertainable facts which raise doubts to the court's impartiality; and the courts task is to determine whether there were sufficient guarantees offered to 'exclude any legitimate doubt'.[941] In this regard, appearances are important. Whilst the perception of the individual concerned is important, it is not decisive. Instead, the focus is the public's

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[934] Ibid.

[935] *Hauschildt v Denmark* (App 10486/83) 12 EHRR 266, para 47; *Kyprianou* (n 933) para 119; *Padovani v Italy* (13396/87) (ECtHR, 26 February 1993), para 26; *Kontalexis v Greece* (App 59000/08) (ECtHR 31st May 2011) para 54.

[936] *Kyprianou* (n 933) para 119.

[937] Ibid, para 133.

[938] Ibid, para 130.

[939] Ibid, para 119.

[940] Ibid.

[941] *Piersack v Belgium* (App 8692/79) (1982) 5 EHRR 169, para 30.

perception of the alleged impartiality.[942] The basis for this line of reasoning is the ECtHR's emphasis on the necessity to maintain public confidence in the justice system in a democratic society.[943] The criterion of legitimate fear combined with the emphasis on the public perception means that impartiality is not merely concerned with a judge's professional character, but also with the institution's structural impartiality which may affect public confidence in the judiciary. The question is whether this appearance of bias, due to the institution's structure, can be objectively justified.[944] The ECtHR jurisprudence illustrates, for example, that the dual exercise of advisory and judicial functions in the same case is not in itself sufficient to justify concerns as to a court's impartiality.[945] This illustrates the ECtHR's adherence to the requirement of the separation of judicial and legislative functions.[946]

5.1.2. Independence

Article 6(1), also guarantees the right for an individual's case to be heard before an independent tribunal. 'Independent' means 'independent of the executive and also of the parties'.[947] In its assessment of whether the judicial body has the requisite independence the ECtHR takes into account:

> the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[948]

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[942] *Werner v Poland* (App 26760/95) (2003) 36 EHRR 28, para 39*; Sigurdsson v Iceland* (App 39731/98) (2006) 40 EHRR 15, para 42.

[943] Piersack, para. 30; *De Cubber v Belgium* (App 9186/80) (1985) 7 EHRR 236, para 26; Fey *v Austria* (App 14396/99) (1993) 16 EHRR 387, para 30.

[944] See: Richard Clayton and Hugh Tomlinson, *Fair Trial Rights* (2nd ed, Oxford University Press, 2010) 173. For an example of findings of a violation of Article 6(1) due to failure to meet the objective test of impartiality.

[945] This was the case in *Procola v Luxembourg* (App 27/1994) (1996) 22 EHRR 193, para 45 cf. *Kleyn*(n 925) para 200, where the court considered that the advisory opinions and the subsequent appeal proceedings could not be regarded as involving the 'same case' or 'same decision'.

[946] See Masterman (n 929) 80 -84.

[947] *Ringeisen v Austria (No.1)* (A/13) (App 2614/65) (1979-80) 1 EHRR 455, para 95.

[948] *Campbell and Fell v United Kingdom* (App 7819/77, 7878/77A/80) (1985) 7 EHRR 165 , para 78.

With regard to the 'manner of appointment' of the members of the tribunal, the appointment of the members by the executive or parliament is considered standard practice by the court.[949] In order to establish a breach, the applicant would have to demonstrate 'improper motives' for the appointment of the members, for example, to attempt to influence the outcome of the case. In addition, once appointed they must not receive 'pressure or instructions in the performance of their judicial duties.'[950] As to the 'duration of their term of office', the ECtHR has taken into account the 'irremovabiltiy' of judges during their term of office.[951] This doesn't necessarily need to be provided for in domestic legislation however, provided the 'other necessary guarantees are present.'[952] This is indicative of the ECtHR's holistic approach to interpretation. Nevertheless, the manner of appointment or duration of term of office is unlikely to lead to issues of compatibility regarding Part 2 of the JSA. The more relevant consideration is the question of whether the body presents an appearance of independence, which will be discussed further shortly.

In terms of the institutions' exercise of their functions, the emphasis the ECtHR has placed on the requisite independence of the 'tribunal' from the executive is important. This is well illustrated in the line of cases concerning the use of military judges in the State Security Courts in Turkey. These cases illustrate Strasbourg's lack of a clear distinction between independence and impartiality, because where the requisite independence from the executive is absent, the same reasoning leads to the conclusion that the guarantee of impartiality has also been breached.

The cases all concern applicants who complained that they had not received a fair trial before an independent and impartial tribunal given the presence of military judges on the bench of the Security Court which convicted them. The ECtHR has asserted that such cases must be subjected to 'particularly careful scrutiny'.[953] The court concluded that the applicant's fears as to a lack of independence and impartiality are 'objectively

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[949] *Sacilor Lormines v France* (App 65411/01) (2012) 54 EHRR 34, para 67; *Campbell and Fell* (n 948) para 79; *Ninn-Hansen v Denmark* (App 28972/95) (1999) 28 EHRR CD96, 110.

[950] *Sacilor Lormines* (n 949) para 67.

[951] *Campbell and Fell* (n 948) para 80; *Sacilor Lormines* (n 949) para 67.

[952] Ibid.

[953] *Ergin v Turkey (No.6)* (App 47533/99) (2008) 47 EHRR 36, para 42.

justified',[954] given that military judges are service men who belong to the army which takes its orders from the executive.[955] In reaching their decision the court took into account that the military judges on the bench of such Security Courts remained subject to military discipline and their assessment reports were compiled by the army.[956] In contrast, the court found that the applicants' fears regarding the independence and impartiality of the presence of military judges on the bench of the Supreme Military Administration Court were not 'objectively justified'.[957] The difference was that, in the latter situation the military judges were appointed for life and were not accountable in any manner to the executive for their decisions.[958]

As far as CMPs under Part 2 of the JSA are concerned, the composition of the court is unlikely to give rise to any issues in relation to the requirements of independence and impartiality. Neither is it argued here that the subjective impartiality of the members of the judiciary who have heard cases involving CMPs are in question. However, this chapter will establish that concerns relating to the separation of powers between the judiciary and executive stem from the process itself, not the composition of the court. Nevertheless, an examination of the ECtHR's jurisprudence also reveals that the ECtHR has questioned the independence of the court in circumstances concerning its ability to make decisions independently of the executive.[959]

5.1.2.1. The independence of judicial decision making

This section will outline the ECtHR case law demonstrating an emphasis on the independence of the judicial process from executive decision-making power. In *Beumartin v France*,[960] the ECtHR held that the applicant's case had not been heard by an independent tribunal with full jurisdiction because the tribunal in question had

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[954] *Incal v Turkey* (App 22678/93) (2000) 29 EHRR 449, paras 72-73; *Çiraklar v Turkey* (App 19061/92) (2001) 32 EHRR 23, para 40; *Sadak and Others v Turkey (No1)* (App 29900/96 29901/96 29902/96 2903/96) (2003) 36 EHRR. 26, para 39

[955] *Incal* (n 954) para 68; *Çiraklar* (n 954) para 39; *Sadak* (n 954) para 37.

[956] Ibid.

[957] *Yavuz v Turkey* (App 299870196) (2000) 30 EHRR CD353.

[958] Ibid, 357.

[959] *Beaumartin v France* (App 15287/89) (1995) 19 EHRR 485; *Bryan* (n 932); *Easterbrook v UK* (App 48015/99) (2003) 37 EHRR 40.

[960] *Beumartin* (n 959).

deferred to the opinion of the executive.[961] The Conseil d'Etat did not satisfy the requirement of independence from the executive, because it had considered itself bound by the Foreign Minister's interpretation of an international agreement (which was the cause of action).[962] In reaching its decision that the proceedings were incompatible with Article 6(1), the court observed that the court had 'referred to a representative of the executive for a solution to the legal problem before it.'[963] Additionally, the fact that the parties had not been able to challenge the Minister's involvement, which was decisive to the outcome of the proceedings, was relevant to the ECtHR's conclusion.[964] This case suggests that deferring to the opinion of the executive for what is essentially a legal question could amount to a violation of Article 6(1).

In *Bryan v United Kingdom*,[965] whilst an Inspector was appointed to decide the applicant's planning appeal in a quasi-judicial, independent and impartial, and fair manner; the Secretary of State could at any time revoke the power of the Inspector to decide an appeal.[966] The ECtHR found that the mere existence of such a power available to the executive was enough to deprive the Inspector of the necessary appearance of independence for the purposes of Article 6(1).[967] Therefore, even if the court is found to be sufficiently independent from the executive this may be compromised if the executive retains a power to make a decision considered to be outside of its role. In *Bryan v United Kingdom*, the ECtHR ultimately held that there was no violation of Article 6(1). This was on the basis that the proceedings had subsequently been subject to control by a judicial body complying with the Article 6(1) guarantees.[968]

In addition, there are a series of cases in which the ability of the Home Secretary to impose sentences in criminal proceedings has deprived the court of the requisite

[961] Ibid, para 39.

[962] Ibid, para 38.

[963] Ibid.

[964] Ibid.

[965] *Bryan* (n 932).

[966] Ibid, para 38.

[967] Ibid.

[968] Ibid, para 40, and 47-48.

independence and therefore amounted to a breach of Article 6(1).[969] The ECtHR has asserted that the protection of Article 6(1) includes the determination of sentence.[970] In *V and T*, the applicants' complained that the fixing of a tariff is 'in reality, if not also in form, a sentencing exercise which should attract the safeguards of Article 6(1)'.[971] The ECtHR agreed and it followed that the proceedings amounted to a violation of Article 6(1), because the Secretary of State who set the applicant's tariff was clearly not independent of the executive.[972] This reasoning was endorsed by the ECtHR in *Stafford v United Kingdom*,[973] whereby the court even went on to state the difficulty in reconciling the role of the Home Secretary in fixing the tariff and deciding on a prisoner's release with 'the notion of separation of powers between the executive and the judiciary'[974]. Similarly, in *Benjamin v United Kingdom* the release of the applicants detained in a hospital was dependent on the decision of the executive as opposed to the tribunal. The ECtHR affirmed that this impinged on the 'fundamental principle of the separation of powers',[975] which resulted in a violation of Article 6(1) with regard to the requirement of independence.[976] The sentencing cases are particularly illustrative of the ECtHR's view that where the executive makes a decision that it considers should have been made by the judiciary, this will amount to a breach of Article 6(1).

The issue of judicial decision making powers, and preserving the independence from the judiciary have been most prominent in relation to the section 6 declaration ordering the use of a CMP in each particular case. It is acknowledged here that the section 6 declaration is invoking a process, which is not a final judgment in the same manner as in *Bryan v United Kingdom*, for example. Nevertheless, the argument here in relation to the independence of judicial decision making powers, is that formally the application to use a CMP in proceedings is not determinative of the substantive case. However, in

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[969] *V and T v United Kingdom* (2000) 30 EHRR 121; *Stafford v United Kingdom* (2002) 35 EHRR 32; Easterbrook v United Kingdom (2003) 37 EHRR 40.

[970] *Eckle v Germany* (1983) 5 EHRR 1, para 77.

[971] *V and T v United Kingdom* (App 24888/94) (2000) 30 EHRR 121, para 107.

[972] Ibid, para 114.

[973] *Stafford* (n 926) para 75.

[974] Ibid, para 78.

[975] *Benjamin* (n 927) para 35.

[976] Ibid, para 39.

substance, if the court's role is so limited at this initial stage then in practical terms there cannot be a formal determination once the process is initiated. In other words, if the courts do not have the requisite decision-making capacity in terms of ordering the use of a CMP in a case then the fact the application is submitted is determinative, due to the lack of meaningful judicial discretion over the process.

5.2. Judicial Decision Making in the Justice and Security Act

The initial decision-making process, declaring the use of a CMP, is provided for in section 6 of the JSA. Before the court can make a declaration under section 6, two conditions must be satisfied. The first is that there is 'sensitive material' which would be required to be disclosed in the course of proceedings, if it were not for public interest immunity.[977] The second is that the use of a CMP is 'in the interests of the fair and effective administration of justice.'[978] In addition, the court must be 'satisfied' that the government has considered a claim for public interest immunity.[979] The section 6 provisions are the result of the JSA's undulating journey through Parliament, which brought to light two groups of issues in relation to judicial decision making. The first was the preservation of the decision-making power of the judiciary. In other words, do the courts have the decision-making power to order the use of a CMP in the first place? The second group related to the exercise of the decision-making power. So, if the courts do in fact possess the decision-making power, how should the power be exercised? The first group of issues relate directly to the separation of powers, and are most likely to raise concerns regarding the Act's compatibility with the requirements of independence and impartiality as guaranteed by Article 6(1). In this regard, the Lords introduced the 'judicial discretion' amendment discussed in Chapter 2, which survived the Act's parliamentary passage and is retained in section 6(4). With regard to the second set of issues, the Lords introduced the 'judicial balancing' and 'last resort provision' amendments, which were advanced with a view to enhancing the protection of the decision-making power of the court.[980] These amendments were not retained in Part 2 of

[977] Section 6(4).

[978] Section 6(5).

[979] Section 6(7).

[980] See chapter 3, section 3.3.3.

the JSA, and the second of the two section 6 conditions outlined above was seen to provide a satisfactory alternative.[981]

This chapter argues that, whilst section 6 does appear to preserve the judicial decision-making power at this initial stage, it does not adequately address the critics' concerns regarding the way such power is exercised and the meaningfulness of the court's decision-making power. This may raise issues with ECHR standards of fairness guaranteed by Article 6(1). Therefore, Section 5.3 advances an alternative decision-making framework that offers a more rigorous approach to the initial stage of the proceedings that should be used instead of section 6 of the JSA. The contention is that the debate became polarised, almost immediately following the publication of the *Green Paper*. This was unhelpful, and may have contributed to the unsatisfactory result that is section 6. The decision to order a CMP involves a complex series of questions. These need to be carefully identified and separated out. Yet the parliamentary debate was reduced to a simple dichotomous choice: whether the Act would confer control over the procedure on the executive or the judiciary. To move beyond this simplistic binary choice this section begins by discussing the appropriate limits of executive and judicial power in this context. This more sophisticated understanding of the issues will form the basis of the subsequent analysis of section 6. A fuller understanding of the concerns of the critics, and what their proposed amendments set out to achieve, will enable an analysis of whether the final version of the Act adequately addresses their concerns. The contention here is that it did not. Equally, however, it will be argued that the Lords' amendments that did not survive the passage of the Act would also have failed to adequately preserve the appropriate judicial decision-making powers.

In immediate response to the publication of the *Green Paper*, critics of the legislation contended that the proposals failed to subject the operation of the use of CMPs to adequate judicial control. The *Green Paper* proposed that the use of a CMP would be triggered by the Home Secretary's decision that relevant sensitive material would cause harm to national security, the making of this decision would be openly disclosed, and this decision would be reviewable by the court on judicial review principles.[982] This aspect of the proposals instantly provoked debate surrounding the question of which

[981] See speeches in HL Ping Pong: HL Deb, 26 March 2013, vol 744

[982] *Green Paper*, para 2.7.

institution should make the decision to order a CMP in any given case. The government indicated that they believed this to be in the control of the executive, only reviewable upon judicial review,[983] whereas the critics forcefully argued that the decision must be for the court and not the government.[984] Therefore the debate immediately became polarised, and centred on one question: is the decision one for the executive or the judiciary?

Following the responses to consultation, which were almost unanimous in their rejection of this aspect of the *Green Paper*,[985] the government agreed that the final decision to order the use of a CMP should be made by the court. Therefore, the position was that both the critics and the government appeared to agree on the importance of the role of the court and the need to preserve the decision-making power of the judiciary. Nevertheless, they disagreed on whether amendments to the Government's Bill were necessary in order to achieve this. The government resisted amendments inserting a judicial balancing test and last resort provision, disputing their necessity. It is argued here that the debates surrounding these issues exhibit a problem that can be referred to as 'normative duality'.[986]

What is meant by normative duality is that a particular entity can have positive and negative attributes; and it is possible to present the entity in opposing ways by selectively emphasising one side or the other to support a particular claim, or to further a particular purpose.[987] As explained by Macdonald, someone's 'choice of presentation

[983] In oral evidence given to the JCHR the Home Secretary stated their reluctance that the decision should be a judicial decision alone. See *JCHR The Green Paper* (n 553).

[984] See, for example, the evidence given to the JCHR of Dinah Rose QC; the Bingham Centre; and the Independent Reviewer of Terrorism in relation to *JCHR The Green Paper* (n 553).

[985] Ministry of Justice, Government's response to the public consultation on Justice and Security (Cm. 8364, 2012) para 2.13.

[986] See Christopher Edley, 'The Governance Crisis, Legal Theory, and Political Ideology' *Duke Law Journal* (1991) 561-606. This concept is well-explained by Macdonald, who 'borrows' this concept from Edley, see: Stuart Macdonald, 'The Role of the Courts in Imposing Terrorism Prevention and Investigation Measures: Normative Duality and Legal Realism' (2015) *Criminal Law and Philosophy* 265.

[987] Edley (n 986); and, Christopher Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy* 3.2. (refers to concept as attributive duality).

will flow from their normative position'.[988] This is exhibited by the debate surrounding the application stage of the CMP, and the two opposing views that emerged between the critics and the government. The duality is evident when considering: how we should view CMPs; how we should conceive the roles of the executive and the judiciary; and how these institutions themselves view these two questions. The government regarded CMPs as being primarily a necessary measure to safeguard national security, which has unfortunate incidental effects on certain fundamental rights. The Government's contributions to the parliamentary debates therefore exhibit an emphasis on the need to protect national security, the executive's responsibility in this regard, and the negative aspects of the existing alternative mechanism, public interest immunity. On the other hand, the critics of CMPs viewed CMPs as a process which should be primarily regarded as an encroachment on our fundamental rights, for the sake of national security, and which must therefore be subject to judicial control. As a result, the critics emphasised the impact on the fair administration of justice, and the role of the court as the guardian of human rights. The question thus becomes, how should this duality be resolved?

In addition to this duality, this chapter argues that it is important to recognise that the decision to order a CMP does not involve just one question – who should order the use of a CMP? The process is much more complex than this and involves a series of questions. By carefully delineating each of these questions, and considering the duality dilemma identified above in respect of each individual question, it is possible to establish a more nuanced decision-making framework. This will be outlined in Section 5.3. This framework may also be used as a tool for assessing the adequacy of section 6 of the JSA. But first it is necessary to consider the appropriate roles of the judiciary and the executive.

5.2.1. The appropriate limits to executive and judicial power

The starting point for this discussion is the fact that the use of CMPs interferes with an individual's civil rights. Therefore, the process must comply with Article 6(1). This is recognised in the JSA, with section 14(2)(c) providing that nothing in Part 2 of the Act is to be read inconsistently with Article 6. Moreover, when Convention rights are

[988] Macdonald (n 986) 267.

engaged, the final assessment as to the need for restrictive measures that interfere with the right must be made by the court. Therefore, the *final* step in the process to order the use of CMP in any given case should be made by the court. Once the Government's Bill was introduced into the Lords this was not disputed.

On the other hand, as noted in Chapter 4, there is the doctrine of the margin of discretion, also known as judicial deference.[989] The national security context is a realm in which the courts will accord a certain amount of deference to the views of the executive.[990] Traditionally the executive was considered the institution best equipped to decide what was best in the interest of national security.[991] During the Act's parliamentary passage, whilst the Government claimed to agree that the decision to order the use of a CMP was within the role of the court, their rhetoric reflected this traditional approach as they consistently stressed the national security context and the executive's competence and expertise in this regard.

However, deference does not prevent judicial scrutiny altogether. The flexibility of the doctrine permits the court to assess, on a case by case basis, its own institutional competence and expertise; and, to recognise in relation to the particular issue where their competence is limited.[992] Where the court sees its own competence as limited, it does not then exclude the matter from adjudication. Rather,

> judicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy.[993]

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[989] See chapter 4, section 4.6.3.

[990] Adam Tomkins, 'National Security and the role of the court: a changed landscape?' (2010) LQR 543.

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

[992] Aileen Kavanagh, 'Constitutionalism, counterterrorism and the courts: Changes in the British constitutional landscape' (2011) 9(1) *International Journal of Constitutional Law* 172, 175.

[993] This definition is advanced by Kavanagh in: Aileen Kavanagh, 'Defending deference in public law and constitutional theory' (2010) LQR 222, 223. See also Aileen Kavanagh, 'Constitutionalism, counterterrorism and the courts: Changes in the British constitutional landscape' (2011) 9(1) *International Journal of Constitutional Law* 172, 175; and, Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in the Constitutional Adjudication' in G. Hushcroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Oxford University Press, 2008) 189-190.

The *Belmarsh detainees'* case illustrates the flexibility of notion of judicial deference and that it arises due to the nature of the decision, as opposed to the context. The House of Lords distinguished between factual assessments of a political nature – where 'great weight' would be accorded to the executive's assessment – and assessments of a legal nature, stating the 'greater the legal content of any issue, the greater the potential role of the court'.[994] On this basis they reasoned that the assessment of whether there was a public emergency threatening the life of the nation was within the domain of the executive. However, the question of whether the indefinite detention without trial of the individuals was strictly required by the exigencies of the situation was subjected to intense judicial scrutiny. Thus, judicial deference assigned varying degrees of judgment to the court and the executive, within the same context, in recognition of the institutions' competence and expertise.

Similarly, in *AF (No 3) v Secretary of State for the Home Department,* [995] Lord Hope recognised the government's 'first responsibility' as being to the public, and 'to protect and safeguard the lives of its citizens.'[996] Whilst the court should 'respect and uphold that principle', its duty is also 'to protect and safeguard the rights of the individual.'[997]

These cases illustrate the need to delineate issues and separate stages of the decision-making process, with regard to the respective roles of the institutions. The question of the expertise and competence between the court and the executive differs for each of the assessments. In relation to ordering the use of a CMP, the decision-making process requires (1) an assessment of the damage disclosure of certain material may have on national security and, then, (2) an assessment of whether the CMP is the appropriate procedure to follow to avoid such damage to national security. The contention here is that the national security risk is primarily a matter for the executive given its institutional competence and expertise. Therefore, the degree of judicial deference to the executive will be greater. The result is that the government should make the decision at

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[994] *A v Secretary of State for the Home Department* [2004] UKHL 56, [29] *per* Lord Bingham. [The case is referred to as the "*Belmarsh detainees'* case"]. See: Clive Walker, 'The Terrorism Prevention and Investigations Measures Act 2011: one thing but not much the other?' (2012) *Criminal Law Review* 421, 432.

[995] [2009] UKHL 28.

[996] Ibid, at [76].

[997] Ibid.

stage 1, subject to judicial oversight. However, the assessment at stage 2 is of a legal nature given the interference with Article 6(1), and the assessment of the appropriate choice of judicial procedure. These are judicial functions, and deference does not result in these functions moving completely within the province of the executive merely because they also concern matters of national security. Nevertheless, deference does not preclude the government from deciding what procedure it thinks is best to address the risk to national security it has identified at stage 1. Rather, stage 1 requires a greater role of the court given that their greater expertise and competence in deciding the appropriate judicial procedure. Hence, a lesser degree of deference to the executive. Consequently, the government's assessment at stage 2 must be subjected to judicial scrutiny, as opposed to mere oversight. In short, the answer the answer to the duality dilemma differs depending on the stage of the decision-making process.

The level of judicial review of an executive decision is dependent on how the limits to executive power are framed; [998] and, this involves questions of institutional competence and expertise of the executive and the courts.

Additionally, how the institutions view their own expertise and competence is important. There is no advantage in asserting that the court should be the decision maker at stage 2, if they themselves proclaim this not to be within their institutional competence and expertise. Nevertheless, over the years the court has gained more knowledge and expertise in national security matters, and the court has itself recognised this expertise and competence.[999] Consequently, the court has subjected national security matters to intense scrutiny, a trend known as the 'judicialisation of intelligence.'[1000] The doctrine of deference enables this approach, because it does not preclude judicial scrutiny altogether. The flexibility of the doctrine permits the court to assess, on a case by case basis, its own institutional competence and expertise; and, to recognise in relation to the particular issue where their competence is limited.[1001]

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[998] Nino Guruli, 'A Justifiable Self-Preference? Judicial Deference in Post-9/11 Control Order and Enemy Combatant Detention Jurisprudence' (3)3 *Cambridge Journal of International and Comparative Law* (2014) 884, 885.

[999] Macdonald (n 986) 270.

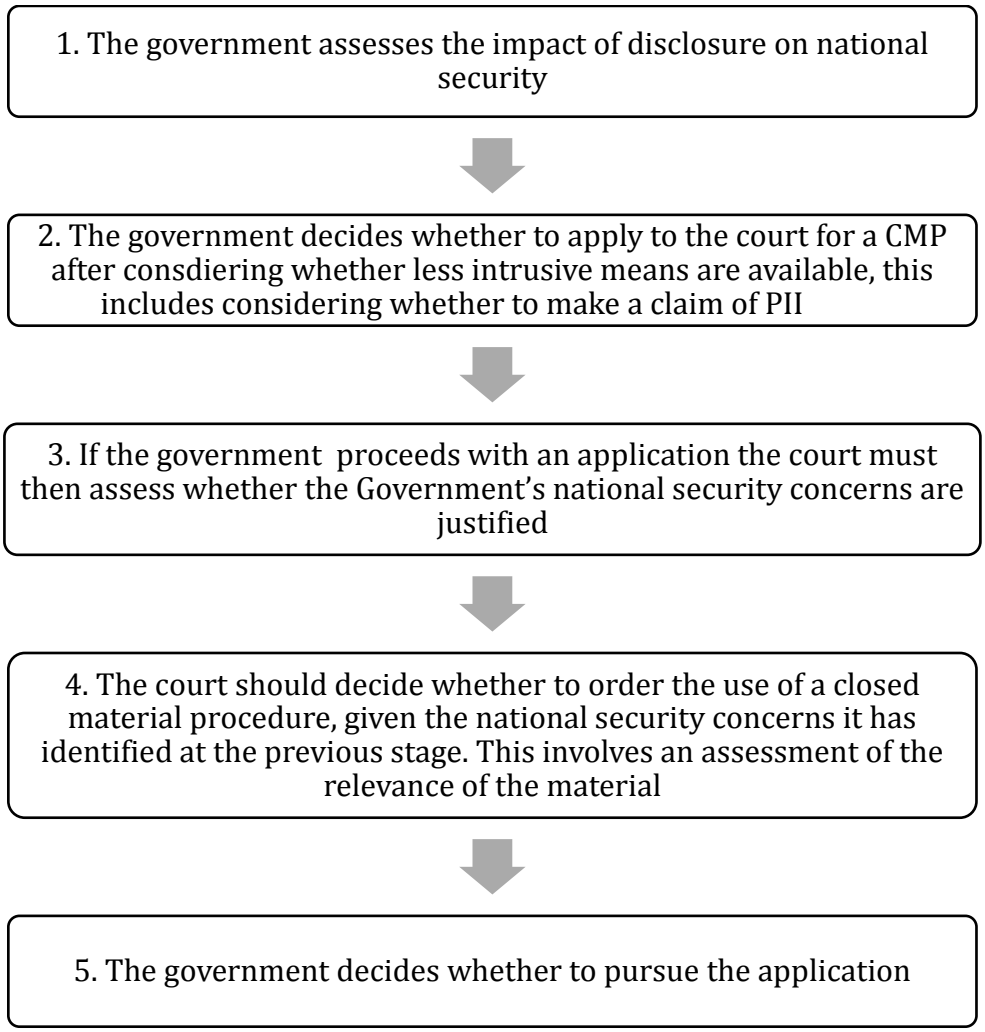
[1000] Clive Walker, 'The Judicialisation of Intelligence in Legal Process' [2011] *Public Law* 235.

[1001] Kavanagh (n 992) 175.

The dilemma of duality differs depending on the assessment at stage 1 or stage 2, because the institutional competence and expertise varies at each stage of the decision-making process. As a result, the degree of judicial deference to the executive will vary. The flexibility of deference, as applied in *A v SSHD,* can provide the rationale for distinguishing between (1) an assessment of the damage disclosure may have on national security; and, (2) an assessment of whether the CMP is the appropriate procedure to follow.

This chapter argues that the JSA conflated the stages of the decision-making process and consequently failed to address the dilemma of duality; and respect the appropriate roles of the court and the executive in the decision-making process. Section 5.3 will present an alternative decision-making framework which goes some way to resolve the duality. It delineates the relevant issues, and assigns judicial deference of varying degrees depending on the stage of the assessment. This is done in consideration of the institutional competence and expertise of the court and the executive, and the appropriate limits to their powers. Moreover, the framework uses the standards of judicial independence and impartiality as established in the ECtHR's jurisprudence. This decision-making framework will then be used as a tool to assess the sufficiency of the decision-making process provided for by section 6 of the Act.

5.3. The decision-making framework



The following analysis demonstrates that Section 6 of the JSA conflated stages of the decision-making process that need to be separated. The consequence of this is that the Act provides scope to be interpreted in such a way that the decision-making powers of the judiciary in relation to ordering the use of a CMP are rendered illusory, as opposed to meaningful. This in turn threatens to undermine judicial independence and public confidence in the administration of justice. In addition, it will be shown that the interpretation of section 6 fails to ensure that CMPs will only be used when strictly necessary. This could affect the compatibility of the Act with the remaining Article 6(1) guarantees. Section 6 is examined here within this decision making framework. Reference will be made to the provisions to the JSA, the debates surrounding their insertion, and the small body of case law heard under the Part 2 of the JSA which is currently developing.

5.3.1. Stage One

The reason for applying to use a CMP is the claim that if the 'sensitive material' is disclosed in the course of proceedings this could damage national security. Therefore, the first stage in the decision-making process is the assessment of the impact of disclosure on national security. The executive is predominately responsible for national security, it is governmental agencies that receive sensitive information and assess risks and threats to the nation's national security. This is recognised judicially[1002] and is stated in the *Green Paper* as being the 'first duty of government'.[1003]

Section 6(4) of the JSA is presented as the 'first condition' that needs to be satisfied before the court can make a declaration that a CMP can be used in the proceedings. However, it is argued here that this is not the first stage in the decision-making process. Section 6(4) provides that the court 'may' make a declaration to use a CMP if 'a party to the proceedings would be required to disclose sensitive material in the course of the proceedings', if it weren't for a claim for public interest immunity.[1004] This conflates the question of (1) the impact of disclosure on national security; and (2) the choice of judicial procedure. The issue of the appropriate role of the executive and the judiciary differs in relation to each question.

Therefore, in accordance with the decision-making framework stage 1 is missing from section 6, the first step must the assessment as to whether the material is 'sensitive'. This is an assessment within the domain of the executive given their expertise and competence in national security matters.

5.3.2. Stage Two

Following its own assessment, the government must then make a decision as to whether to apply for the use of a CMP. The government does possess expertise and competence to make an assessment of the best means to prevent the perceived damage to national security. At this stage, the government are required to assess whether there are

[1002] *AF (No 3)* (n 995), *Rehman* (991).

[1003] *Green Paper*, Executive Summary, para 1.

[1004] s.6(4)(b).

alternative, less intrusive, means available to protect national security in the circumstances; including making a claim for public interest immunity. This would be in line with their duty under the Human Rights Act 1998, which requires effect to be given to the ECHR as far as possible[1005]. This could be taken to require consideration to be given to whether restrictions on Convention rights are necessary and proportionate.

Section 6(2), gives the government the power to apply for a CMP. However, section 6(7) provides that the court has to have been satisfied that before making the application the Secretary of State has 'considered' whether to make a claim for PII in relation to the sensitive material. Whilst it has been established that the government should make the assessment as to which procedure is more appropriate for safeguarding national security, this assessment must be able to stand judicial scrutiny at stage 4 due to the legal nature of the assessment. Section 6(7) makes no provision for an assessment of necessity and proportionality in relation to the application for a CMP, which would include considering less restrictive alternative measures, not limited to public interest immunity. Admittedly, section 6(7) does not preclude such an assessment, however in the interests of transparency and maintaining public confidence in the administration of justice it should be clear that in each case the government will have applied its own rigorous decision-making procedure before the application to use a CMP is made.

5.3.3. Stage 3

If the government proceeds with an application for a CMP the court must then assess whether the government's national security concerns are justified. However, at stage 3, the degree of judicial deference will be assigned to a high degree. Following the distinction made in the *Belmarsh* detainees case, this assessment would be deemed one of fact and primarily within the domain of the elected branches. Thus, the role of the court would be limited. Consequently, at stage 3 the court would only be required to subject the government's assessment to judicial oversight.

If the government proceeds with an application for a CMP based on its own assessments at stages 1 and 2, then the court must assess whether the classification of the material is justified. At stage 3, the court should recognise the limits of its expertise and competence in assessments of risks to national security, and assign a high degree of

[1005] Section 6 Human Rights Act 1998.

deference to the executive on this matter. Therefore, mere judicial oversight at stage 3 will suffice.

In the few cases where a CMP application has been made under the Justice and Security Act to date, it is evident that whether the material is 'sensitive' is unlikely to be disputed. In *Khaled v Secretary of State for the Home Department*,[1006] the Court of Appeal rejected the submission advanced by the claimant's legal representation that 'damaging to national security' should be interpreted as requiring 'actual damage' to have occurred.[1007] It was decided that 'the formulation "would be damaging" is a prediction of damage, not a demonstration of actual damage.'[1008] This approach of the courts so far demonstrates that they are tending to defer to the executive's judgment on the potential national security impact of disclosure. This is in line with Stage 3 of the decision-making framework.

5.3.4. Stage 4

At stage 4, the court should decide whether to order the use of a CMP, bearing in mind the government's assessment of the impact disclosure would have on national security at stage 1, which the court has reviewed at stage 3. The choice of the appropriate procedure to follow is within the role of the court given its institutional competence and expertise. Therefore, the degree of judicial deference will be much lower; and the government's assessment at stage 2 must be subjected to judicial scrutiny. The decision to order the use of a CMP also involves an examination of the relevance of the sensitive material to the case; and, the management of evidence is within the case management powers of the court, hence the court will be much less deferential to the government's assessment.

The judgment of the House of Lords in *Belmarsh*, made clear that deference is assigned due to the nature of the decision, as opposed to the context. Thus, that the use of CMPs arises in the national security context will not remove these judicial functions from the province of the court; and vest them instead within the province of the executive. Judicial deference does not preclude judicial scrutiny. The 'judicialisation of

[1006] [2016] EWHC 1727 (QB).

[1007] Ibid, at [43].

[1008] Ibid, at [44].

intelligence' has resulted in the court recognising their own expertise and are increasingly subjecting national security matters to intense scrutiny.

This intense judicial scrutiny to be applied at stage 4 reflects the approach of the lower courts in some of the control order case law, in which they have 'robustly reviewed' government decisions even where they concern national security.[1009] Tomkins commends the judges in these cases for refusing to 'allow judicial process to descend into an exercise in rubber-stamping.'[1010] He points out that if,

> national security has to come to court, it follows not that the courts have to give way to claims made in the name of national security, but that claims made in the name of national security have to give way if they cannot satisfy the court.[1011]

Stage 4 would be where the critics of Part 2 of the JSA would have advanced that the courts must carry out a balancing exercise, like that used by the court in claims for public interest immunity; and, a provision ensuring that CMPs were used as a matter of last resort. These amendments that relate to the way the judicial decision-making power is exercised did not survive the parliamentary passage. The Act's acclaimed 'second condition' in section 6(5) would appear to be the Government's answer to the Lords 'judicial balancing' and 'last resort' amendments which did not survive the Act's parliamentary passage.[1012] It is argued here, that whilst it is referred to the Act as the 'second condition' it is not the second stage in the decision-making process. Section 6(4) concerns the way the judicial power to order a CMP is exercised, thus it is relevant at stage 4 in the proceedings. However, this chapter contends that the provision is an unsatisfactory alternative to the 'judicial balancing' and 'last resort' amendments. It provides scope for the Act to be interpreted in such a way that would contribute to diminishing public confidence in the administration of justice further; and failing to ensure that CMPs were only used in exceptional circumstances.

The insertion of judicial balancing in the initial decision to order a CMP was intended to increase judicial discretion at this stage in the proceedings, consequently adding a

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[1009] Tomkins (n 990) 567. But note, not all judgments are so deferential as pointed out by Macdonald (n 986) 277 - 9.

[1010] Tomkins (n 990) 567.

[1011] Ibid.

[1012] Adam Tomkins, 'Justice and Security in the United Kingdom' (2014) 47(3) *Israel Law Review* 305, 325.

crucial safeguard.[1013] The 'last resort' provision would have entailed an examination of whether there were alternative, less intrusive, means available in order to protect the interests of national security.[1014] Thus, addressing the concern for mission creep and ensuring the use of CMPs only in circumstances that were strictly necessary.

It has been stated, justifiably, that debate in the Commons regarding the insertion of judicial balancing was 'ill-informed'.[1015] This is in relation to the government's contentions that the *Wiley* balance wasn't necessary in the context of CMPs as opposed to PII, because the 'administration of justice cannot but be helped if the judge has access to all the information.'[1016] The presumption of the government was that there was no question of the damage to the interests of justice because the judge could see all the material, therefore no judicial balancing was needed. This fails to acknowledge the damaging effect on the administration of justice as a result of evidence not being effectively challenged, hence the importance of the *Wiley* balance for the protection of open and natural justice.[1017] This misinformed view of the administration of justice is evident in the wording of section 6(5) which significantly replaces the word 'open', used in *Wiley*, with 'effectiveness'. Following the enactment of the legislation, Hickman proposed that section 6(5) left scope for the courts to balance the competing interests;[1018] and, Tomkins suggested that the courts would be unlikely to conclude that section 6(5) was satisfied unless they consider that there is no alternative to a CMP appropriate in the particular case.[1019] So section 6(5) has the potential to meet the concerns of the critics of the Act. Thus, once the Act received Royal Assent, it appeared

[1013] Chapter 3, section 3.3.3.2.

[1014] Chapter 3, Section 3.3.3.3.

[1015] Tom Hickman, 'Turning out the lights? The Justice and Security Act 2013' (UK Const. L. Blog, 11th June 2013) https://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/

[1016] HC, Report Stage, 4 March 2013, Chair of the Intelligence and Security Committee, Sir Malcolm Rifkind. Col 736.

[1017] Hickman (n 1015).

[1018] Ibid.

[1019] Tomkins (n 1012) 33.

that the court's interpretation of the 'fair and effective administration' of justice would determine the extent of the use of CMPs under Part 2 of the JSA.[1020]

Whilst the critics envisaged inserting an amendment that reflected the wording of the *Wiley* balance, an exercise that the courts are already familiar with, using a balancing test is not unproblematic.[1021] Balancing can be described as a 'metaphor which assumes the shape of a scale.'[1022] Ashworth, argues that the metaphor suggests items with a particular weight are put into one side of the scales with different items with a particular weight on the other, to determine which side is the greater weight.[1023] It entails a trade-off of competing interests. This is the type of balancing test employed by British judges; the approach taken is to ask which competing interest "trumps" the other.[1024] The amount of weight to be attributed to the competing interests being balanced is not generally explicitly discussed.[1025] This 'broad notion of "balancing"' adhered to by the British courts[1026], which lacks structure, could result in unpredictability and inconsistencies of outcome. This leads us back to one of the criticisms of "discretion", and as with discretion it is possible to take a structured approach to balancing. This is evident in the ECtHR jurisprudence where instead of a "trade-off" the ECtHR's approach is to seek to reconcile the competing interests to the extent possible. This is the test of proportionality. It is argued here at stage 4 the test of proportionality is more appropriate than the 'judicial balancing' amendment; and section 6(5). Proportionality can provide a much more structured and rigorous approach to decision making, it would enhance the decision-making power of the court and address the critics concerns' that

[1020] Tomkins (n 1012) 33; Hickman (n 1015). Daniel Kelman 'Closed trials and secret allegations: an analysis of the "gisting" requirement" [2016] *Journal of Criminal Law* 264, 270.

[1021] Chapter 3, section 3.3.3.2.

[1022] Aharon Barak "Proportionality and Principled Balancing" (2010) 4:1 *Law and Ethics of Human Rights* 1, 7.

[1023] Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell 2002) 130.

[1024] Ibid.

[1025] Ibid.

[1026] Ibid,127.

the Justice and Security Act would not confine the use of CMPs to exceptional circumstances.[1027]

The test of proportionality requires that a reasonable relationship exists between a particular goal and the means used to achieve that goal. It conveys the notion that human rights are not absolute whilst asserting that restrictions on our rights and freedoms must have their limits.[1028] The proportionality test is used in German Constitutional jurisprudence,[1029] and is a legal standard familiar to the UK judiciary as it is also a well-established principle of ECtHR jurisprudence.[1030] The test comprises three requirements: suitability; necessity; and proportionality in the narrow sense.[1031] The suitability requirements involve an examination of whether the measure restricting the right is suitable to achieve the intended purpose. The test of necessity relates to the scope of the restriction on the individual's rights, and requires an investigation into whether there are less intrusive means of achieving the intended purpose. Finally, proportionality, in the narrow sense, is the balancing requirement. This stage does require the court to weigh up the competing interests and their relative importance, enabling a reasoned conclusion as to which interest in the circumstances can take precedence. In the context of Article 6, it is common practice for the ECtHR to consider whether the restriction is counterbalanced by any safeguards. This is often the missing element in the British approach to balancing.

The application of a test of proportionality at stage 4 would first entail the court examining whether the suitability of a CMP in the circumstances. The purpose of a CMP is claimed to be to protect national security by preventing disclosure of 'sensitive material' into the public domain. More specifically, the primary justification advanced for Part 2 of the JSA was to provide the opportunity for the State to defend itself in civil

[1027] *R (on the application of Daly*) v *Secretary of State for the Home Department* [2001] 2 AC 532, para 27. Lord Steyn stated that the requirements of necessity and proportionality can result in a higher standard of review.

[1028] Barak (n 1022) 6.

[1029] Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) NSW Law Journal 1, at 20.

[1030] Chapter 4. Section 4.6.4.

[1031] See Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 572.

claims pursued against it.[1032] The contention of the government was that, there were cases where they had had to settle out of court, or cases struck out, simply because the material needed to advance their case was sensitive and the public interest immunity mechanism was exclusionary. Therefore, they had been unable to advance their case, because the judicial mechanism that met the demands of protecting national security, excluded the material which supported their case if was sensitive. The assessment of the impact of disclosure of the material has already been assessed at stage 1, and reviewed by the court at stage 3. Therefore, at stage 4 the court would be required to examine the relevance of the material to the case to discern whether the CMP is suitable to achieve the purpose of providing a means whereby the government has the opportunity to present their case when it is based on 'sensitive material'.

In the cases heard under section 6 of the Justice and Security Act, the court appears to have taken into consideration the relevance of the 'sensitive material' to the case, in its interpretation of section 6(4). For example, in in *CF & Mohamed v Secretary of State for the Home Department,* Irwin J claimed that 'some of the sensitive material might be thought to be amongst the most relevant' and this contributed to the conclusion that section 6(4) is satisfied.[1033] This approach of the court fits within the decision-making framework, as it demonstrates that the court is less deferential when the focus is the impact on the proceedings. Here it was specifically the Home Secretary's ability to make his case, in contrast to the focus on the impact on national security. In its interpretation of section 6(4) the court has stressed that at the stage of the section 6 declaration hearing, the court will not take into consideration all of the sensitive material that would be used in the course of the proceedings.[1034] It follows that the court has stated that section 6(4), does not require the court to consider the likelihood of a successful defence.[1035] In *R (on the application of Sarandi and others) v Secretary of*

[1032] See *CF & Mohamed v Secretary of State for the Home Department* [2013] EWHC 3402 (QB), at [18].

[1033] Ibid, at [39].

[1034] Ibid, at [36]; *McGartland and another v Attorney General* [2014] EWHC 2248 (QB) at [4]; *McCafferty v Secretary of State for Northern Ireland* [2016] NIQB 47, at [25].

[1035] *R (on the application of Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687, at [40]; *McCafferty* (n 1034) at [23].

State for Foreign and Commonwealth Affairs,[1036] Bean J stated that he considered that he merely needed 'to be satisfied that the Secretary of State has an arguable defence and that the sensitive material appears *prima facie* to be relevant and to support that defence.'[1037] On this basis, the judgments illustrate an element of deference to the opinion of the executive,[1038] which doesn't appear in line with the need for judicial scrutiny of the executive's assessment established in Section 2.2. Such deference is inevitable if the court, at this point, does not review all the closed material.

Similarly, the reference in section 6(4) to PII is to ensure that the requirement to disclose in the provision can be established even where there is the '*possibility* of a claim' for PII.[1039] The court has interpreted first condition as not requiring the court to consider what the outcome of a PII claim might be: '[W]hat it looks to is whether a party would be required to disclose sensitive material were it not for the *possibility* of a PII claim.'[1040] Therefore it appears, on the section 6 case law to date, that the court will not accept arguments to the effect that the requirement of disclosure in section 6(4) calls for consideration of the issues in the substantive claim. However, the court has stressed that section 6 provides the 'gateway' to a CMP, therefore a preliminary hearing, so a lower standard of proof is appropriate than in the full hearing itself.[1041] This approach still appears to fit within this decision-making framework, providing the court keeps the matter under review, as provided by section 7, in the full hearing.

The court has also considered the relevance of the material in its interpretation of 'fair and effective' under section 6(5). The interpretation of 'fair and effective' focuses on the amount of sensitive material which the government asserts it seeks to rely on; as the case would be untriable without the CMP, due to the government not being able to

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[1036] *R (on the application of Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWHC 2359 (Admin).

[1037] Ibid, at [31].

[1038] In each case the defendant has been a member of the executive.

[1039] *Sarkandi* (n 1035) at [50].

[1040] *R (on the application of Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687, at [50].

[1041] *XH v Secretary of State for the Home Department* [2015] EWHC 2932 (Admin) at [29].

advance a case in defence?[1042] The court's focus is on the amount of material that the judge would be able to see if the CMP was used, and therefore able to determine all the legal issues. Therefore, the case law demonstrates that whilst section 6 has not been interpreted in requiring a test of proportionality, it can be discerned from the interpretation of sections 6(4) and 6(5) that the court has in effect considered the suitability of CMPs. Hence, the courts can be taken to have applied the first step in a proportionality test.

The second step in the proportionality analysis is the test of necessity, which requires an investigation into whether there are alternative less intrusive means of achieving the intended purpose. In this regard, there are certain aspects of the court's reasoning to date which can be welcomed. For example, it has stated that it 'cannot be in the interests of the fair and effective administration of justice in the proceedings to make a section 6 declaration and thereby open the gateway to a closed material procedure unless it is necessary to do so'.[1043] In this respect, the court has considered that it won't be necessary if there are 'satisfactory alternatives' to a CMP available.[1044] It would appear from this that Tomkins's assertion that the 'last resort' amendment was not completely lost in the legislation. In terms of ECHR standards of fairness, this language of the domestic courts is likely to be welcomed, given that the test of necessity is frequently used by the court where measures amount to interferences with Convention rights.

The court is yet to decline to make a declaration to order the use of a CMP under section 6,[1045] and has rejected submissions that a PII certificate would be a more appropriate mechanism.[1046] In *XH* the court stated that the starting point is the Home Secretary's position that the sensitive material cannot be disclosed; PII would prevent consideration of the material in the proceeding and this material is what the court requires to resolve

[1042] *CF* (n 1032) at [43]; *McGartland* (n 1034) at [5]; *Sarkandi* (n 1035) at [63]; *XH* (n 1041) at [19].

[1043] *Sarkandi* (n 1035) at [61].

[1044] Ibid. also *CF* (n 1032).

[1045] Ministry of Justice, *Report on use of closed material procedure (from 25 June 2013 to 24 June 2014)* (July 2014); Ministry of Justice, *Report on use of closed material procedure (from 25 June 2014 to 24 June 2015)* (October 2015).

[1046] *CF* (n 1032) at [45]; *Sarkandi* (n 1036) at [34]; *XH* (n 1041) at [27].

the legal issues.[1047] These decisions are understood given the purpose of the CMP, and the court's focus on the amount of sensitive material in its examination of its relevance, regarding the suitability of the measure. Therefore, it is argued here that at the preliminary section 6 hearing, the operation of public interest immunity as an exclusionary mechanism is likely to always preclude its consideration as an appropriate alternative to a CMP.

The apparent application of a necessity test, which involves considering satisfactory alternatives, is to be welcomed. Nevertheless, it is argued here that the wording of section 6(7) may also inhibit the decision that public interest immunity would be an appropriate alternative under the JSA, in such a way that diminishes the judicial control of the procedure required at stage 4 in the decision-making process. Section 6(7) provides that the court must be 'satisfied' that before making the application the Secretary of State has 'considered' whether to make a claim for public interest immunity in relation to the sensitive material. It is argued here that whilst this drafting does not preclude judicial scrutiny, it does not encourage the independent scrutiny of the executive's assessment of the type envisaged in discussion in Section 2.2. It gives the appearance of deference to the opinion of the executive, which is compounded by the fact that the court does not view all the closed material at this stage in the proceedings. This is unsatisfactory. It is argued here that section 6(7) should be removed, and whether PII is a satisfactory alternative should be considered as part of the proportionality assessment in the test for necessity at stage 4. This should provide for the judicial scrutiny, and leave no scope for mere judicial oversight of the executive's decision regarding the impact of non-disclosure on the proceedings which currently exists as a result of section 6(7).

The final step in the proportionality analysis is proportionality in the narrow sense, which is the balancing requirement. This part of stage 4 in the decision-making process requires the court to weigh up the competing interests at stake in the proceedings. Additionally, the contention here is that in this final step the court should consider whether any detriment caused to the individual, or to the public confidence in the administration of justice, is counterbalanced by safeguards. It is this final step in the proportionality test at stage 4 that the legislation, as interpreted by the court, does not

[1047] *XH* (n 1041) at [16].

adequately address. Chapter 3 illustrated the sheer resistance to the insertion of judicial balancing by the government during the Act's passage through parliament.[1048] The result was the insertion of section 6(5), which provides that the use of a CMP must be 'in the interests of the fair and effective administration of justice'. The discussion has already demonstrated that the courts have focused on the amount of sensitive material and whether without it, the court would not be able to determine the legal issues in its interpretation of 'fair and effective'. Whilst this consideration is applicable to the suitability aspect of the assessment, it is insufficient to adequately weigh the competing interests at the final step in the proportionality assessment. In terms of taking into consideration the competing interests, the court's interpretation of 'fair and effective' appears to reflect the 'ill-informed' debate surrounding judicial balancing in the Commons. On the question of fairness, in *CF v The Security Service* Irwin J claimed to be 'convinced' that the sensitive material was such that 'no such court could fairly try the case' without it.[1049] He referred to the fact that 'a court which remained in ignorance of it would operate in the dark'; and that 'in the absence of disclosure, one side would win and the other lose by default.'[1050] These factors were decisive in his decision to make the declaration to use the CMP under section 6.

These statements do not give adequate consideration to the impact that untested evidence has on the fair and effective administration of justice, and is at odds with the courts previous judgments. In the Supreme Court's judgment in *Al Rawi*, Lord Kerr explicitly rejected the government's submission that placing all relevant material before a judge is always preferable to withholding potentially 'pivotal evidence'.[1051] He stated that:

> The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.[1052]

[1048] Chapter 3, section 3.3.3.2.

[1049] *CF* (n 1032) at [43].

[1050] Ibid.

[1051] *Al Rawi v Security Service and others* [2011] UKSC 34, at [93].

[1052] Ibid.

This is not to say that the courts who have heard cases under section 6 of the JSA have disregarded completely the principles of open justice. In *McCafferty v Secretary of State for Northern Ireland*, the court did state that account should be taken of the 'public interests in play in relation to open justice and upholding the principles of natural justice.'[1053] Nevertheless, this does not appear to permit a situation where the interests of open administration of justice could outweigh the interests of national security and prevent a court from ordering a CMP in the circumstances. In *McCafferty* the court stated that in the Justice and Security Act Parliament has stipulated how 'the balance is to be struck between the competing interests of open justice and natural justice on the one hand and the protection of national security on the other'.[1054] This reasoning does not fit within this framework. This balance of the competing interests is a function of the court and should be carried out by the court in a proportionality analysis.

In summary, stage 4 involves a proportionality assessment. The first step is the suitability of the measure, which would involve examining the relevance of the sensitive material. In this regard, the court's current interpretation of section 6 fits within this part of the framework. The second step is the test of necessity, which entails an investigation as to less restrictive alternative measures. The courts in section 6 proceedings have stated that a necessity test applies which involves looking at satisfactory alternatives. However, this chapter argues that the court's interpretation of the Act to date has not complied with the final step in the proportionality assessment, namely the weighing of the competing interests. The reasoning of the courts evidences a disregard for the principle of open justice, and instead focuses on the interests of the parties in relation to the volume of sensitive material. It is argued here that this position is unsatisfactory. Proportionality in itself does not provide a more rigorous decision-making process,[1055] it is still up to the court to consider all the competing interests at play during the proceedings. The dangers of the current approach are set out concisely by Lord Brown in his judgment in *Al Rawi*:

> The rule of law and the administration of justice concern more, much more, than just the interests of the parties to litigation. The public too has a vital interest in the conduct of proceedings. Open justice is a constitutional

[1053] *McCafferty* (n 1034) at [24].

[1054] Ibid.

[1055] Masterman (n 929) 70.

> principle of the highest importance. It cannot be sacrificed merely on the say so of the parties.[1056]

5.3.5. Stage 5

Finally, the last decision, which is to be made by the Government, is whether or not to pursue the action. If the court has made the decision that they cannot permit the use of the closed material procedure the government may still be of the opinion that alternative means are not suitable. Stage 5 reinforces that the executive is able to retain the power to assess the risk to national security, and choose the appropriate means to address the acclaimed threat. However, this assessment must be made to standards which will stand the independent scrutiny of the court. Then finally if the court orders that a CMP is not proportionate, the government retains the power to protect what it considers to be sensitive material that cannot be disclosed. The effect being, that the court has not placed national security at risk.

5.4. Once the declaration has been made

The court in section 6 proceedings has emphasised that this is the 'gateway' to a CMP.[1057] This justifies their lack of consideration of all the closed material in making the section 6 declaration. In addition, in the section 6 proceedings the court has declined to rule on whether they should require the executive to order a summary of the closed material, or if *A*-type disclosure is required.[1058] The court states that these are questions that will be dealt with under section 8 of the Act, once the section 6 declaration has been made and the full disclosure exercise is conducted with the assistance of the special advocates.[1059] Moreover, the court stresses that section 7 requires the court to keep the proceedings under review and the power to revoke the declaration if the CMP is no longer 'in the interests of the fair and effective administration of justice.' The provisions to keep the declaration under review are to be welcomed, and provide an additional layer of protection for the non-State party. Nevertheless, if the courts attributed meaning to 'fair and effective' does not appear to be adequate at the initial stage, this then affects the value of the safeguards in section 7.

[1056] *Al Rawi* (n 1051) at [84].

[1057] *XH* (n 1041) at [29]; *Sarkandi* (n 1035) at [61]; *McGartland* (n 1034).

[1058] *XH* (n 1041) at [31]

[1059] *McGartland* (n 1034) at[48].

It is contended here that once the use of a CMP has been triggered, the court's discretion that the critics fought hard to secure in section 6 is diminished. At this stage, the significance of the resistance of the Act's resistance of judicial balancing has the most detrimental effect. Once a section 6 declaration has been made, each piece of material is considered. This is where the special advocate's disclosure function comes into play. However, the wording of section 8 is such as to remove judicial discretion over the choice of judicial procedure.[1060] Section 8 states that 'the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to national security'. The effect of this is that at this stage the court loses its power to order disclosure if it is required in the interests of the open or natural administration of justice.[1061] The effect of the lack of judicial balancing in relation to the treatment of each piece of material is increased secrecy, this could have potentially grave consequences. It is a worthy assertion that 'once a court orders a closed material procedure, the curtain of secrecy will descend on the proceedings.'[1062]

It is also significant that the wording of the provision makes reference to the effects of national security, but not the fair administration of justice. This appears at odds with the way we view CMPs, the starting point of which should be fairness because CMPs interfere with our civil rights and therefore must comply with Article 6(1).

5.5. Conclusion

This Chapter illustrates the ECtHR's emphasis on the importance of judicial independence, from the executive. The case law demonstrates a need to separate judicial and administrative functions in order to achieve this. This can include the independence of judicial decision-making powers. In this regard, the ECtHR may find the requirement of independence is not met if the executive retains the power to make a judicial decision, or if the court defers to the executive's opinion on a legal question. One of the underlying rationales in the application of the requirements of independence and

[1060] Tom Hickman and Adam Tomkins, 'National Security Law and the Creep of Secrecy: A Transalantic Tale' Christopher McCrudden, Liora Lazarus and Nigel Bowles *Reasoning Rights: Comparative Judicial Engagement* (Hart, 2014) Tomkins and Hickman in Reasoning Rights, Hickman (n 1015); Kelman (n 1020) 269.

[1061] Hickman and Tomkins (n 1060) 135-159, 157.

[1062] Ibid, 159.

impartiality is maintaining public confidence in the administration of justice. These ECHR standards provide a basis for examining the judicial decision-making powers in Part 2 of the JSA. This Chapter has focused on the initial decision to order the use of a CMP in a particular case.

The Chapter illustrates how the debate during the JSA's parliamentary passage became polarised. This was partly due to the categorical assertions advanced by both the critics and the government in relation to the appropriate limits of the powers of the court and the executive in relation to the assessment. This was unhelpful given the complex nature of the decision-making process.

It is submitted here that, whilst section 6 may be taken to vest the appropriate decision-making power with the court, judicial control over the procedure is then removed once the declaration has been made. The overall effect of both sections 6 and 7 is to give an appearance of judicial decision-making powers, which in practice are illusory rather than meaningful. This would be at odds with the ECtHR's emphasis that Convention rights must be 'practical and effective'.[1063] Whilst this may not be enough to demonstrate to the ECtHR that the court is sufficiently restrained by the executive's discretion to amount to a violation of the Article 6(1) requirement of independence, it certainly does not do much to maintain public confidence in the administration of justice. A principle of which is also given great importance by the ECtHR. An additional effect is that the provisions do not ensure that CMPs are used in circumstances which are strictly necessary, which could raise issues with the assessment of whether interferences with Article 6(1) are justified in relation to the guarantees which are not absolute.

Even if section 6 of the JSA withstands a challenge to Strasbourg, it is argued here that at a domestic level States should be using ECHR standards as minimum standards, of which domestic laws should use as a starting point to ensure protection of fundamental rights and freedoms. Consequently, States should be affording a higher level of protection. This is increasingly important given that the proportionality analysis applied by the ECtHR is often 'compounded' by the margin of appreciation. Which is likely to be wide in the context of national security.[1064] Therefore, it is imperative that a high

[1063]Chapter 4, section 4.5.2.

[1064] Chapter 4, section 4.6.3.

standard of review is applied at domestic level. It is of vital importance that the initial decision to order the use of a CMP in each case is subjected to a rigorous decision-making process, in line with the five-stage decision-making framework presented in Section 5.3.

Chapter 6 The Article 6(1) Requirements of Publicity

Article 6(1), enshrines the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. In addition, it requires that the judgment be pronounced publicly. These guarantees apply to both civil and criminal proceedings and are explicitly guaranteed by the text of Article 6(1). This chapter examines the use of CMPs provided for by Part 2 of the JSA, in light of these publicity requirements. This is necessary in order to reach the aim of this thesis which is to demonstrate that CMPs within the scheme of the JSA are potentially incompatible with Article 6(1). At first sight CMPs appear to raise issues of compatibility with both aspects of the requirement of publicity, given that they are neither conducted in public, nor are the judgments pronounced in public. In order to establish the standard of fairness that can be applied, this section illustrates the rationale underpinning the requirements; the meaning of both aspects of publicity as applied by the ECtHR; and, of particular importance, the circumstances in which the requirements can be lawfully restricted. Therefore, this chapter also contributes to the analysis and critique of the ECtHR's Article 6(1) jurisprudence.

The requirement of publicity is considered by the ECtHR to be a, 'fundamental principle enshrined in Article 6, thus clearly regarded as a critical part of the notion of a fair trial.[1065] The ECtHR has stressed the, 'intrinsic link between the right to a "public" and the right to a "fair" hearing.'[1066] Publicity contributes to achieving the right to a fair trial primarily by, 'rendering the administration of justice transparent.'[1067] Transparency is a key element of the rule of law which is of importance to the interpretation of the Convention as it is referred to in the preamble.[1068] The right to a fair trial is also a core element of the rule of law, and therefore the ECtHR's pronouncements of the

[1065] *Håkansson and Sturesson v Sweden* (App 11855/85) (1991) 13 EHRR 1, para 66; *Diennet v* France (App 25/1994) (1996) 21 EHRR 554, para 33; *Werner v Austria* (App 21835/93) (1998) 26 EHRR 310, para 45.

[1066] *Schadler-Eberle v Liechtenstein* (App 56422/09) (ECtHR 18th July 2013) para 83; *Jussila v Finland* (Grand Chamber) (App 73053/01) (2007) 45 EHRR 39, para 42 and 48.

[1067] *Diennet* (n 1065), para 33; *Werner* (n 1065), para 45; *B and P v UK* (App 36337/97, 35974/97) (ECtHR 24th April 2001), para 36; *Nevskaya v Russia* (App 24273/04) (ECtHR 11th October 2011), para 46.

[1068] Preamble to the European Convention on Human Rights.

fundamental importance of the public nature of proceedings are unsurprising. One of its key overarching objectives is to protect individuals 'against the administration of justice in secret with no public scrutiny'.[1069] In this respect 'it is also one of the means whereby confidence in the courts can be maintained.'[1070]

The use of CMPs by their very nature do not appear to conform with these principles, acclaimed by the ECtHR, to be of fundamental importance to the right to a fair trial. Which is in turn a core aspect of the rule of law, vital to a democratic society. In CMPs the 'administration of justice' is arguably in 'secret'. If the individual and their legal representation, the press, and the public are excluded, how can public scrutiny of the judiciary be ensured and confidence in the claimed administration of justice maintained? Hence, the need to examine the compatibility of the use of CMPs under Part 2 of the JSA, with the Article 6(1) requirements of publicity is important. To begin, the subsequent section proceeds to illustrate the meaning of both aspects of publicity.

6.1. The right to a public hearing

The right to a public hearing is given particular importance in the criminal context[1071]; and any difference in the application of the publicity requirement between civil and criminal proceedings will be taken into consideration in the examination into the compatibility of closed material proceedings. The right to a public *hearing* suggests that an oral hearing must be held, even that it can be considered to 'presuppose that an oral hearing is held.'[1072] Nevertheless, the ECtHR appears to distinguish between two dimensions: a hearing in public, and an oral hearing, yet the relationship between the right to a public hearing and the right to an oral hearing is not entirely clear.[1073]

[1069] *Werner v Austria* (n 1065), para 45. *Fejde v Sweden* (App 12631/87) (1994) 17 EHRR 14, para 28; *Tierce v San Marino* (App 24954/94 24971/94 24972/94) (2002) 34 EHRR 25, para 92.

[1070] Ibid.

[1071] *Jussila* (n 1066).

[1072] Ola Johan Settem, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency* (Springer: 2016) 266.

[1073] See: Hanneke Senden, *Interpretation of Fundamental Rights in a Multi-level Legal System: an Analysis of the ECtHR and CJEU* (Cambride: Intersentia: 2011) section 7.1.2. A detailed discussion of this point in beyond the boundaries of this thesis – it doesn't contribute to the

It has stated that the right to a public hearing *may* entail an entitlement to an oral hearing.[1074] The oral hearing dimension of the right to a public hearing provides the parties an opportunity to address the court and present evidence orally. In this respect, Setten stresses the value of an oral hearing to a democratic society of contributing 'to proximity between those who are able to make a decision and those who are affected by it'.[1075] On this point in cases heard under the JSA, there will be open and closed sessions. In the open sessions, it is expected that the individual would be able to address the court. It is not clear from the ECtHR's case law in this regard whether the fact that the individual at some point could make oral representations could suffice.

An additional hurdle for those challenging the use of CMPs under Part 2 of the JSA for non-compliance with the right to an oral hearing is that, 'the right to appear in person in a civil case is not as such guaranteed by the Convention'.[1076] Instead it may be 'implied' in particular circumstances, 'in particular where the court needs to gain a personal impression of the parties'.[1077]

In addition, the ECtHR has stated that the obligation to hold a hearing is not absolute.[1078] It has affirmed that:

> There may be proceedings in which an oral hearing may not be required: for example, where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials.[1079]

The ECtHR emphasises the necessity for an oral hearing where the proceedings are before a court of first and only instance.[1080] Utilisation of the ECtHR's holistic approach

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present study of the examination of CMPs – because arguably the individual neither has an oral or public hearing.

[1074] *Fredin v Sweden* (No.1) (App 12033/86) (ECtHR, 18 February 1991); *Jussila* (n 1066), para 40.

[1075] Settem (n 1072) 266.

[1076] *Sandor Lajos v Hungary* (App 26958/05) (ECtHR 29th September 2009); *Helmers v. Sweden* (App 11826/85) (1993) 15 EHRR 285, para 38; *Sporer v Austria* (App 35637/03) (2015) 60 EHRR 22, para 44.

[1077] Ibid.

[1078] *Håkansson and Sturesson* (n 1065) para 66

[1079] *Jussila* (n 1066) para 41.

[1080] *Miller v Sweden* (App 55853/00) (2006) 42 EHRR 51, para 29.

to interpreting the Convention is particularly explicit with regard to the right to a public hearing. An examination of the case law demonstrates that the ECtHR consistently views the entirety of the proceedings in making its final decision. For example, where an oral hearing has been held at First Instance, it is not always considered necessary in the appellate courts.[1081] Even in criminal proceedings whilst the general principle is that an applicant should be entitled to be present at a hearing at First Instance, their personal attendance is of less significance at appellate level. Similarly, in certain circumstances the failure to hold a public hearing at First Instance may be remedied by holding a public hearing on appeal, providing that the court considers the merits of the case; and is regarded as a judicial body with full jurisdiction.[1082]

Nevertheless, that there has been an oral hearing at First Instance will not always necessarily render it unnecessary on appeal. For example, in *Sigurthor Arnarsson v Iceland,* the ECtHR held that the Supreme Court's decision to convict the applicant without hearing oral evidence from him or other witnesses violated Article 6(1).[1083] Whilst there was a full hearing at First Instance whereby the applicant in person and witnesses were heard,[1084] the ECtHR reasoned that the issues before the Supreme Court were primarily factual.[1085] With this in mind, it was not considered that the issues could be determined without a 'direct assessment' of the evidence given by the applicant and certain witnesses in person.[1086]

[1081] *Axen v Germany* (App 8273/78) (1984) 6 EHRR 195; *Melin v France* (App 12914/87) (1994) 17 EHRR 1; *JJ v Netherlands* (App 21351/93) (1999) 28 EHRR 168 , para 39; *Sigurthor Arnarsson v Iceland* (App 44671/98) ((2004)39 EHRR 20.

[1082] *Albert and Le Compte v Belgium* (A/58) (App 7299/75) (1983) 5 EHRR 533, para 29; *Diennet* (n 1065) para 34. See also, *Milatova v Czech Republic* (App 61811/00) (2007*)* 45 EHRR 18, the lack of public hearing before the constitutional court had been compensated by public hearings held before regional court when merits of the claims was determined.

[1083] *Sigurther Arnarsson* (n 1081), para 38.

[1084] Ibid, para 31.

[1085] Ibid, para 34. Note that the mere fact an appeal court had the power to examine both points of law and fact does not necessarily automatically mean that Article 6(1) requires the right to a public hearing or right to appear in person in such appeal proceedings, see: *Botten v Norway* (App 16206/90) (2001) 32 EHRR 3, para 39.

[1086] *Sigurther Arnarsson* (n 1081), para 36. See also *Fredin v Sweden (No. 2)* (App 18928/91) (ECtHR 23rd February 1994) paras 21-22.

It has also stated that the right to a public hearing entails the right to an oral hearing unless there are, 'exceptional circumstances that justify dispensing with such a hearing,'[1087] which is in conformity with its pronouncements on the fundamental importance of the requirement. Whether the circumstances are considered 'exceptional' is dependent on the nature of the issues to be decided by the national courts. The frequency of such situations is not of relevance.[1088] For example, the ECtHR generally accepts that disputes concerning social security benefits do not require an entitlement to an oral hearing. This is due to the State's need to have regard to the demands of efficiency and economy.[1089] The decisive factor is not that it is common practice for the State not to hold an oral hearing in proceedings concerning social security benefits. Therefore, if a case reached the ECtHR questioning the compatibility of the use of closed material proceedings, as provided for Part 2 of the JSA, with the right to a public hearing; the decisive factor should not be the common practice of member states.

The social security cases also provide an example of what the ECtHR accepts as justifying dispensing with an oral hearing. It will have regard to the national authorities' need to take into consideration issues of efficiency and economy. On the point of efficiency, this illustrates a method of interpretation by the ECtHR which involves reading rights in conformity with each other. Thus, the right to a public hearing must be read in conformity with the right for proceedings to be heard in a reasonable time.[1090]

Whilst oral and public hearings are the most effective way to achieve public scrutiny, this objective could also be achieved, in part, 'if proceedings are conducted entirely in writing, by letting the case file or parts of it be available to the public.'[1091]In terms of the meaning of 'public hearing', the mere fact that there was not a member of the public present at the hearing will not automatically violate the right.[1092] However, in harmony

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[1087] *Mitkova v "The Former Yugoslav Republic of Macedonia"* (App 48386/09) (ECtHR 15th October 2015) para 56; *Eriksson v Sweden* (App 60437/08) (ECtHR 12th April 2012) para 64; *Fischer v Austria* (App 16922/90) (1995) 20 EHRR 349, para 44.

[1088] *Miller* (n 1080) para 29; *Jussila* (n 1066) para 42.

[1089] Ibid.

[1090] *Boddaert v. Belgium* (App 12919/87) (1992) 16 EHRR 242, para. 39; *Schuler-Zgraggen v Switzerland* (App 14518/89) (1993) 16 EHRR 405**,** para 58**;** *Jussila* (n 1066), para 42.

[1091] Settem (n 1072) 266.

[1092] *Galstyan v Armenia* (App 26986/03) (2010) 50 EHRR 25, para 81.

with the principle of effectiveness the national court is not permitted to hold, 'formally public' but inaccessible hearings, for example due to their time or location.[1093] In *Hummatov v Azerbaijan*,[1094] the hearing which took place in a heightened security environment, was held not to be of sufficient public character for the purpose of Article 6(1). Although the Government did not formally exclude the public from the hearings that took place, there was no evidence that the time, date or location of the hearings were communicated to the press or the public.

When examining whether a lack of public hearing will amount to a violation of Article 6(1), the ECtHR has also asserted that such a hearing may be dispensed with if an applicant 'unequivocally waives' his or her right.[1095] A waiver can be done 'explicitly or tacitly'.[1096] The Convention organs have found an applicant to have waived their right to a public hearing in circumstances where the applicant has not requested one, and due to the circumstances it could be said that they were expected to.[1097] In addition, if the applicant is taken to have waived their right to a public hearing at First Instance, and they then go on to request one on appeal and this request is denied. The Court does not consider that a public hearing is required where the appeal court is called upon to examine the same questions of law as the first-instance court.[1098]

6.2. Public pronouncement of judgment

The second aspect of the publicity requirement is that the 'judgment shall be pronounced publicly'. The ECtHR asserts that 'the principles governing the holding of hearings in public also apply to the public delivery of judgments'.[1099] The wording suggests that the judgments should be read aloud.[1100] However, the ECtHR claims that

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[1093] Ibid.

[1094] *Hummatov v Azerbaijan* (App 9852/03, 13413/04) (2009) 49 EHRR 36.

[1095] *Döry v Sweden* (App 28394/95) (ECtHR 20th November 2002) para 37.

[1096] Ibid.

[1097] *Alatulkkila and others v Finland* (App 35538/96) (2006) 43 EHRR 34, para 53; Håkansson and Sturesson (n 1065), para 66.

[1098] *Juricic v Croatia* (App 58222/09) (ECtHR 26th July 2011) para 92; see also *Miller* (n 1080) para 30.

[1099] *Werner* (n 1065), para 54.

[1100] *Pretto v Italy* (App 7984/77) (1984) 6 EHRR 182, para 25; *Axen v Germany* (App 8273/78) (1984) 6 EHRR 195, para 30; *Sutter v Switzerland* (App 8209/78) (1984) 6 EHRR 272, para 31.

the requirement should not be read too literally as to do so would be 'unnecessary for achieving the aims of Article 6'.[1101] The ECtHR has taken into account that:

> many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public.[1102]

Lemmens notes that the interesting aspect of this reasoning is that in this case the 'object and purpose' of Article 6(1) served as a 'justification for setting aside an explicit requirement.'[1103]

In each case the mode of publicity given to the judgment, 'must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6(1)'.[1104] For example, in *Pretto v Italy* it was reasoned that depositing the judgment in the court registry therefore making it available for all, fulfilled the object of the publicity requirement of Article 6(1), namely to ensure public scrutiny of the judiciary.[1105] On the contrary, in *Werner v Austria* the ECtHR confirmed that simply depositing a judgment in a court registry will not suffice if the registry does not comply with the publicity requirement.[1106]

Depending on the breadth of the ECtHR's flexibility in its application of the required mode of publication for the judgment, it is not inconceivable that the delivery of the open judgment in cases heard in a CMP would satisfy the requirement. This would depend on the detail of reasoning. Nevertheless, it is argued here that the detail disclosed in the open judgments to date should not be deemed to satisfy the requirement, especially in light of the desire for transparency. In *CF v The Security Service*,[1107] the claimants' lost their case. The judge, however, claimed that he could not

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[1101] *Sutter*, para 34. See also *B and P* (n 1067) para 48.

[1102] Pretto (n37)

[1103] Paul Lemmons, 'The Right to a Fair Trial and its Multiple Manifestations' in Brems and Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013) 307.

[1104] *Werner* (n 1065) para 54; *B and P* (n 1067).

[1105] *Pretto* (n 1100) para 27; see also *B and P v UK* (n 1067) para 47; *Ernst v Belgium* (App 33400/96) (2004) 39 EHRR 35

[1106] *Werner* (n 1065) para 58.

[1107] [2013] EWHC 3402 (QB)

reveal the substantive reasons without damaging national security. Therefore, those individuals are left in the dark regarding the outcome of the proceedings; as are the public.

6.3. The exceptions

The requirement to hold a public hearing is also subject to exceptions which are set out in the text of Article 6(1), this contains the provision that:

> the press or public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

An examination of the case law demonstrates that these exceptions may be applicable to both aspects of the requirement of publicity.[1108] It is worth noting the difference between the text of Article 6(1) with regard to the restricting the requirements of publicity, and the approach to restricting the qualified rights provided for by Articles 8 to 11 of the Convention. Interestingly, unlike the latter, Article 6(1) does not provide for a general test of necessity. The text merely provides that a measure may only restrict the requirements of publicity when 'strictly necessary' with regard to the last exception, namely: 'special circumstances where publicity would prejudice the interests of justice.' Brems suggests that, notwithstanding the difference in terminology with the limitation clauses in Articles 8 to 11, 'it may be assumed that it likewise includes a requirement of proportionality between the measure restricting the public character of the hearing and the aim of that measure.'[1109] Nonetheless, it would appear that the more stringent requirement of 'strict necessity' is only applicable to the interests of justice exception.[1110]

[1108] Cf. Piero Leanza and Ondrej Pridal, *The Right to a Fair Trial* (Kluwer Law International, 2014) [3.03].

[1109] Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27(1) *Human Rights Quarterly* 294, at 299.

[1110] Brems (n 1109) 299.

[1110] Ibid.

[1110] Ibid.

This section will address the interpretation and application of the exceptions. Although the most relevant exception to this thesis is national security, it is necessary to gain an understanding of the general trends in and approaches to the interpretation of all the exceptions, before focusing in particular on national security.

The legitimate aims stated in Article 6(1), are also recognised as limitations on the right to a fair trial and a public hearing by Article 14(1) of the International Covenant on Civil and Political Rights (IIPR), and Article 29 of the United Nations Universal Declaration of Human Rights (UNDHR). Nevertheless, the exceptions are broadly stated, as are the legitimate aims stated in Articles 8 to 11. In addition, the general approach of the ECtHR with regard to legitimate aims is to give States a wide margin of appreciation in the decision as to whether the restrictive measure is in pursuit of one of the legitimate aims. Consequently, this stage of the ECtHR's analysis is generally treated as something of a formality. The question is: given the fundamental importance attached to the right to a fair trial, and the lack of provision for a general test of necessity, does the ECtHR's approach differ to that taken in its interpretation and application of the qualified rights contained in Articles 8 to 11?

Fawcett has referred to this list of exceptions as 'extensive' and expressed reservations about the protection that would be given to the right to a public hearing in practice.[1111] The broadly stated exceptions present the danger that whether a restriction falls within their ambit is, relatively straightforward to satisfy. However, an examination of the case law demonstrates that the ECtHR does not always take a hands-off approach in this regard.

The public order exception is potentially too broad. Fawcett questioned whether this would merely include order in the court, or whether it was a 'vaster concept of public policy'.[1112] The case of *Campbell and Fell v UK*, demonstrates that the exception could extend beyond public order in the court room. The ECtHR accepted the government's argument regarding the public order and security difficulties that would be involved if prison disciplinary proceedings were held in public.[1113] The ECtHR concluded that to

[1111] J Fawcett, The Application of the European Convention on Human Rights (Clarendon Press, 1987) 161.

[1112] Ibid, 162.

[1113] *Campbell and Fell v UK* (App 7819/77, 7878/77) (1985) 7 EHRR 165, paras 87-88.

require that such proceedings were held in public would, 'impose a disproportionate burden on the authorities of the state'[1114]. Nevertheless, a violation of Article 6(1) was found to have occurred as the ECtHR concluded that the same reasoning could not justify dispensing with the second aspect of publicity, namely the requirement to publicly pronounce the judgment. That the ECtHR is not willing to merely accept the exception is applicable to the second aspect because it justifies measures restricting the right to a public hearing. This demonstrates the court's willingness to uphold the fundamental importance attributed to the requirement of publicity. However, it is unlikely that this reasoning could be applied by analogy to interferences justified in the interests of national security; the distinguishing feature being that in general national security considerations will apply equally to whether there is a public hearing or the judgment is made publicly available. This is due to the fact that the underlying issue is whether the sensitive information is in the public domain.

Despite the decision that the circumstances fell within the public order exception, the ECtHR has stated its recognition that security problems are a 'common feature of many criminal proceedings', and that cases whereby security concerns could justify excluding the public from a trial are 'rare.'[1115] This illustrates the ECtHR's general approach to its interpretation of Article 6(1) making its decision based on the circumstances on a case by case basis.

The cases of *Werner v Austria*,[1116] and *Diennet v France*,[1117] provide examples of where the ECtHR has held there to be a violation of Article 6(1) despite the Contracting States' submissions that the restrictive measures were justified in order to protect privacy. In *Diennet*, the ECtHR found there to be no good reason to presume that any confidential information would be mentioned and if it became apparent there was such a risk, the tribunal could then have ordered the hearing should continue in camera. In *B and P v United Kingdom*,[1118] which was a case said to fall within the need to protect the interests of juveniles, the ECtHR reaffirmed that a State could not designate an entire

[1114] Ibid, para 87.

[1115] *Riepan v Austria* (App 35115/97) (ECtHR 14th November 2000), para 34.

[1116] *Werner* (n 1065).

[1117] *Diennet* (n 1065).

[1118] *B and P* (n 1067).

class of cases as an exception to the general rule of public hearings. Although, it did note that child residence proceedings were 'prime examples' of where the press and public may be justified in order to protect the privacy of the child and parties.[1119]

6.3.1. The national security exception

The general approach of the Convention organs is to afford a wide margin of appreciation, both in the decision that the restriction is in the interests of national security, and in the application of the test of necessity. Nevertheless, the ECtHR's judgment in *Belashev v Russia*[1120] demonstrates a willingness to take a more interventionist stance. In that case, the ECtHR found that the measures restricting the applicant's right to a public hearing did not fall within the ambit of the national security exception. Most relevant to the ECtHR's conclusion was the State's inconsistent reasoning as to why holding the trial in camera was justified.[1121] Thus the ECtHR stated that is was 'not convinced national security concerns served as a basis for the decision to exclude the public.'[1122] Interestingly, the ECtHR went on to consider that the national authorities had decided to close a trial to the public 'without balancing openness with national security concerns.'[1123] It could therefore not agree with the government's submission that the mere presence of classified information in a case file automatically warranted the lack of a public hearing.[1124] The ECtHR observed the importance for a State to protect its secrets, 'but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity.'[1125]

The decision supports the ECtHR's self-pronouncements of the fundamental importance of the right to a public hearing, and the court noted the national authorities' failure to

[1119] Ibid.

[1120] *Belashev v Russia* (App 28617/03) (ECtHR 4th December 2009).

[1121] Ibid, aara 82.

[1122] Ibid.

[1123] Ibid, para 83

[1124] Ibid, para 83.

[1125] Ibid, para 83.

take any measures to counterbalance the 'detrimental effect' their decision would have on public confidence in the administration of justice.[1126]

The ECtHR's judgment in *Fazliyski v Bulgaria*[1127] is more significant for present purposes, because it illustrates the ECtHR willingness to take more interventionist stance in civil proceedings. In *Fazliyski v Bulgaria*, the issue was the lack of publicity given to the judgment. The ECtHR did not accept the national authorities' submission that this requirement could be restricted in the interests of national security.[1128] The ECtHR did not question whether the classification of the applicant's case was correct according to Bulgarian Law.[1129] This is in accordance with the principle of subsidiarity and the fact that the ECtHR is not a court of fourth instance.[1130] The issue in this case was that the judgment was not given any form of publicity for a considerable amount of time.[1131] The case also demonstrates the ECtHR's tendency to refer to the practice of other member-States in its interpretation of the Convention.[1132] In this regard, the ECtHR noted the complete concealment in *Fazlyiski* and pointed out that, 'even in indisputable national security cases, such as those relating to terrorist activities, some States had opted to classify only those parts of the judicial decisions whose disclosure would compromise national security'.[1133] On this basis the ECtHR affirmed that there were means available, 'which could accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions.'[1134] This latter part of the ECtHR's reasoning poses the question of whether the system of closed material procedures and special advocates is considered to be one of the existing 'techniques' available. In addition, it must be noted that *Fazlyiski* concerned complete concealment of a judgment, whereas the practice of proceedings

[1126] Ibid, para 84.

[1127] *Fazliyski v Bulgaria* (App 40908/05) (ECtHR 16th April 2013).

[1128] Ibid.

[1129] Ibid, para 68.

[1130] Chapter 4, Section 4.6.

[1131] *Fazliski* (n 1127)

[1132] Chapter 4, Section 4.6.

[1133] *Falzliski* (n 1127) para 69.

[1134] Ibid.

heard under the JSA is that there will be an open and a closed judgment. This issue is that the majority of the decision is often handed down in the closed judgment.

On the other hand, the ECtHR's decision in *Kennedy v UK*[1135] highlights the difficulties in the success of a claim that CMPs, as provided for by the JSA, are incompatible with the publicity requirements embedded in Article 6(1). *Kennedy*, concerned proceedings before the Investigatory Powers Tribunal (IPT) in relation to secret surveillance measures. The ECtHR accepted that the material before the IPT was 'likely to be highly sensitive'[1136] and took into consideration the IPT's duty to 'prevent the potentially harmful disclosure of sensitive information'.[1137] Once again in conformity with the subsidiary role of the ECtHR, whether the material was sensitive was not questioned by the ECtHR. The ECtHR concluded that in the circumstances, given that the terms of Article 6(1) clearly state national security concerns may justify the exclusion of the public from the proceedings, there was no violation in this regard.[1138]

The exact approach of the ECtHR in *Kennedy* to restricting the requirements of publicity is hard to decipher as compliance with the equality of arms, the limitations on oral and public hearings, and the provision of reasons were addressed together in merely a few paragraphs. The majority of the judgment centred on compliance with Article 8 given that the issue was surveillance measures. With regard to its assessment of compliance with the equality of arms, the ECtHR did address whether in the Court's view the restrictions were disproportionate or impaired the very essence of the applicant's right to a fair trial.[1139] It concluded that it did not.[1140] The reasoning on whether the limitations on oral and public hearings were compatible with Article 6(1) appeared to focus on the IPT's jurisdiction to hold hearings in private. The ECtHR emphasised that there were provisions making it clear that there was 'nothing to prevent the IPT from holding an oral hearing where it considers that such a hearing would assist

[1135] *Kennedy v UK* (App 26839/05) (2011) 52 EHRR 4.

[1136] Ibid, para 187.

[1137] Ibid, para 188

[1138] Ibid, paras 188 and 191.

[1139] Ibid, para 186.

[1140] Ibid, para 187.

its examination of the case.'[1141] This is in conformity with the ECtHR's own approach to view cases on a case by case basis depending on the circumstances. This reasoning suggests that the ECtHR will look favourably on section 7 of the JSA which provides the national court to keep the declaration to use a CMP under section 6 under review throughout the course of the proceedings. If the use of a CMP is no longer considered to be in the 'interests of the fair and effective administration of justice' the court can revoke the CMP.

It is not entirely clear whether the ECtHR applied a test of necessity and proportionality in relation to assessing the limitations on oral and public hearings. The ECtHR's reasoning on this point appears to be contained in paragraph 188 of the judgment, which makes no mention of necessity or proportionality. In contrast, in the paragraphs in which the ECtHR deals with the compatibility with equality of arms and the right to adversarial proceedings, it does make such an explicit reference. At paragraph 190, the ECtHR sums up its reasoning on the compatibility of the proceedings before the IPT and stated that it did consider the, 'restrictions on the applicant's rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's Article 6 rights.'[1142] It is argued here that this lack of clear application of the ECtHR's tools of interpretation in its assessment of restrictions on the Convention rights is unhelpful. It is difficult to establish a coherent test that will be applied to the national security exception to the Article 6(1) requirements of publicity

The use of CMPs under Part 2 of the JSA is closer to the situation in *Kennedy*, than in *Belashev* or *Fazliyski*. There will not be an inconsistency in the UK's reasoning for limiting the publicity requirements as the use of a CMP is only permitted if the section 6 statutory requirements are satisfied. In accordance with the principle of subsidiarity, the fourth instance doctrine, and a wide margin of appreciation; the ECtHR will not question the classification of such material and the danger it presents to national security. The reasoning in *Kennedy* leaves unclear whether a test of necessity or engagement in a proportionality analysis will consistently be applied. The case does illustrate the context-specific approach to interpretation of the ECtHR, therefore making

[1141] Ibid, para 188.

[1142] Ibid, para 190.

it difficult to come to a definitive answer on compatibility. Whether the 'character of the circumstances justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court'.[1143]

6.4. Concluding observations

In conclusion, the ECtHR has made strong pronouncements regarding the fundamental importance of the requirements of public nature of proceedings as a critical part of the right to a fair trial. The underlying rationales for the requirement is to protect individuals from the administration of justice in secret, by rendering the proceedings transparent. This in turn adheres to the rule of law. Nonetheless the requirements may be subjected to broadly worded exceptions; and the ECtHR also uses other interpretative techniques to reduce the scope of the requirement. In relation to this later point the ECtHR's holistic approach to interpretation is particularly evident in its interpretation of the requirements of publicity. This is illustrated by the ECtHR's approach to the right to oral hearings as an aspect of 'public' hearing is less likely to be considered a necessity at the appeal stage if the individual received an oral hearing at First Instance. Of particular interest was the court's use of teleological interpretation, in relation to the second aspect of publicity, to widen the meaning of a public pronouncement of judgment. The effect of this was to restrict an explicit requirement of the text of Article 6(1). The argument here is not that the decisions of the ECtHR in these respects are wrong. They are interesting from the perspective of illustrating the interplay between the different principles of interpretation. The ECtHR appears to open its judgments reiterating the principles that would contribute to enhancing the level of rights protections. Then, in some cases, goes on to employ different interpretative techniques which have the effect of restricting the scope of the requirements.

The use of CMPs would fall within the national security exception, providing the ECtHR accepts that the CMP does not have the required public characteristics to satisfy Article 6(1), This chapter has demonstrated the difficulty to discern from the case law a coherently consistent approach in applying the national security exception. This is particularly regarding the application of a test of necessity. Therefore, a conclusion stating the definitive outcome of a challenge to CMPs under the JSA is not possible.

[1143] Ibid, para 188.

Nevertheless, there are some key points that do emerge from the case law that help to build a picture of what the ECtHR will take into consideration before finding a violation of Article 6(1). The ECtHR has stressed the importance of the reasons that the member-States have provided for interferences with the publicity requirements, and the decision-making process that was undertaken before concealing the public from the proceedings. This reinforces the conclusions reached in Chapter 5, which is the importance of the initial decision making procedure to order the use of a CMP in each case. It is vital that a rigorous procedure is carried out and the control of the judicial procedure is retained by the court. This is important in terms of the commitment to the rule of law by increasing transparency; and, maintaining public confidence in the administration of justice.

Chapter 7 The Role of Special Advocates and the Right to Access a Court

Special advocates and the requirement of *A*-type disclosure can provide important tools to mitigate the perceived unfairness of CMPs. This is recognised by the ECtHR, and affirmed in the leading judgment of the Grand Chamber in *A v United Kingdom*.[1144] Nevertheless, difficulties persist regarding both limitations on special advocates which can prohibit their ability to carry out their role effectively, and in the application and operation of *A*-type disclosure. This thesis demonstrates the potential for the use of CMPs within the scheme of Part 2 of the JSA to be held incompatible with Article 6 ECHR. The use of special advocates are a central feature of CMPs across all contexts, and this thesis contends that the provision of *A*-type disclosure is key to their effectiveness. It is necessary to address the ECtHR's current approach in its assessment of their use and compatibility with the Convention; and, to demonstrate the importance of the requirement of *A*-type disclosure. This chapter begins by carrying out such an analysis. In doing so, it suggests that there is a danger that the limitations on special advocates can potentially escape intense scrutiny, which in turn can affect the compatibility of the system with the Convention. Therefore, Chapter 7 will also advance an alternative framework by which to examine the use of special advocates and *A*-type disclosure. The basis of this is a holistic approach to assessing the system of CMPs, which includes the shortcomings of the special advocate system, and the impact on the fairness of the proceedings in accordance with ECHR standards. In this manner, it is argued that in certain circumstances it may be deemed that the special advocates' ability to carry out their functions are inhibited in such a way that this should be considered as part of the factual matrix that constitutes an interference with Article 6(1). This is in contrast to the current approach which considers special advocates as a mechanism, that has the potential to offset the negative impact of the use of a CMP. This is presented with the view to attracting a higher level of scrutiny at an ECHR level, and an increase in the likelihood of a successful challenge to Part 2 of the JSA at Strasbourg.

The conventional approach of the ECtHR in its examination of special advocates reflects the portrayal of special advocates as a safeguard, capable of minimising the negative impact of CMPs. Strasbourg's examination has so far been in a proportionality

[1144] (App 3455/05) (2009) 49 EHRR 29.

analysis within the framework of the requirements of the principle of equality of arms, and the right to adversarial proceedings. Therefore, within the ECtHR's two-stage approach to analysis of alleged violations of qualified Convention rights, special advocates have only been assessed at the second stage. Namely, whether the interference with the ECHR is justifiable. In such an analysis, special advocates have been viewed as positive mechanism capable of ensuring the system is proportionate. In *A*, the Grand Chamber recognised the difficulties that special advocates had in representing the interests of the individual excluded from a CMP.[1145] However, some of the subsequent case law evidences what appears to be a lower level of scrutiny of these difficulties. This chapter will demonstrate this, and proposes that the correct reading of the judgement of the Grand Chamber in *A* is not always adhered to.

This thesis identifies that with regard to the ECtHR's use of its interpretative principles in the case law reviewed, the enhancing principles appear to be more prominent at the first stage, and the deferential principles are more prominent at the second stage of its analysis. In this sense, the ECtHR's approach to reconciling the tensions between its interpretative principles is mechanistic. Consequently, if the challenge brought to Strasbourg is within one of the contexts which generally attracts the more deferential standard of review, there lies the danger that this will trump the principles that enhance the level of rights protection. Therefore, the mechanistic approach to reconciling the tensions can have a significant impact of the outcome of a case. This results in indeterminacy. This poses particular difficulties in the context of CMPs because of the ECtHR's tendency to use the deferential interpretative principles in the context of national security, and the admissibility of evidence. Consequently, this thesis seeks a solution to this danger and contends that a more holistic approach can be taken to the analysis of the operation of CMPs, which includes the central role played by special advocates. Chapter 7 and 8 focus predominately on the role of special advocates. Their contention is that the limitations they face on their ability to carry out this role effectively could come under a higher level of scrutiny if these were examined at the first stage of the ECtHR's assessment. Hence, in the examination of whether there exists an interference, where the enhancing interpretative principles are more prominent. Therefore, it will be argued that in certain circumstances the negative impact of a CMP,

[1145] *A*, para 199. Reiterated by the ECtHR in, *Othman v United Kingdom* (App 8139/09) (2012) 55 EHRR 1, para 213.

coupled with limitations faced by special advocates, overall can interfere with the ECHR. It is not disputed that special advocates play a vital role in CMPs and are a mitigating tool with regard to the perceived unfairness. Nonetheless, the overall effect still falls short of the acceptable standard of fairness that should be sought to be achieved; and, it is this overall effect that should be the focus of an analysis of the system and rights protection.

This chapter will specifically assess the potential for CMPs as provided for by Part 2 of the JSA to amount to a violation of the right to access a court, a guarantee which has been held by the ECtHR as implied in Article 6(1). The focus is the role of special advocates, and this will include the provision of *A*-type disclosure. Special advocates are examined here in light of ECHR standards of legal assistance. Whilst the denial of legal assistance in civil proceedings will not in itself amount to a violation, the ECtHR jurisprudence demonstrates that in certain circumstances effective legal assistance will be deemed as an aspect of the right to access a court. The individual's legal representation is excluded from the CMP, thus leaving the individual with the special advocate as the only form of legal assistance at that point. Therefore, this chapter will proceed to examine special advocates as the individual's legal assistance; and, assess the effectiveness of assistance they provide in accordance with ECHR standards. Consequently, an assessment can be made as to whether the overall effect of the CMP and the restrictions placed on the special advocates' ability to carry out their role, could in itself constitute an interference with the right to effective legal assistance as an aspect of the right to access a court.

The limitations on the ability of special advocates to carry out their functions can be classified into two groups. The first group predominately relate to the relationship between the special advocate and the individual, and the effect of this on the ability for the individual to give the special advocate effective instructions. In this sense, the requirement of *A*-type disclosure is also of relevance given its correlation with providing special advocates' with effective instructions. This chapter will illustrate that the ECtHR's body of case law on effective legal assistance is capable of covering the issues within the first group of limitations. Therefore, they are addressed here in chapter 7. The second group of limitations relate to the special advocates ability to participate in the proceedings. The issues with participation are generally a consequence of the first group of issues, as they can be the result of lack of effective instructions that the special

advocate receives. This second group are caught within the framework of the equality of arms and adversarial proceedings, the essence of both principles being that parties are able to participate as far as possible in the proceedings. These will be examined in further detail in Chapter 8.

The right to access a court is primarily concerned with the initiation of proceedings. The current case law demonstrating the link with the right of access and effective legal assistance has concerned issues that have occurred at the preliminary stages, as opposed to during the course of the proceedings. The most widely acclaimed understanding of the restrictions on special advocates is that the consequence is that they are unable to receive 'effective instructions' from the individual. In this sense the application of *A*-type disclosure is fundamental. There lies the argument that it is difficult to conclude that one has enjoyed an effective access to a court if one has been unable to give effective instructions to those who represent them. So this chapter will illustrate how the first group of limitations on the special advocate can give rise to problems at the preliminary stage of the CMP, hence the possibility of raising an issue with effective legal assistance as an aspect of the right to access a court.

The issues that the use of special advocates raise with ECHR standards of effective legal assistance do not end at the preliminary stage. However, the ECtHR's rationale for the implication of the right to access a court is that the Convention was intended to guarantee rights that are 'practical and effective'. Therefore, this chapter will argue that the provision of effective legal assistance should continue to apply throughout the conduct of the proceedings, and thus become an inherent part of the Article 6(1) notion of fairness. It is difficult to imagine a situation where the circumstances are such that effective legal assistance is deemed to be a requirement, yet this ceases to be applicable once the proceedings are in motion. This appears at odds with the ECHR's principle of effectiveness, which is particularly prominent in the interpretation of Article 6.

First, this chapter will outline the ECtHR's current approach to assessing the use of special advocates and *A*-type disclosure. The discussion then progresses to this thesis' alternative approach for the assessment of the shortcomings of the special advocates system. This is that the interference with Article 6(1) should be assessed holistically at the first stage of the ECtHR's assessment, and so include consideration of any limitations on the special advocates' ability to carry out their role. Section 7.2 advances

the argument that, in certain circumstances, the restrictions placed on special advocates could inhibit their ability to carry out their role in such a way that this could constitute an interference with the right to access a court. In order to advance this argument it is necessary to begin with illustrating the establishment of the right to access a court in the ECtHR's jurisprudence, before demonstrating that in certain circumstances the ECtHR considers effective legal assistance as an aspect of this right. Subsequently, the chapter will establish that such circumstances can arise in the context of CMPs and therefore it could be deemed likely that an individual subject to a CMP requires effective legal assistance in order to be Convention compliant. The use of the special advocate will then be assessed in accordance with the ECtHR's case law on effective legal assistance. This analysis looks specifically at the relationship between the special advocate and the individual and considers whether this could raise an issue with Article 6(1). However, even if the ECtHR finds an interference with the right to access a court, the right is not absolute. Therefore, Section 7.3 examines the ECtHR's approach in its assessment of justifying interferences with the right and how this may affect the outcome of a challenge to the Justice and Security Act regarding its provision of legal assistance in CMPs.

7.1. The ECtHR's conventional approach to examining the role of special advocates

In cases that refer to the use of special advocates, the complaints have been generally brought under Article 5(4), Article 8 or Article 3 in conjunction with Article 13. There are no cases to date whereby the complaint has been brought under Article 6(1). One reason for this could be that the types of cases where CMPs have so far been utilised do not engage Article 6, for example circumstances involving immigration issues.[1146] Nevertheless, the case law is instructive in illustrating the ECtHR's approach towards the use of special advocates and CMPs in cases which involve national security concerns.

[1146] See for example: *Maaouia v France* (App 39652/98) (2001) 33 EHRR 42, para 40; *Mamatkulov v Turkey*(App 46827/99 46951/99) (2005) 41 EHRR 25, para 82; *Lupsa v Romania* (App 10337/04) (2008) 46 EHRR 36, para 63; *Atkas v Germany* (Admissibility) (App 56102/12) (2014) 58 EHRR SE3.

Special advocates were first referred to in the ECtHR's judgment in *Chahal v United Kingdom.*[1147] In concluding that the UK government had violated Article 5(4) the ECtHR considered that the applicant had not been entitled to legal representation under the 'three wise men' procedure[1148] operating at the time. Whilst the case prompted the establishment of SIAC, which included CMPs and special advocates, the ECtHR did not make an assessment of the compatibility of their use with the ECHR. On the contrary, in conducting the proportionality assessment the ECtHR merely referred to the system in Canada to illustrate a less restrictive means to deal with secret evidence.[1149] Interestingly, this was prompted by Amnesty International, Liberty, the Aire Centre and the JCWI who intervened in the case.[1150] All of which condemned the extension of CMPs as provided for by Part 2 of the JSA. The ECtHR stated in *Chahal* that the Canadian model illustrated that:

> there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.[1151]

This reference to the Canadian model was also made by the ECtHR in *Tinnelly* when conducting a proportionality analysis and suggesting that there were less restrictive alternative means to the Northern Ireland procedure operating at the time.[1152] Moreover, in *Al Nashif v Bulgaria*,[1153] *Chahal* and *Tinnelly* were cited by the ECtHR as demonstrating the existence of procedures capable of accommodating security concerns and according individuals with a substantial measure of procedural justice.[1154] In each of these cases there was no opinion stated by Strasbourg as to whether procedures would be Convention compliant.

[1147] *Chahal v United Kingdom* (App 22414/93) (1996) 23 EHRR 413

[1148] Chapter 2, Section 1.

[1149] *Chahal* (n 1147) para 131.

[1150] Ibid, para 141.

[1151] Ibid, para 131.

[1152] *Tinnelly and Sons & McElduff v United Kingdom* (App 20390/92 21322/92) (1996) 22 EHRR CD62, para 78.

[1153] *Al-Nashif v Bulgaria* (App 50963/99) (2003) 36 EHRR 37, paras 95 – 97.

[1154] *Al-Nashif* (n 1153) paras 95-7.

The first case to consider the compatibility of CMPs and the use of special advocates with the Convention was in *A v United Kingdom*[1155] which was heard under Article 5(4). The Grand Chamber acknowledged that Strasbourg had not yet been required to decide whether Special Advocates were compliant with the ECHR.[1156] The Grand Chamber went on to assert that the special advocate:

> could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings.[1157]

However, it held that special advocates could only provide a 'useful function' of 'testing the evidence and putting arguments on behalf of the detainee during the closed hearing' if there was *A*-type disclosure.[1158] *A*-type disclosure can be regarded as the most significant principle that emerges from the judgement in the context of CMPs. The principle is that, the individual excluded from the CMP is to be provided with 'sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.'[1159] It appears that it was on the basis that the requirements of *A*-type disclosure were met, that led to the ECtHR in *A* to consider that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing.[1160] Chapter 2 addressed the approach in the UK to the requirements and operation of *A*-type disclosure, as applied by the House of Lords in *AF (No 3)*.[1161] The following discussion will focus on the judgment in *A* and its application at Strasbourg, which is necessary to the assessment of the use of CMPs and special advocates and their compatibility with the ECHR. This in turn assists in the examination of the compatibility of CMPs as provided for by the JSA with Article 6 ECHR, which is one of the core objectives of this thesis.

[1155] *A* (n 1144).

[1156] *A* (n 1144) para 209. Refers to *Al Nashif* (1153); *Jasper v UK* (App 27052/9) (2000) 30 EHRR 441; *Edwards v UK* (Grand Chamber) (App 39647/98 40461/98) 40 EHRR 24.

[1157] *A* (n 1144) para 220.

[1158] Ibid, para 220.

[1159] Ibid, para 220.

[1160] Ibid, para 220.

[1161] Chapter 2, section 2.7.

The ECtHR in *A*, had taken into consideration the shortcomings of the special advocate mechanism in reaching their conclusion. It had the advantage of the submissions from special advocates themselves to the House of Commons Constitutional Affairs Committee highlighting the, 'serious difficulties they faced in representing appellants in closed proceedings'.[1162] Emphasis was placed on the prohibition on communication concerning the closed material. The ECtHR referred to the special advocates' submission in relation to the 'very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented.'[1163] The judgment illustrates the importance and value attributed to the role of special advocates in CMPs, despite acknowledging the shortcomings in the system. It is contended here that the correct reading of the Grand Chamber's judgment is that the use of special advocates is only to be regarded as Convention compliant if the excluded individual was provided with 'sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.'[1164] However, the consequence of the judgement was that the Grand Chamber were taken to have approved 'in principle' of the use of special advocates as providing sufficient procedural guarantees.[1165] Unfortunately, the link between the need for *A*-type disclosure and the effectiveness of the special advocate has been overlooked in some later case law. This is evident in recent admissibility decisions, whereby the shortcomings of the special advocate system appear to have been provided with a lower level of scrutiny.

The two admissibility decisions concerned complaints that the proceedings before SIAC violated the applicants Convention rights under the procedural requirements of Article 8.[1166] Both the decisions concerned the proceedings before SIAC in regard to the decision to exclude the applicants from the United Kingdom. Significantly both applications were rejected as manifestly ill-founded,[1167] with little attention in the

[1162] *A* (1144) para 199.

[1163] Ibid, para 199.

[1164] Ibid, para 220.

[1165] *IR v United Kingdom (Admissibility)* (2014) 58 EHRR SE14, para 63; *Khan v United Kingdom (Admissibility)* (2014) 58 EHRR SE15, para 33 referring to the judgment in *IR.*

[1166] *IR v United Kingdom* (Admissibility) (App 14876/12, 63339/12) (2014) 58 EHRR SE14, and *Khan v United Kingdom* (Admissibility) (App 35394/97) (2014) 58 EHRR SE15.

[1167] *IR*, para 67; Khan, para 35.

judgments of the ECtHR of the operation of CMPs and effectiveness of the special advocate.[1168] In *IR*, the ECtHR highlighted with approval that the special advocate could make submissions regarding both procedural and substantive matters, and was able to challenge the Home Secretary's objection to disclosure on the grounds of the danger posed to national security.[1169] In relation to the prohibition on communication the ECtHR noted that communication was not wholly excluded. This was also highlighted in *Saeed v Denmark*,[1170] where reference was made to the fact that the individual can make written submissions to the special advocate at any time.[1171] This was without any consideration that the communication was one way, and whether this alleviated the difficulties the prohibition posed for the special advocates' ability to discharge their functions in the first place. In its judgment in *Saeed*, the ECtHR also stressed that the special advocate was notified of all hearings and invited to attend.[1172] It is particularly worrying that these are admissibility decisions, thus paving the way for a trend that cases involving CMPs and the provision of special advocates will not even make it past the first hurdle at Strasbourg. This presents the danger of reducing complaints to Strasbourg concerning their use, and thus the ECtHR handing down a ruling on the compatibility on Part 2 of the JSA. Nevertheless, given the ECtHR's context specific approach to interpretation, there is the possibility that there will be a case where the circumstances are such that will give rise to a declaration of admissibility. Moreover, it is arguable that a complaint brought under Article 6(1) could be more likely to give rise to a more detailed assessment of the defects of the legislation given the fundamental importance accorded to the fair trial guarantees in comparison to Article 8.

In addition, whilst the judgment in *A* is to be welcomed and is regarded as well reasoned and unambiguous,[1173] it also posed two main issues which have transpired as

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[1168] In *Khan* (n 1166) the ECtHR merely refers to its judgement in *Khan* as setting out the reasons in detail in *IR* as to the approval of the proceedings before SIAC, para 33.

[1169] *IR* (n 1166) para 63.

[1170] *Saeed v Denmark* (App 53/12) (ECtHR, 24 June 2014).

[1171] Ibid, para 37.

[1172] Ibid.

[1173] John Jackson, 'Justice, security and the right to a fair trial: is the use of secret evidence ever fair?' [2013] *Public Law* 720.

problematic in subsequent jurisprudence. First, the Grand Chamber emphasised that the requirement of procedural fairness under Article 5(4) 'does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and consequences.'[1174] Moreover it stated that *A*-type disclosure would need to be decided on a 'case-by-case basis',[1175] in conformity with the general context specific approach Strasbourg takes to interpretation of the Convention. Second, the judgement raises the question as to what amount of information can be considered as 'sufficient'.

Strasbourg's context specific approach to interpretation will often be viewed in a positive light by human rights activists, as opposed to the alternative of ruling in the abstract. Nevertheless, in relation to cases in this area the approach has resulted in gaps in protection between the different Convention rights.[1176] In *Al-Nashiri v Poland,* the circumstances amounted to a violation of Article 3 which is an absolute right. In these circumstances the ECtHR stated that it was essential that, 'as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security.'[1177] The ECtHR's judgment emphasised the allegations of 'serious human rights violations' involved in the investigation.[1178] Similarly, in the context of Article 5(4), the article at issue in *A v UK*, the ECtHR has indicated a higher protection of *A*-type disclosure. In *Sheh v UK*, the ECtHR pronounced that the authorities must disclose 'adequate information to enable the applicant to know the nature of the allegations against him and have the opportunity to lead evidence to refute them.'[1179]

Nevertheless, in the context of complaints brought under Article 8 the ECtHR has been demonstrated reluctance in their application of *A*-type disclosure. In *IR*, the ECtHR suggested a hierarchy of procedural guarantees depending on the right. The ECtHR distinguished from *A v UK*, on account of the Article 5(4) context, and also stated that

[1174] *A* (n 1144) paras 203 and 204.

[1175] Ibid, para 220.

[1176] Gordon Anthony, 'Article 6 ECHR, Civil Rights and the Enduring Role of the Common Law' *European Public Law* (2013) 19(1) 75-96, 80.

[1177] *Al Nashiri v Poland* (App 28761/11) (2015) 60 EHRR 16, para 488.

[1178] Ibid, para 488.

[1179] *Sher and others v United Kingdom Kingdom* (App 5201/11) (ECtHR, 20 October 2015) para 149.

in certain circumstances the procedural guarantees inherent in Article 8, 'may not be as demanding as those which apply under arts 5 and 6.'[1180] The judgment suggests that *A*-type disclosure is not a requirement in Article 8 cases.

In addition, the requirements of *A*-type disclosure vary in the context of Article 13 of which the scope of the right 'varies according to the nature of the applicant's complaint under the Convention.'[1181] In *Al-Nashif*, the ECtHR examined a complaint regarding the detention and the deportation of the applicant which was based on a decision by the national authorities that he presented a threat to national security.[1182] The ECtHR held that in the presence of national security concerns the guarantee of an effective remedy 'requires as a minimum that the competent independent appeals authority must be informed of the reasons grounded the deportation decision, even if such reasons are not publicly available.'[1183] It is noted that the ECtHR did not refer to the need for the applicant to have been given sufficient information of the reasons, it was enough that an independent body competent to reject the executive's assertion that there was a threat to national security.[1184]

With regards to Article 6, in *A v UK* the ECtHR emphasised the nature of the proceedings proclaiming that:

> in view of the dramatic impact of the lengthy—and what appeared at that time to be indefinite—deprivation of liberty on the applicants' fundamental rights, art.5(4) must import substantially the same fair trial guarantees as art.6(1) in its criminal aspect.[1185]

This left open the possibility that *A*-type disclosure will not always be required in civil proceedings, of which complaints are brought under Article 6(1). The lack of uniform requirement in all circumstances which engage Article 6 is evident in *Kennedy v United Kingdom*, where the ECtHR did not require *A*-type disclosure or the provision of a special advocate in proceedings before the Investigatory Powers Tribunal.[1186] Therefore,

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[1180] *IR* (n 1166) para 61.

[1181] *Kudla v Poland* (App 30210/96) (2002) 35 EHRR 11; *Al-Nashif* (n 1153) para 136.

[1182] *Al-Nashif* (n 1153).

[1183] Ibid, para 137.

[1184] Ibid.

[1185] *A* (n 1144) para 217.

[1186] *Kennedy v United Kingdom* (App 26839/05) (2011) 52 EHRR 4.

although it would seem reasonable to presume that *A*-type disclosure would always be a requirement of Article 6, given the fundamental importance of the right; *Kennedy* suggests that this is not even a uniform requirement in all circumstances which engage Article 6.

Therefore, *A*-type disclosure applies differently according to the substantive right, and the specific context in which the proceedings arise. This presents some uncertainty as to the application of *A*-type disclosure, without the additional layer of uncertainty as a result of the meaning of 'sufficient information'.[1187] The Grand Chamber's judgment in *A v UK* set out a 'guiding template' as to when the requirements of *A*-type disclosure will be satisfied,[1188] nevertheless this template is not as easy to apply as it is to set out.[1189] The Grand Chamber's *A*-type disclosure template conflates three questions.[1190]The first relates to the proportion of the closed material as the ECtHR stated that 'where the evidence was to a large extent disclosed' then the applicant will not be denied the opportunity against him.[1191] The second is the question of the specificity of the allegations. The ECtHR stated that where most of the material was undisclosed, if the allegations contained in the open material were 'sufficiently specific' then applicants should have been able to give effective instructions to their special advocates.[1192] Finally, the ECtHR also considered that the relevance of the closed material to the decision of the domestic courts could affect the outcome of their decision, and stated that where the determination of the applicants' case was based 'solely or to a decisive degree on closed material, the procedural requirements of Article 5(4), would not be satisfied.'[1193]

[1187] Jackson (n 1173) at 724.

[1188] Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 78(6) MLR 913, 925.

[1189] Jackson (n 1173) 724.

[1190] This point is made by Gray in his article: Anthony Gray, 'A comparison and critique of closed court hearings' (2014) 18 *The International Journal of Evidence and Proof* 230-259 at 241. See also Nanopoulos (n 1188) at 925.

[1191] *A v* (n 1144) para 220.

[1192] Ibid.

[1193] Ibid.

The ECtHR therefore takes a context specific approach to *A*-type disclosure, and Chapter 2 established that this has been reflected in the UK's approach to its application.[1194] Nevertheless, the danger that arises is that the door has opened to a lower level of scrutiny of the limitations placed on special advocates. It is imperative that the shortcomings of the system are consistently subjected to intense scrutiny, and this includes the provision of *A*-type disclosure. In some cases, including *A*, Strasbourg has recognised the need for *A*-type disclosure in order for the special advocate to provide any form of effective assistance. However, this thesis proposes that the lack of consistency of the application of the requirements can contribute to a lack of high level scrutiny of the restrictions placed on special advocates. This is at the ECtHR level, which could then facilitate the same standard of review at a national level. This is as a consequence of the States who are signatory to the Convention, potentially viewing the system as being in effect 'rights-proofed', which could then act as a catalyst for its further development. This in turn plays a role in the further normalisation of restrictive measures. The shortcomings of the use of special advocates is widely recognised, and a consistent high level of scrutiny is needed. The remainder of this chapter proposes that one way in which to achieve this is to take a holistic approach to the examination of the system, which includes consideration of the limitations that special advocates face in carrying out their role in the assessment as to whether an individuals' Convention right has been interfered with. It does so within the framework of the right to access a court, which is implied by Article 6(1).

7.2. The role of special advocates and the right to access a court

The right to access a court is primarily concerned with the initiation of the proceedings. One of the predominant concerns with the difficulties special advocates are met with in carrying out their role in representing the role of the excluded individual, is that they are unable to receive 'effective instructions'. This appeared to ultimately be the focus of the unease with the system in the ECtHR's judgment in *A*, consequently leading to the requirement of *A*-type disclosure. It is argued here that it would appear difficult to conclude that one has enjoyed the right to access a court if they have been unable to provide effective instructions to those who represent them. Therefore, the remainder of this chapter addresses the potential for CMPs under Part 2 of the JSA to amount to a

[1194] Chapter 2, section 2.7.

breach of the right to access a court, the particular focus being on special advocates and *A*-type disclosure. This is due to the relationship between these two mitigating tools, and the ability to provide effective instructions. The discussion begins with an outline of the establishment of the right to access a court, including its rationale and the ECtHR's approach to its application. This is necessary to provide an understanding of this Article 6(1) guarantee before making an assessment as to the compatibility of the JSA.

7.2.1. The establishment of the right to access a court

In *Golder v United Kingdom*, the ECtHR was faced with the question whether the application of Article 6(1) could extend to securing a right of access to the courts for every individual who wanted to commence proceedings, or was the application limited to legal proceedings already pending.[1195] The ECtHR concluded that the right to access a court 'constitutes an element which is inherent in the right stated by Article 6(1).'[1196] The court emphasised the importance of guaranteeing the right of access to ensure respect for the rule of law, and read in the right predominately with reference to the 'object and purpose' of the Convention.[1197] It was held to be 'inconceivable' that Article 6(1) would set out the procedural guarantees of a fair trial if it did not first protect what makes it possible to benefit from those guarantees: access to a court.[1198]

The right to a court therefore provides protection to individuals at the preliminary stage of a hearing; it opens the gateway to the remaining Article 6 fair trial guarantees. In *Golder*, the ECtHR was not unanimous in its decision to read a right to access a court into Article 6(1), the dissent taking the view that the ECtHR in doing so was overstepping its role. Nevertheless, the guarantee is an important aspect of Article 6(1) and is now firmly established in the ECtHR's jurisprudence and the ruling and judgment of the ECtHR in *Golder* is thus an example of where teleological interpretation, particularly the principle of effectiveness enable the further realisation of our rights and

[1195](App 4451/70) (1979-80) 1 EHRR 524, para 25. See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford Univeristy Press, 2007) for a concise and comprehensive evaluation of the ECtHR's judgment.

[1196] *Golder* (n 1195) para 36.

[1197] Ibid, para 34.

[1198] Ibid, para 33.

freedoms.[1199] The ECtHR's 'extensive, teleological interpretation'[1200] in *Golder* illustrates a broader protection under Article 6(1) as an aspect of the right to a court in an important passage of the ECtHR's judgment:

> Were Art.6 para.1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the [fundamental principles of law] … and which the Court cannot overlook.[1201]

Hickman has described this aspect of the right to a court as a 'constitutional safeguard' in that it confers an 'institutional protection on the jurisdiction of the courts.'[1202] In this respect the right prevents the Contracting States from removing the jurisdiction of the court, and prevents them from removing classes of civil claims.[1203] This reinforces the right to access a court and strengthens the separation of powers and the rule of law by 'guarding against arbitrary power and executive rule.'[1204] Consequently, the development of this aspect of the right illustrates the significance of maintaining the independence of the judiciary in relation to the ECtHR's standards of fairness, not only in relation to the Article 6(1) requirements of independence and impartiality.

The right to a court applies to civil and criminal proceedings, however it 'retains most of its significance' in civil proceedings.[1205] The right to a court is only applicable in

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[1199] Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press: 2010) 322

[1200] Pieter van Dijk and Fried van Hoof, *Theory and Practice of the European Convention on Human Rights* (Intersentia: 2006) 558.

[1201] *Golder* (n 1195) para 35.

[1202] Tom Hickman, 'The "uncertain shadow": throwing light on the right to a court under Article 6(1)" [2004] *Public Law* 122, 125.

[1203] *Kaplan v United Kingdom* (App 598/76) (1982) 4 EHRR 64, para 162; *Pinder v United Kingdom* (App 10096/82) (1985) 7 EHRR CD464, para 6; *Al-Fayed v United Kingdom* (App 17101/90) (1994) 18 EHRR 393, para 65; *McElhinney v Ireland* (App 31253/96) (2002) 34 EHRR 13, para 24; *Al-Adsani v United Kingdom* (App 35763/97) (2002) 34 EHRR 11, para 47; *Fogarty v United Kingdom* (App 37112/97) (2002) 34 EHRR 12, para 25.

[1204] Hickman (n 1202) 125.

[1205] David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (3rd ed, OUP 2014) 399.

respect of existing substantive rights in national law because the Convention cannot create a new substantive civil right, and it is not possible to challenge the substantive content of national law.[1206] This is in accordance with the principle of subsidiarity. However, Article 6(1) may be applicable if the national law contains procedural bars which prevent or limit the possibilities of bringing potential claims to a court.[1207] For example, rules granting immunity to special categories of persons such as: states,[1208] employees[1209] and members of parliament.[1210] Such procedural bars on the access to a court must be justified in accordance with the tests of legitimacy and proportionality which will be examined in detail in subsequent sections.

In addition to the constitutional safeguard, it soon became apparent that the right to access a court was a right of effective access. It is not enough that an individual's case is heard by a court, if they are denied the opportunity to effectively present their case to the court.[1211] This conforms to one of the main themes in the ECtHR Article 6 jurisprudence that the Convention was, 'intended to guarantee not rights that are theoretical or illusionary but rights that are practical and effective'.[1212] In *Airey v Ireland*, it was emphasised that this was 'particularly so of the right to access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'.[1213] The implication of the right itself is an example of the ECtHR's use of the principle of effectiveness, and the judgment in *Golder* provides a good example of the meaning of the right being that of ensuring an individual has effective access to a court. The issue in *Golder*, was not that the applicant was denied the right to sue, i.e. his claim

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[1206] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th ed, OUP, 2014) 259.

[1207] It is difficult to draw the distinction between the two, see: Rainey, Wicks and Ovey (n 1206) 258; Connor Gearty, 'Unravelling *Osman*' (2001) 64:2 MLR 159.

[1208] *Al-Adsani* (n 1203).

[1209] *Osman v United Kingdom* (App 23452/94) (2000) 29 EHRR 245.

[1210] *Syngelidis v Greece* (App 24895/07) (ECtHR, 11 February 2010); *A v United Kingdom* (App 35373/97) (2003) 36 EHRR 51.

[1211] *Bellet v France* (App 23805/94) (ECtHR, 4 December 1995), para 38.

[1212] *Airey v Ireland* (App 6289/73) (1979-1990)1 EHRR 305; *Artico v Italy* (App 6694/74) (1981) 3 EHRR 1; *Lala v The Netherlands* (App 14861/89) (1994)18 EHRR 586; *Wos v Poland* (App 22860/02) (2007) 45 EHRR 28. See Chapter 4, Section 4.5.2.

[1213] *Airey* (n 1212) para 102.

was not denied and there was not a procedural limitation preventing his access. The ECtHR found a violation on the basis that the Home Secretary has failed to give the applicant permission to contact his legal representation, which hindered the initiation of proceedings. It was held that 'hindrance can contravene the Convention just like a legal impediment.'[1214] This point is important in relation to the use of CMPs under the JSA given that the excluded individual is not in principle denied a right to defend himself against a potential claim against him. This thesis seeks to argue that the specific circumstances and difficulties that an individual will experience due to the operation of CMPs could hinder his right to access a court in accordance with ECHR standards of fairness.

Further examples of circumstances in which the ECtHR has found that an individual's right of effective access to a court has not been respected, include proceedings that are particularly complex[1215] and not sufficiently attended by safeguards to prevent misunderstanding.[1216] In addition is the excessive cost of proceedings,[1217] undue delays on a court determination,[1218] and rules on time limits for appeals.[1219] Moreover, an individual must be accorded a sufficient amount of notice of proceedings to enable them to challenge it in an independent and impartial tribunal.[1220]

The ECtHR has also found that where the circumstances are such that the applicant does not have the possibility of applying to the tribunal, in order to have his civil rights determined, this will infringe the applicant's right of effective access.[1221] For example,

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[1214] *Golder* (n 1195) para 26. Also *Vasilescu v Romania* (App 27053/95) (1999) 28 EHRR 241, para 51.

[1215] *DE Geouffre de law pradelle v France* (App 12964/87) (ECtHR, 16th December 1992).

[1216] *F.E. v France* (App 38212/97) (2000) 29 EHRR 591.

[1217] *Kreuz v Poland* (App 28249/95) (ECtHR, 19 June 2001); *Podbielski and PPU Polpure v Poland* (App 39199/98) (ECtHR, 30 November 2005); *Stankiewicz v Poland* (App 46917/99) (2007) 44 EHRR 47; *Jedamskii v Poland* (App 73547/01) (2007)45 EHRR 47; *FC Mretebi v Georgia* (App 38736/04) (2010) 50 EHRR 31.

[1218] *Acimovic v Croatia* (App 61237/00) (2005) 40 EHRR. 23; *Melnyk v Ukraine* (App 23436/03) (ECtHR, 28 March 2006).

[1219] *Perez de Rada Cavanilles v Spain* (App 28090/95) (2000) 29 EHRR 109; *Tricard v France* (App 40472/98) (2003) 37 EHRR 15.

[1220] *DE Geouffre de law pradelle* (n 1215); *Perez de Rada Cavanilles* (n 1219).

[1221] *Keegan v United Kingdom* (App 28867/03) (2007) 44 EHRR 33; *Holy Monasteries v Greece (*App 13092/87, 13984/88) (1995) 20 EHRR 1; *Peltier v France* (App 32872/96) (2003)

in *Sporrong and Lonnroth v Sweden*, the applicant was entitled to challenge the lawfulness of the decision by requesting the Supreme Administrative Court to re-open the proceedings. However, when considering the admissibility of such an application, the Supreme Administrative Court did not examine the merits of the case. Therefore, it did not undertake a full review of the measures affecting the civil right. Consequently, the ECtHR held that the remedy did not meet the requirements of Article 6(1).[1222] The ability of the parties to apply for the use of a CMP arose during the JSA's parliamentary passage. The Government's Bill merely made provision for the Home Secretary to make the application to use a CMP, but not the other parties.[1223] Critics of the legislation framed their arguments opposing this provision as an inequality of arms,[1224] however the ECtHR case law shows that the inability of an individual to apply for the use of a CMP could have raised an issue with the right to access a court. Although the individual is entitled to sue the government, if they could then not apply to use a CMP if they wished, this could constitute an interference with their effective access. Nevertheless, the provision was amended and Part 2 of the JSA makes provision for any party to make an application to use a CMP, therefore it appears unlikely an issue would arise with Article 6(1) in this respect.

With regard to the application stage of using a CMP under the JSA, the critics also raised concerns that centred on the potential wide ranging powers of the executive to make the decision to use a CMP, which threatened to undermine the separation of powers in respect of the independence of the judiciary.[1225] At first sight the ECtHR's judgment in *Tinnelly & others v McElduff & Others v United Kingdom*[1226] appears to be

37 EHRR 8; *Zwierzynski v Poland*(App 34049/96) (2004)38 EHRR 6; *Polskiego v Poland* (App 42049/98) (2005) 41 EHRR 21; *Devlin v United Kingdom* (App 29545/95) (2002) 34 EHRR 43; *Devenney v United Kingdom*(App 24265/94) (2002) 35 EHRR 24.

[1222] *Sporrong & Lonnroth v Sweden* (App 7151/75 7152/75) (1983) 5 EHRR. 35, para 86.

[1223] Government's Bill, clause 6(1).

[1224] For example, HL Committee 2nd sitting 11 July 2012 col 1181 Lord Thomas, col 1180 and 1192 Lord Hodgson, col 1198 Lord Thomas.

[1225] Chapter 3, Section 3.3.3.

[1226] *Tinnelly* (n 1152).

instructive because the individual's right to access a court was deemed to have been restricted due to an executive decision.

The applicants challenged a decision to withdraw their contracts of employments on the grounds that they had been unlawfully discriminated against. They relied on the Fair Employment (Northern Ireland) Act 1976 which made it unlawful for employers to discriminate against employees and made provision for remedies to be made available for such employees. Nevertheless, the Secretary of State for Northern Ireland issued a certificate under s.42 of the Act certifying that the decision was done for the purpose of safeguarding national security and therefore the Act did not apply. The Secretary of State's s.42 certificate was considered to be 'conclusive evidence'. The effect was that the applicants were denied the opportunity to have their claim for unlawful discrimination determined by a court. The only domestic remedy available to the applicants was judicial review of the Secretary of State's decision to order the s.42 certificate. When judicial review was sought, the Secretary of State ordered a public interest immunity certificate in respect of certain documents. The application for judicial review was dismissed as the procedures followed by the national authorities were lawful and had been taken in good faith. The national court stated that it was not within the function of judicial review to retry the issues.

The Strasbourg organs found that this domestic procedure could not be reconciled with the notion of the effective access to a court as guaranteed by Article 6(1) of the Convention. Both the Commission and the ECtHR placed particular emphasis on the conclusive nature of the Secretary of State's decision. They stressed the lack of independent scrutiny of the facts which led to the Secretary of State's issuing of the s.42 certificate, and that the assessment of the security risk was viewed as exclusively within the Secretary of State's competence to determine. Central to the reasoning was that there was no judicial determination of the factual basis for withholding the applicants' employment contracts because of the lack of jurisdiction of the national court due to the Secretary of State's invocation of national security considerations and issuing of the s.42 certificate which was conclusive.

It is argued here that the domestic law and the procedures followed by the national authorities which formed the basis of the complaint in *Tinnelly*, amounted to a procedural bar on the applicants' access to a court. The effect being that their original

claims of unlawful discrimination could not be heard and therefore the complaint was correctly heard under the right to access a court. This is a notable difference between the Northern Irish legislation and the JSA. The JSA, does not constitute a procedural bar in the sense that the individual's case is heard, albeit partly in closed session. Therefore, *Tinnelly & McElduff* is unlikely to support a challenge of Part 2 of the JSA, brought to Strasbourg under the right to access a court. The case relates to the first aspect of the guarantee, namely the constitutional safeguard. Subsequent discussion will demonstrate that the JSA is more likely to raise issues with the second aspect: the right to *effective* access. The ECtHR has deemed legal assistance as relevant to an individual's effective access to a court. The following discussion will establish that this is the most significant aspect of the right of access when testing the compatibility of the operation of CMPs, and special advocates under the JSA, with the Convention.

7.2.2. Legal assistance as an aspect of the right to access a court

Article 6 only explicitly guarantees the right to legal assistance in criminal proceedings,[1227] however the JSA makes provision for CMPs in all civil proceedings. Whilst there is no 'automatic right' under the ECHR for the availability of legal assistance in civil proceedings,[1228] the ECtHR's jurisprudence demonstrates that in certain circumstances legal assistance is deemed as relevant to an individual's effective access to a court. This is significant as it lays the foundations to question the sufficiency of legal assistance under the JSA in accordance with ECHR standards of fairness. The purpose of this section is to highlight the link between the right to access a court, and legal assistance in the ECtHR's case law. In doing so discussion will establish the factors that the ECtHR takes into consideration in making its decision that in the circumstances the right entails effective legal assistance. It follows that the section will determine that, in general, the circumstances surrounding CMPs are such that the ECtHR would be likely to find that legal assistance would be necessary to ensure an individual's right to access a court is respected.

The first of the ECtHR's judgments on the right to a court is indicative of a link between effective access and legal assistance. As it has already been stated in *Golder*, the national authorities' refusal of permission for the applicant to contact a solicitor was

[1227] Article 6(3)(c).

[1228] *P, C and S v United Kingdom* (App 56547/00) (2002) 35 EHRR 31, para 88.

the contributing factor in the ECtHR's finding that the applicant's Article 6(1) guarantees had been violated. *Golder* demonstrated that the right of access operates as a constitutional safeguard in the sense that it prevents the Contracting States from removing the jurisdiction of the court. In this sense the JSA does not appear to raise issues with this Article 6(1) guarantee, as the effect is not to bar the ability of individuals' to initiate the proceedings altogether. However, the ECtHR's judgment in *Golder*, also paved the way for individuals to bring a challenge to Strasbourg in circumstances where, although domestic law did not explicitly prevent access, they allege that as a consequence of the domestic authorities they could not effectively initiate proceedings. Thus, that they were denied an effective access to a court. Golder was not formally denied his right to institute proceedings.[1229] However, the refusal by the Home Secretary for permission to contact a solicitor to assist in the initiation of proceedings 'actually impeded the launching of the contemplated action.'[1230] The ECtHR took the view that in these circumstances contacting a solicitor 'was a normal preliminary step in itself' and in view of Golder's imprisonment was 'probably essential.'[1231] An analogy can be drawn here with the reality of the situation in CMPs. The appointment of the special advocate to represent the interests of the excluded individual is not only considered a 'normal preliminary step', it is a statutory requirement.[1232] If the effect of the limitations on special advocates is that they cannot receive instructions, from the individual whose interests they represent, their ability to initiate proceedings could be said to have been hindered. The ECtHR explicitly stated that 'hindrance can in fact contravene the Convention just like a legal impediment.' Therefore, whilst the individual has not been formally obstructed from accessing the court as such, the basis is there to formulate the argument that restricting the ability to give effective instruction to those who represent their interests can restrict their effective access to a court.

[1229] *Golder* (n 1195) para 26.

[1230] Ibid, para 26,

[1231] Ibid.

[1232] JSA, s.9

The reasoning in *Golder*, was subsequently applied in *Silver v United Kingdom*,[1233] and *Hilton v United Kingdom.*[1234] This line of cases is particularly interesting in the examination of special advocates due to the restrictions on communication with the excluded individual, and their legal representation, following disclosure of the closed material. The effect of this on ECHR compatibility will be explored in more detail in section 7.2.3 which examines further the sufficiency of legal representation in the JSA.

The ECtHR has pronounced in a number of cases concerning Article 6(1) that the provision of legal aid may be a requirement of an individual's effective right of access to a court, illustrating further the establishment of a link between access and legal assistance. It should be noted here that these cases are not referred to advance an argument regarding the provision of financial assistance for legal representation. The case law is relevant in demonstrating the ECtHR's view that even in civil proceedings, in certain circumstances, the provision of legal assistance is necessary to guarantee the right to access a court. The landmark decision of *Airey v Ireland,* contains a particularly important passage: 'Article 6(1) may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to a court.'[1235]

The decision in *Airey* was controversial and considered a 'bold move' on behalf of the ECtHR, considering the potential financial consequences for the Contracting States.[1236] In despite of this apparent expansive interpretation, the decision opened the pathway for applicants' to allege a violation on their right to access a court in civil proceedings on the basis that they were denied access to legal aid.[1237] The ECtHR's reasoning emanates

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[1233] *Silver v United Kingdom* (App 5947/72 6205/73 7052/75 7061/75 7107/75 7113/75 71361/75) (1983) 5 EHRR 347.

[1234] *Hilton v United Kingdom* (Commission) (App 5613/72) (1981) 3 EHRR 104

[1235] *Airey* (n 1212) para 26.

[1236] Ed Bates *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human* Rights (Oxford University Press: 2010) 345. The ECtHR was dismissive of the Irish Government's arguments; and the decision was particularly interesting given that Ireland at this point had not ratified Article 6(3)(c) demonstrating their intensions of limiting its legal aid in the criminal sphere, let alone in the civil sphere (see *Airey* para 26).

[1237] *Andronicau and Constantinal v Cyprus* (App 25252/94) (1998) 25 EHRR 491; *P,C and S* (n 1228)*; Del Sol v France*(App 46800/99) (2002) 35 EHRR 38*; Steel and Morris v United Kingdom* (App 68416/01) (2005) 41 EHRR 22. N.b. this is not to say that it is implied that

from the idea that the Convention is designed to safeguard individuals' rights in a 'real and practical way'.[1238] This provides a further example of the right to access a court does more than act as a constitutional safeguard, and guarantees effective access. Airey was seeking a judicial separation from her husband, the Irish government contended that she did 'enjoy access to the High Court' despite the denial of legal aid as she was 'free to go before that court without the assistance of a lawyer.'[1239] The ECtHR did not regard this possibility, 'of itself, conclusive of the matter.'[1240] In compliance with the principle of effectiveness, the question was whether 'Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.'[1241] However, it was made clear in *Airey* that the State would not always be required to provide legal aid for civil disputes as Article 6(1) leaves the State with a free choice of means to guarantee individuals' right of effective access to a court.[1242] The need for legal assistance for Airey was justified by the ECtHR as being the result of the complexity of the proceedings for judicial separation in Ireland at the time. Therefore an alternative means by which to respect individuals' right of effective access in these circumstances could be the simplification of the procedure.[1243]

This ECtHR has since clarified that the question of whether Article 6(1) requires the provision of legal assistance to an individual is dependent on, 'the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.'[1244] The applicant's circumstances in *McVicar* were contrasted with those of the applicant in *Airey* and McVicar was considered to have been 'well-established' and capable of

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Contracting States must provide free legal aid for every dispute that arises in civil proceedings: *Airey* (n 1212) para 26.

[1238] *Airey* (n 1212) para 26.

[1239] Ibid, para 24.

[1240] Ibid.

[1241] Ibid.

[1242] *Airey* (n 1212) para 26

[1243] Ibid.

[1244] *McVicar v United Kingdom* (App 46311/99) (2002) 35 EHRR 22, para 48.

'formulating cogent argument.'[1245] In addition, the ECtHR did not consider the law on defamation, which was the subject of the applicant's challenge, sufficiently complex to require legal assistance.[1246] The consequence of the culminating factors was that the ECtHR did not deem that legal assistance was necessary to ensure the applicant's right of effective access to a court was respected.[1247]

In conformity with the ECtHR's context specific approach to interpretation, the court came to a different conclusion in *Steel and Morris v United Kingdom*[1248] although the applicant's challenge to Strasbourg also regarded defamation proceedings. On the basis of the complexity of the proceedings, including a particularly voluminous case file, the ECtHR concluded legal assistance to be a necessity in the civil proceedings.[1249] The special advocates have reported the difficulties in both the quantity and complexity of the closed material presented to them in CMPs. Therefore, both *Airey* and *Steel and Morris* can provide the basis for the contention that CMPs give rise to the types of circumstances in which the ECtHR would deem legal assistance an aspect of the right to access a court. It is argued here that an alternative means, such as the simplification of procedure, would not be an adequate alternative to assistance in the CMP given that the individual is excluded. The simplification of the procedure would have no bearing on the individual's ability to participate if they are excluded from a substantial part of the proceedings.

The ECtHR jurisprudence also illustrates that the court takes into consideration the consequences of the outcome of the proceedings for the applicant and the gravity of the case. This was also a contributing factor in the ECtHR's decision in *Steel and Morris*, which took into account the significant financial consequences for the applicants.[1250] Moreover, the provision of legal aid, which ensures the applicant has legal assistance, is

[1245] Ibid, para 53.

[1246] Ibid, para 55, reluctance to deem legal aid requisite to effective access in defamation proceedings given that this is generally not a requirement in the Contracting States (example of use of the European consensus principle).

[1247] Ibid, para 62.

[1248] *Steel and Morris* (n 1237).

[1249] Ibid, para 65.

[1250] Ibid, para 63.

generally deemed a necessity where the individual's right to liberty is at stake.[1251] There is already a small body of case law forming under the JSA. The cases concern serious allegations, such as the State's complicity in unlawful detention, torture, ill-treatment, travel bans and asset-freezing orders. However, at present, these claims are for monetary compensation,[1252] or claims for judicial review whereby the remedy is damages.[1253] The claims do not necessary concern individuals whose personal freedoms are currently interfered with. Therefore, the direct consequences of the proceedings themselves would not impose further restrictions upon those individuals. The claims are with regard to harm suffered previously. Nevertheless, this does not mean this will always be the case. For example, in *Sarkandi*, the claimants sought judicial review of the Foreign Secretary's decision to propose them to the UN for designation on the sanctions list.[1254] The claimants' designation had subsequently been revoked, therefore the potential remedy was damages. However, a claim for judicial review of a ministerial decision for designation on a sanctions list, could carry with it the remedy of removal from that list. This is an example where the gravity of consequences is more likely to be considered severe, because if the claim was unsuccessful their personal freedom would remain severely restricted.

Nevertheless, even putting the gravity of consequences aside, the contention here is that the sheer volume and complexity of the closed material dealt with in a CMP can be such as to give rise to circumstances in which the ECtHR deems legal assistance a necessity, to guarantee an individual's effective access to a court. The ECtHR jurisprudence also demonstrates that the mere provision for legal assistance will not in itself respect the right, and it is important to consider the quality of that assistance.[1255] For example, in *Garcia Manibardo v Spain*,[1256] the ECtHR has found that the delay in providing legal aid due to the negligence of a judicial body to be a contributing factor in finding a violation of Article 6(1). In *Sialkowska v Poland*, the ECtHR reemphasised the principle

[1251] *Aerts v Belgium* (App 25357/94) (2009) 29 EHRR 50, paras 59-60.

[1252] *CF & Mohamed v Secretary of State for the Home Department* [2013] EWHC 3402 (QB)

[1253] *R (on the application of Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWHC 2359 (Admin)

[1254] Ibid.

[1255] *Essaadi v France* (App 49384/99) (ECtHR, 26 February 2002), para 35.

[1256] (App 38695/97) (2002) 34 EHRR. 6

of effectiveness stating that in determining an interference with the right the court will consider whether: 'taking the proceedings as a whole, the legal representation may be regarded as practical and effective'.[1257]

Therefore, once the ECtHR has held that the circumstances are such that legal assistance is requisite to an individual's effective access to court, the legal assistance must be considered effective. So if it can be established that in cases where a CMP has been ordered, under the JSA, legal assistance is necessary to guarantee the individual the right to access a court. It is then necessary to examine whether the sufficiency of the provisions for legal assistance under the JSA meet the ECHR requirements.

Unfortunately, the Article 6(1) jurisprudence does not provide requisite guidance as to the sufficiency of the legal assistance necessary to meet ECHR standards of fairness. Therefore, the following section also refers to the Article 6(3)(c) jurisprudence, which guarantees the right to legal assistance in criminal proceedings. The cases of most relevance to legal assistance under the JSA will be examined and applied by analogy. This analysis presupposes that the threshold for effective legal assistance is the same in criminal and civil proceedings, because if it is established that the circumstances in civil proceedings are such that legal assistance is required, then the standards required should be the same. The ECtHR itself has made reference to its Article 6(3)(c) case law in its decisions on the right of effective access and legal assistance under Article 6(1).[1258]

7.2.3. Special advocates and effective legal assistance

In the CMP, the individual and their legal representation are excluded and not permitted to view the closed material. It is argued here that in cases heard under Part 2 of the JSA where the use of a CMP is invoked, the circumstances may be such that the majority of the case may be contained in the closed material. Commenting on the Justice and Security Bill, Martin Chamberlain proposed that it was possible and 'indeed likely' that there will be civil cases tried where the excluded party is told nothing of significance about the case.[1259] As has been the case previously in SIAC, such as in *RB (Algeria) v*

[1257] *Sialkowska v Poland* (App 8932/05) (2010) 51 EHRR 18, para 100. See also: *Bertuzzi v France* (App 36378/97) (ECtHR, 13 February 2003), para 30.

[1258] *Sialkowska* (n 1257) para 100.

[1259] Martin Chamberlain, 'The Justice and Security Bill' (2012) *Civil Justice Quarterly* 424, 429.

Secretary of State for the Home Department.[1260] The *Green Paper* itself supports this possibility in the government's rationale for the necessity for the increase in the availability of CMPs. The government stated that CMPs were necessary in civil proceedings as the common law mechanism of PII was not useful where a large proportion of sensitive material is of central relevance.[1261] Therefore, it is possible that the CMP will have a direct effect on the outcome of a case which can entail grave consequences for the individual. It is argued here that in these type of circumstances, it is conceivable that legal assistance is likely to be considered as requisite in accordance with ECHR standards of fairness.

The need for assistance in the CMP appears to be undisputed by the UK government, hence the provision for the appointment of special advocates. The special advocate is the only form of meaningful legal assistance available to the excluded individual in the closed session, therefore this section considers whether the special advocate can meet ECHR standards of effective legal assistance. This approach to the analysis of the effectiveness of special advocates, in line with ECHR standards, is yet to be advanced in the literature. Neither, has it formed the basis as of yet for the challenge of the use of CMPs at Strasbourg. This is not to say that the ECtHR will not ever adhere to this alternative framework for the assessment of the compatibility of CMPs. The ECtHR is not bound by precedent, and in keeping with the principle of evolutive interpretation there is the opportunity for a case to be made for the development of a new body of jurisprudence.

The conventional approach as outlined above is to view special advocates as a safeguard mechanism that can offset the perceived unfairness of a CMP. The argument advanced here is that the shortcomings of the special advocate system can potentially inhibit their effectiveness to the extent that this constitutes an interference with Article 6(1), alongside the negative impact of CMPs. This change in approach is advanced with the view that it could lead to the heightened scrutiny of the limitations that special advocates operate under than currently happens at Strasbourg, when their use is assessed in relation to whether interferences with the Convention are justified.

[1260] [2009] UKHL 10.

[1261] *Green Paper*, para 1.52.

The right to access a court is relevant to the preliminary stages of proceedings in respect of an individual being able to initiate proceedings. It could be argued that at the point the use of a CMP is declared under section 6 of the JSA, the proceedings of the individual's substantive claim have already been initiated. For example, in a claim for a judicial review, in general an individual will put in a claim and at the point the claim is accepted by the court the government will make an interlocutory application for the use of the CMP in the substantive judicial review hearing. Therefore, it would appear that the issue is not that the individual is denied their access to a court. Nevertheless, it is argued here that accessing a court is a process as opposed to a one off point in time. Formally, at the point in time the claim for judicial review is accepted, the proceedings are in progress. However, once the CMP is declared, this changes the individual's ability to prepare their case as the nature of the material has significantly changed, as has the way the substantive proceedings will be conducted. Therefore, problems arise which are in the nature of problems with the preliminary aspects of proceedings. For example, the ability to give effective instructions to those who represent you affects the ability to initiate proceedings, hence can restrict ones access to a court. On this basis, the remainder of Section 7.2 will critically examine the first group of limitations on the special advocates' ability to carry out their functions effectively, in light of the ECtHR's jurisprudence on effective legal assistance. This first group of limitations directly affect the ability of the special advocate to receive effective instructions, therefore are capable of giving rise to issues of compatibility with an individual's right of effective access to a court.

Article 6(3)(c) refers to the right to legal assistance as opposed to legal representation, and the ECtHR has itself rejected a narrow interpretation of the meaning of 'assistance' for the purposes of Article 6(3)(c).[1262] In the drafting of Article 14 ICCPR on which Article 6 is based, the original wording included 'qualified representation' which was later replaced with legal assistance. This suggests that the right was not necessarily meant to guarantee qualified legal representation, rather 'assistance in the legal conduct of the case.'[1263] Accordingly, there appears to be no reason as to why the special

[1262] *Krombach v France* (App 29731/96) (ECtHR, 13th February 2001) para 89. The ECtHR has also held that this can be a person chosen by the accused who is not a qualified lawyer: *Morris v United Kingdom* (2002) 34 EHRR 52.

[1263] Harris, O'Boyle and Warbrick (n 1205) 478.

advocate cannot be considered as the 'legal assistance' in the CMP and consequently be examined as to whether the assistance they provide meets ECHR standards or could in itself amount to an interference with Article 6(1). Therefore the remainder of this section investigates the core requirements and qualities of legal assistance that the ECtHR emphasises which are of relevance to the use of special advocates in CMPs.

7.2.3.1. The relationship between the special advocate and the individual

The special advocate is appointed to represent the 'interests' of an individual who is subject to a CMP under Part 2 of the JSA.[1264] The legislation makes explicit that the special advocate merely represents the interests of the individual and is not responsible to such an individual.[1265] The relationship is very different from the usual solicitor-client relationship, particularly in relation to professional and ethical duties.[1266] The implications of this are far reaching and present serious limitations on the ability of special advocates to carry out their functions. For example they do not owe a duty of care to the individual they represent in accordance with conventional legal professional ethics; and, their relationship lacks the quality of confidence.[1267] Chapter 2 presented the implications of the relationship as twofold: it raises questions of professional ethics; and, questions regarding the effectiveness of the system in terms of the ability of special advocates to carry out their function of representing the individual's interests.[1268] The focus for the purposes of examining this shortcoming in the context of ECHR standards of effective legal assistance is the latter. This is specifically in relation to initiating the proceedings, hence the compatibility with the right to access a court guaranteed by Article 6(1).

[1264] S.9 JSA 2013

[1265] S.9(4) Explanatory notes 9.2

[1266] SASO Open Manual (n 50), para 7. See also Andrew Boon and Susan Nash, 'Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems' (2006) 9 *Legal Ethics* 62, 110 - 124. This article focuses on the representative function of the special advocate and considers the ethical considerations, particular with an attempt to accommodate the role of the special advocate within the code of Conduct of the Bar of England and Wales.

[1267] *R v H and C* [2004] UKHL 3 per Lord Bingham.

[1268] Cian Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 KLJ 19, 30; JUSTICE, *Secret Evidence* (2009) 206.

Professional privilege is predominately protected by Article 8 ECHR which specifically includes the protection of legal professional privilege.[1269] In addition to the need to protect the lawyer in their professional exchanges with their clients, the ECtHR has identified that privilege also serves to protect the client.[1270] The 'relationship of trust' between a lawyer and a client is regarded by the ECtHR as essential.[1271] More importantly, the ECtHR has recognised repercussions of encroaching on professional secrecy, in the context of legal assistance, on the administration of justice and the rights guaranteed by Article 6.[1272] In *Khodorkovskiy v Russia*,[1273] the ECtHR acknowledged that, whilst such complaints were usually brought under Article 8, where the prohibition on communications is capable of obstructing effective legal assistance then this must be examined under Article 6(1) and Article 6(3)(c). This opens up the possibility of bringing a challenge under Article 6 for an individual who has been adversely affected by the lack of professional secrecy. It is proposed here that there is scope for an argument to be made that in this regard the special advocate does not meet the ECHR standards given that their relationship does lack the quality of confidence as a consequence of the unconventional professional relationship between them.

In terms of the Article 6(3)(c) jurisprudence, the ECtHR has specifically asserted the importance of the 'relationship of confidence' between the individual and their legal assistance, although this is not an absolute right.[1274] This has arisen in the legal aid case law in relation to whether the defendant's wishes should be considered in choosing their legal representation.[1275] This relates to another of the primary implications that the special advocate is not professionally accountable to the person whose interests they represent.[1276] This is the possibility that whilst the special advocate may act in the best

[1269] *Michaud v France* (App 12323/111) (2014) 59 EHRR 9, para 119.

[1270] *Wieser v Austria* (App 74336/01) (2008) 46 EHRR 54, para 67.

[1271] *Michaud*(n 1269) para 118.

[1272] *Niemietz v Germany* (App 13710/88) (1993) 16 EHRR 97, para 37.

[1273] (App 11082/06, 137772/05) (2014) 59 EHRR 7.

[1274] *Croissant v Germany* (App 13611/88) (1993) 16 EHRR 135; *Popov v Russia* (App 26853/04) (ECtHR, 13th July 2006) para 171, *Lagerblom v Sweden* App no 26891/95 (ECtHR, 14th January 2003), para 54, *Dvorski v Croatia* (2016) 63 EHRR 7 para 79.

[1275] *Popov v Russia* (n 1274) para 171, Lagerblom v Sweden (n 1274) para 54, *Dvorski v Croatia* (n 1274) para 79.

[1276] Murphy (n 1268) 14

interests of the individual, this may be inconsistent with the individual's wishes,[1277] because the special advocate represents the 'interests' of the individual there in principle lies the possibility that they may act contradictorily with the individual's wishes.[1278] This point is well illustrated by Abu Qatada's case in SIAC, which demonstrates the potential for the divergence in the individuals' best interests, and his wishes. However, it is also illustrative of the professional conduct of the special advocates, which has never been called into question.[1279] Abu Qatada had explicitly stated that he would not participate in the proceedings because he had 'no faith in the ability of the system to get the truth.'[1280] Nevertheless special advocates were appointed to represent his interests, thus creating the possibility to contradict his wishes. In recognition of this conflict the special advocates appointed SIAC that 'after careful consideration they had decided that it would not be in [his] interests for them to take part in the proceedings'.[1281] SIAC made their disapproval of this clear and stated that whilst the special advocates 'believed they had good reasons……..they were wrong and there could be no good reason for not continuing to take part in an appeal which was still being pursued.'[1282] However, the Special Advocate Support Office (SASO) Open Manual states that 'special advocates may therefore withdraw from an appeal if their judgments is that it is in the best interests of the appellant.' This followed correspondence with the special advocates, SIAC, and the Solicitor General where it was agreed that the professional opinion of the special advocates as to what they consider to be in the individual's best interests would not be interfered with. SIAC emphasised with the 'invidious position' they were faced with by the appellant's late decision not to participate in the hearing.[1283]

However, the ECtHR has reasoned, regarding the defendant's choice of legal aid representation that the national authorities 'must have regard to the defendant's wishes',

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[1277] JUSTICE (n 1268) para 391.

[1278] Ibid.

[1279] *Abu Qatada v Secretary of State for the Home Department* (SC/15/2002, 8 March 2004). This case is used as example in JUSTICE's report and Boon and Nash's article (n 862),

[1280] Ibid, para 5.

[1281] Ibid, para 8.

[1282] Ibid, para 10. Lord Carlisle also took this stance in: Lord Carlile, *Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2004* (2004), para 78.

[1283] *S v Secretary of State for the Home Department* SC/25/2003, 27th July 2004, para 38.

but they may 'override those wishes where there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.'[1284] An argument raised against the change of relationship between the special advocate and the individual to one of responsibility in the JSA's parliamentary passage, raises the possibility that the ECtHR may find that the provisions are 'in the interests of justice'. During the JSA's parliamentary passage a number of amendments were introduced the underlying purpose of which was to improve the relationship between the special advocate and the individual. Unfortunately, the amendments were either withdrawn or not moved.[1285] The speeches in the House of Commons evidenced a concern that if the relationship between the special advocate and the individual became one of responsibility, as opposed to representative, then there was a greater potential that a special advocate would withdraw from the proceedings if this was the wish of the individual.[1286] It was noted that this would be undesirable and leave the individual with no representation at all in the CMP, which would create a high probability of giving rise to a violation of the ECHR.[1287] This reflects the importance that the ECtHR has placed on the use of special advocates as counterbalancing the disadvantages an individual faces in CMPs. Consequently, whilst an analogy can be drawn with the ECtHR jurisprudence in relation to choice of representation, it is likely that the reasoning behind the relationship can possibly satisfy the interests of justice exception.

In addition to the importance given to the 'relationship of confidence' by the ECtHR, an examination of ECHR jurisprudence illustrates the importance given to an individual's access to, and communication, with their legal assistance.[1288] These standards set by the ECHR are significant given that one of the most problematic restrictions placed on the special advocates' ability to discharge their functions is the prohibition on

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[1284] *Croissant* (n 1274) para 29; *Mayzit v Russia* (2006) 43 EHRR 38, para 66; *Dvorski* (n 1274) para 79.

[1285] Chapter 3, section 3.3.1.

[1286] See: HL Committee 3rd Sitting: HL Deb, 17 July 2012, vol 739

[1287] Ibid.

[1288] *Golder* (n 1195); *Hilton* (n 833); *Silver* (1233); *S v Switzerland* (App 12629/87, 13965/88) (1992) 14 EHRR 670; *Brennan v United Kingdom* (App 39846/98) (2002) 34 EHRR 18; *Ocalan v Turkey* (2003) 37 EHRR 10; *Zagaria v Italy* (App 58295/00) (ECtHR, 27 November 2007); *Sakhnovskiy v Russia* (App 21272/03) (ECtHR, 2nd November 2011); *Moiseyev v Russia* (2011) 53 EHRR 9; *Titarenko v Ukraine* (2015) 61 EHRR 12; *Khodorkovskiy* (n 1273).

communication.[1289] Accordingly, the ECHR jurisprudence in this area will be examined in more detail in order to assess the compatibility of the assistance of the special advocate in light of the ECHR standards.

7.2.3.2. The prohibition on communication

Once the closed material has been served on the special advocate, they are prohibited from communicating 'with any person about any matter connected with the proceedings.'[1290] The rationale is to ensure that sensitive material is not inadvertently disclosed. However the prohibition presents a further example of the significant departure from the solicitor-client relationship. Despite the objection to this prohibition in the response to the *Green Paper* proposals, no amendments in this regard were even advanced. The ECtHR has emphasised the importance for 'lawyer-client confidentiality' in the context of Article 6(1) and Article 6(3)(c),[1291] and in doing so retains focus on the principle of effectiveness by acknowledging that:

> if a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee right that are practical and effective.[1292]

One of the predominant implications of the prohibition on communication between the special advocate and the excluded individual is contended to be that the special advocate cannot receive effective instructions. Therefore this reasoning from the ECtHR and focus on the 'usefulness' of the legal assistance is significant in examining the sufficiency of the legal assistance provided by Part 2 of the JSA. Nevertheless, the right is not absolute and given the context specific approach to interpretation, further case law is necessary to attempt a conclusion as to ECHR compatibility.

In *Golder*,[1293] and two subsequent cases,[1294] the applicants complained that their right of effective access to a court had been interfered with because the Home Secretary had

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[1289] Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73:5 MLR 836, 838.

[1290] CPR Rules and Directions Part 82 Closed Material Procedure, Rule 82.11(2).

[1291] *Khodorkovskiy* (n 1273) para 627

[1292] *S* (n 1288) para 48; *Khodorkovskiy* (n 1273) para 627.

[1293] *Golder* (n 1195).

[1294] *Hilton* (1234); *Silver* (n 1233).

refused permission to contact their legal representation with a view of initiating proceedings. The ECtHR held that the refusal of contact with their legal assistance had hindered their right to access a court. Whilst the reasoning illustrates the importance of contact with an individuals' legal assistance, which is restricted under the JSA, the particular facts of the ECHR cases provide scope to distinguish from them. In *Golder*, the applicant sought to communicate his legal representation with a view to initiate proceedings. It is possible to argue in the context of the JSA, the prohibition on communication does not prevent the individual from initiating proceedings. The prohibition only takes effect once the special advocate has seen the closed material, therefore the proceedings are already in progress.

In *Ocalan v Turkey*,[1295] the Turkish government restricted the applicants' visits with his legal assistance to two hourly visits a week. The ECtHR found this to be a contributing factor which made the preparation of his defence 'difficult' and was therefore contrary to Article 6.[1296] It stated that the government had not adequately explained why the authorities had not permitted the lawyers to visit the applicant more frequently even in view of the 'exceptional security considerations of the case'.[1297] This evidences that even where security concerns are a consideration, the ECtHR will not merely accept the need to restrict an individuals' right to effective legal assistance. This demonstrates the necessity for the UK government to sufficiently explain the prohibition on communication without merely referencing a potential threat to national security.

The ECtHR also stressed that the 'highly complex charges', and 'exceptionally voluminous case file' involved in *Ocalan* required, 'skilled legal assistance' and these were contributing factors to finding that the restricted access to a lawyer was unjustified.[1298] With regard to their experience in SIAC, special advocates have reported receiving vast amounts of complex material in the closed material that they are required to examine in representing the interests of the excluded individual. This comes with it the additional problem of being in the form of intelligence assessments and information,

[1295] *Ocalan* (n 1288).

[1296] Ibid, para 157.

[1297] Ibid, para 155.

[1298] Ibid, para 154.

with no effort to turn it into evidence.[1299] Van Harten has pointed out that the way in which intelligence assessment views evidence is very difference to the legal assessment of establishing a defence.[1300] The problem is exacerbated by the very nature of intelligence which can be described as looking forward, it is based on prevention and is an estimation of 'what is happening and when will it happen.'[1301] Whilst the police force are faced with the task of turning their information into evidence in order to establish a case against the accused, intelligence officers will not be trained to assess evidence in the same way. These circumstances appear analogous to the reasoning in *Ocalan* with special advocates experiencing voluminous and complex case files in the closed material; thus likely that CMPs would require 'skilled legal assistance' in accordance with ECHR standards. As a result a high threshold should be set for the Home Secretary to justify restricting communications between the special advocate and the individual whose interests they represent.

The prohibition on communication is subject to some minor exceptions. The special advocate may communicate with the individual before the closed material is served.[1302] The special advocates have reported that this communication is 'unlikely to be of much use' given that they are unaware of the nature of the closed case the individual has to meet at that stage;[1303] and, it is difficult to formulate effective questions to the individual that may assist in the case.[1304] In addition, once the closed material has been served the excluded individual and /or their legal representative are permitted to communicate with the special advocate on a one way basis. This second exception is also viewed as potentially ineffective as the individual will not have been made any

[1299] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2* (n 55) Q61 Ian Macdonald QC.

[1300] Gus van Harten, "Weakness of adjudication in the face of secret evidence" 13 (2009) *The International Journal of Evidence and Proof* 1,16.

[1301] Fred Manget, 'Intelligence and the Criminal Law System' (2006) 17 Stan L and Policy Review 415 at 416.

[1302] CPR Rules and Directions Part 82 Closed Material Procedure Rule 82.11(1).

[1303] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2* (n 55). Written evidence submitted by a number of special advocates, para 9.

[1304] *JCHR Counter-Terrorism Policy and Human Rights* (n 243) Oral evidence, 12 March 2007, Q44 (Nick Blake QC).

more aware of the case against them as they will not have seen the closed material.[1305] This is not to say that these exceptions will be ineffective in every case. It is possible in cases where the individual has brought the case against the government, compensation proceedings for example,[1306] that the ability to communicate prior to the special advocate being served the closed material may assist the special advocate's ability to represent their interests. The one way method of communication may also be of assistance in such circumstances.

7.2.3.3. *A*-type disclosure

It is contented here that the usefulness of these exceptions could be dependent on the application of *A*-type disclosure. This chapter has already established the disparity of the application of *A*-type disclosure and the difficulties in discerning the level of disclosure that it requires. The interpretation of the Strasbourg decision fell to be considered by the UK courts in *Secretary of State for the Home Department v AF*,[1307] in which the House of Lords held *A v UK* as decisive. It was determined that an individual subject to a control order would have to be given sufficient information about the case against them in order for them to give effective instructions to the special advocates representing their interests.[1308]

Unfortunately, it is apparent, that even following the decision of the House of Lords in *AF*, there is a reluctance to apply *A*-type disclosure at a domestic level.[1309] The approach of the domestic courts has been in line with the context specific approach of the Strasbourg organs. This is well illustrated by the majority's decision of the Supreme Court in *Home Office v Tariq*[1310] who proclaimed that *A v UK* as applied in *AF* had not established an absolute rule that *A*-type disclosure must always be applied regardless of

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[1305] John Ip, 'The Rise and Spread of the Special Advocate' (2008) PL 717 at 733.

[1306] This was the view of Irwin J, in *CF & Mohamed v Secretary of State for the Home Department* [2013] EWHC 3402 (QB).

[1307] [2009] UKHL 28.

[1308] Ibid, at [65] *per* Lord Phillips; [74] *per* Lord Hoffman; [85] *per* Lord Hope; [97] *per* Lord Scott; [98] *per* Lord Rodger; [99] *per* Lord Walker; [106] *per* Baroness Hale; [108] *per* Lord Carswell; [119] *per* Lord Brown.

[1309] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64 *Current Legal Problems* 215, 219; Nanopoulos (n 1188); Kavanagh (n 1289) 852.

[1310] *Tariq v Home Office* [2011] UKSC 35.

the circumstances.[1311] The Supreme Court emphasised the specific context of the case and distinguished Tariq's situation being a civil claim for discrimination whereby the question was whether he was entitled to damages, as a 'less grave invasion of a person's rights'[1312] and concluded that the Home Office was not required to provide him with sufficient information about the allegations against him.[1313] Additionally, *A*-type disclosure does not apply in SIAC proceedings, due to the assertion that they do not engage Article 6.[1314] This is in line with the apparent disparity in protection between Convention rights that the ECtHR has left in cases before Strasbourg. Unfortunately, the approach to the application of *A*-type disclosure at the domestic level in CMPs heard under the JSA has continued.[1315] The approach of the lower courts has been to not require *A*-type disclosure in cases that do not directly affect the liberty of the individual.[1316] In *CF v Secretary of State for the Home Department*,[1317] Lloyd Jones LJ found that *A*-type disclosure did not apply in circumstances in which the controlee made allegations, in contrast to allegations made against the controlee.[1318]

However, Maurice Kay LJ in the Court of Appeal stated that: 'to differentiate between allegations against a suspected terrorist and the case for the Secretary of State in opposition to an abuse of process application, is too fine a distinction.'[1319] He relied on the case of *El Masri v Macedonia.*[1320] *El Masri* was a case regarding an allegation of extraordinary rendition and the challenge was brought under Article 3 ECHR. However,

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[1311] Ibid, at [83] *peri* Lord Hope. See also Lord Manse at [69]; Lord Brown at [85]; Lord Dyson [138].

[1312] Ibid, at [160] *per* Lord Dyson.

[1313] Ibid, at [69] *per* Lord Manse; at [80] – [81] *per* Lord Hope; at [85] *per* Lord Brown; at [138] *per* Lord Dyson.

[1314] *(BB, Algeria) v SIAC; IR(Sri Lanka)* [2012] 1 WLR 232; *U v SIAC* [2009] EWHC 3052 (Admin).

[1315] *Khaled v The Security Service* [2015] EWHC 1727 (QB)

[1316] *CF v Ministry of Defence* [2014] EWHC 3171 (QB) at [23]; *Kiani v The Secretary of State for the Home Department* [2015] EWCA Civ 776 at [143].

[1317] [2012] EWHC 2837 (Admin).

[1318] Ibid at [27] – [30].

[1319] *CF & Mohamed v Secretary of State for the Home Department* [2014] EWCA Civ 559 at [16].

[1320] (App 39630/09) (2013) 57 EHRR 25, paras 191 – 192.

the judgment of the ECtHR contains an important passage which could have potential significance to the types of cases heard under the JSA. On the issue of investigating the allegations made against the national authorities, the ECtHR emphasised the importance of the case not only on the individual, but also for the 'public, who had a right to know what happened.'[1321] The ECtHR went on to state that:

> an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful act.[1322]

In addition, the ECtHR asserted that there must be a 'sufficient element of public scrutiny of the investigation' to ensure accountability.[1323]

Another positive point that emerges from the domestic case law where *A*-type disclosure is deemed to apply is the recognition of the link between *A*-type disclosure and the ability of the special advocate to carry out their functions. For example in *Kiani v SSHD* the Court of Appeal stated that:

> if the special advocate is unable to perform his function in any useful way unless the detainee is provided with sufficient information about the allegations to enable him to give effective instructions to the special advocate, then there must be disclosure to the detainee of the gist of that information.[1324]

This line of reasoning was also applied in *AH v Secretary of State for the Home Department*,[1325] where the decision not to order further disclosure was made on the grounds that the individual was considered to be able to give effective instructions on the basis of the material that had already been disclosed.[1326] It is argued here, in relation to the two exceptions to the prohibition on communication with the special advocate and the individual stated above, that their usefulness would be dependent on the level of *A*-type disclosure. This is if the level required was sufficient to enable the individual

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[1321] Ibid, para 191.

[1322] Ibid, para 192.

[1323] Ibid, para 192.

[1324] *Kiani* (n 1316) at [143]. See also *RM v St Andrew's Healthcare* [2010] UKUT 119 (AAC) at [23].

[1325] [2011] EWCA Civ 787.

[1326] Ibid. See also *R (on application of S) v Northampton Crown Court* [2010] EWHC 723 (Admin).

and the special advocate to know the nature of the case and enable the individual to give effective instructions. This is likely to be seen as an important factor by the ECtHR given the emphasis on the principle of effectiveness in the context of legal assistance. A determinative opinion on the compatibility of the sufficiency of legal assistance in the JSA is difficult to give in the abstract given that *A*-type disclosure is not a requirement in the legislation. It therefore remains to be seen whether the UK courts will take the reluctant approach illustrated by cases such as *Khaled* and Lloyd Jones LJ in *CF*, or the approach of Maurice Kay LJ. Which is praised here for the importance given to public scrutiny, and maintaining confidence in the administration of justice.

After the closed material has been served on the special advocate it is also possible for the special advocate to seek the permission of the court to communicate with the excluded individual or their legal representative.[1327] However, the Home Secretary is notified of the request and of the content of the proposed communication,[1328] and is given the opportunity to oppose it.[1329] This option is considered to be 'tactically undesirable'.[1330] It has been stated that special advocates feel 'inhibited' about even being required to draw the attention to their opponent to certain issues on which they require assistance with from the appellant.[1331] This exception exemplifies the ethical concerns with the relationship between the special advocate and the excluded individual as unconstrained communication would usually be protected by legal professional privilege.[1332] In examining the sufficiency of the legal assistance the special advocate can provide given these restrictions with ECHR standards, it is noteworthy that the ECtHR has specifically examined the issue of private communications between individuals and their legal assistance. This is as opposed to merely examining the issue of restricted communication, or lack of communication.

In *S v Switzerland,* almost all of the applicant's communications with his lawyer were placed under surveillance by the police which prevented any confidential

[1327] CPR Rules and Directions Part 82 Closed Material Procedure Rule 82.11(4).

[1328] Ibid, r.82.11(5)(a).

[1329] Ibid, r.82.11(5)(b).

[1330] *JCHR Counter-Terrorism Policy and Human Rights* (n 243) para 201.

[1331] Ibid, Oral evidence, 12 March 2007, Q44 (Andy Nicol QC).

[1332] *JCHR Sixteenth Report* (n 336).

discussions.[1333] The Commission held that the consequence was that the applicant was deprived of the 'chance of organising his defence effectively at an important stage of the proceedings.'[1334] The ECtHR upheld the Commission's decision with a strong focus on the principle of effectiveness and found a violation of Article 6(3)(c).[1335] Moreover in *Brennan v United Kingdom*[1336] the ECtHR found a violation of Article 6(3)(c) in conjunction with Article 6(1) regarding the presence of a police officer during the first consultation between the applicant and his solicitor.[1337] Similarly in *Zagaria v Italy* the authority's interception of private telephone conversations between the applicant and their lawyer amounted to an interference with Article 6(3)(c).[1338]

This line of cases emphasise the importance of private communications, however the case of *Moiseyev v Russia* is particularly relevant to the exception whereby the special advocate can apply to the court to communicate with the individual. In *Moiseyev* the applicant and his lawyer were required to obtain permission from the remand centre (the same authority that was conducting the prosecution) for any contact between the two;[1339] and for any material they wished to pass each other, which was read by the authorities.[1340] This was viewed by the ECtHR as effectively giving the prosecution advance knowledge of the applicant's defence strategy[1341] and undermined the appearance of a fair trial, the principle of equality of arms, and "eroded the rights of the defence to a significant degree."[1342] This is almost identical to the predicament the special advocate is placed in given that the Home Secretary is notified of the communications and is also the other party to the case. Consequently, it is argued here that *Moiseyev* could be used by analogy that this exception to the prohibition on

[1333] *S v Switzerland* (n 1288).

[1334] Ibid.

[1335] Ibid..

[1336] *Brennan* (n 1288).

[1337] Ibid.

[1338] *Zagaria* (n 1288).

[1339] *Moiseyev* (n 1288) para 202.

[1340] Ibid, para 208.

[1341] Ibid, para 211.

[1342] Ibid, para 207 and 212.

communication is not sufficient to comply with the standards set by the ECHR regarding effective legal assistance.

To sum up, the ECHR standards of effective legal assistance could raise questions specifically regarding the unconventional professional relationship between the special advocate and the individual; and the prohibition on communication including the exceptions. This is in the sense of the importance placed on the relationship of confidence, professional secrecy, the ability to communicate freely with one's legal assistance, and in private. Given the context specific approach to interpretation, and the fact the examination of the special advocate at the first stage of the ECtHR's assessment is a new approach, it is impossible to come to a definitive conclusion as to the compatibility with Article 6(1). However, the discussion demonstrates a sound basis for advancing the argument that the limitations placed on special advocates' ability to carry out their role are capable of amounting to an interference with the right of effective access to a court.

Nevertheless, even if an interference with the right of effective access to a court due to the insufficiency of legal assistance provided by the special advocate can be established, the right is not absolute. The remainder of the chapter examines the ECtHR's approach to its assessment of whether an interference with the right to access a court can be justified.

7.3. Justifying an interference with the right to access a court

Notwithstanding the wide application to different factual circumstances the right to access a court is not an absolute right and is subject to implied limitations.[1343] The ECtHR has stated that the right of access, 'by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals.'[1344] In imposing restrictions the Contracting States are allowed a certain margin of appreciation.[1345] Nonetheless, the limitations must not restrict or reduce access to court in such a way that the very essence of the right is

[1343] *Golder* (n 1195) para 38.

[1344] Ibid.

[1345] *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 57.

impaired.[1346] Moreover the limitation must pursue a legitimate aim; and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim.[1347]

The legitimate aims that have been accepted by the ECtHR as potentially justifying an interference with the right to access a court include: the fair administration of justice;[1348] legal certainty;[1349] procedural bars such as an immunity defence;[1350] parliamentary immunity;[1351] and maintaining good international relations by for example state immunity.[1352] Additionally, and of direct relevance to the assessment of the compatibility of Part 2 of the JSA with Article 6(1) national security is also accepted as a legitimate aim which may justify imposing restrictions on the right to access a court.[1353]

In relation to the very essence test, what this requires is difficult to discern from the ECtHR's case law as the ECtHR has never defined the concept in the context of Article 6.[1354] Christoffersen contends that it remains unclear whether the ECtHR uses the term to denote the real meaning of the right, or what is important about it.[1355] In principle the very essence test is one of the doctrines used by the ECtHR that illustrates that Article 6(1) cannot be interpreted restrictively.[1356] Nevertheless, this section illustrates that the

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[1346] *Philis v Greece* (App 12750/87, 13780/88, 14003/88) (ECtHR, 27 August 1991), para 59; *De Geouffre de la Pradelle v France*, para 28; *Stanev v Bulgaria*, para 229.

[1347] *Golder* (n 1195); *Ashingdane* (n 1345); *Al-Fayed* (n 1203) para 65.

[1348] *Tolstoy Miloslavsky v the United Kingdom* (App 18139/91) (1995) 20 EHRR 442, para 61.

[1349] *Tence v Slovenia* (App 37242/14) (ECtHR, 31 May 2016) para 31.

[1350] *Ashingdane* (n 1345); *Al-Fayed* (n 1203); *Taylor v United Kingdom* (2003) 36 EHRR CD104.

[1351] *Dombo Beheer BV v Netherlands* (App 14448/88) (1994) 18 EHRR 213.

[1352] *Fogarty* (n 1203); *McElhinney* (1203); *Al-Adsani* (n 1203).

[1353] *Tinnelly* (n 1152).

[1354] Laura Hoyano, 'What is balanced on the scales of justice? In search of the essence of the right to a fair trial' (2014) *Criminal Law Review* 4, 15.

[1355] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff, 2009) 163.

[1356] Fenwick takes this view in Helen Fenwick, 'Recalibrating ECHR Rights, and the Role of the Human Rights Act Post 9/11: Reasserting International Human Rights in the "War on Terror"?' 63:1 (2010) *Current Legal Problems* 153-234, pp.206-207.

use of the doctrine is relative and therefore does not give as higher protection to the right to access a court as it would appear on the face of it. The ECtHR's application of the doctrine does not correspond with its discourse. Whilst the ECtHR's claims to separate the very essence test, from the proportionality test an examination of the ECtHR jurisprudence evidences that in practice the ECtHR does not strictly divide the two.[1357] The cases of *Beer and Regan*[1358] and *Waite and Kennedy*[1359] demonstrate this point well. In both cases the ECtHR states that the right to a court is not absolute and that limitations arise by implication. The court goes on to state that any limitations must not 'impair the very essence' of the right, the limitations must be in pursuit of a legitimate aim and satisfy the proportionality test. However, the ECtHR does not go on to apply the very essence test and in fact makes no reference to the doctrine until its concluding sentence after engaging in the proportionality statement:

> it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention.[1360]

This approach to limitations on the right to access a court calls into question the significance of the very essence test. Goss rightly suggests that the doctrine appears to be a 'circumlocution that simply amounts to a proportionality test.'[1361]

Whilst the ECtHR accepts there are situations which may justify an interference, there must be a reasonable relationship of proportionality between the restrictive measure and the legitimate aim.[1362] Interestingly, in the context of the right to access a court, the ECtHR has not employed the test of strict necessity which is consistent with its interpretation of the other Article 6(1) guarantees. The reason for this is not evident in the ECtHR's jurisprudence, and could be considered surprising given that the ECtHR has made no indication that this particular guarantee is of any less importance.

[1357] Christoffersen (n 1355) 163. See also Ryan Goss, *Criminal Fair Trial Rights* (Hart: 2014). 198 - 201.

[1358] *Beer and Regan v Germany* (App 28934/95) (ECtHR, 18th February 1999).

[1359] *Waite and Kennedy v Germany* (App 26083/94) (ECtHR 18 February 1999).

[1360] *Beer and Regan* (n 1358) para 63; *Waite and Kennedy* (n 1359) para 73.

[1361] Goss (n 1357) 200

[1362] *Ashingdane* (n 1345); *Al-Fayad* (n 1203).

The case law illustrates that whether a measure is considered proportionate by the ECtHR is dependent on a number of aspects. For example in the context of immunities the ECtHR has held that measures which in principle reflect generally recognised principles of public international law cannot in principle be considered disproportionate.[1363] In *Tinnelly*, the ECtHR stated that the conclusive nature of the Home Secretary's decision was disproportionate,[1364] the Commission stated that the absence of judicial guarantees impaired the very essence of the right.[1365]

It is difficult to discern an established set of principles regarding the ECtHR's proportionality analysis applicable to the potential interference cause by the use of the special advocate as the individual's legal assistance in the CMP. This is because of the limited body of case law specifically regarding the effectiveness of legal assistance in accordance with the right to access as guarantees by Article 6(1). The Article 6(1) cases used above as evidencing a link between the right of effective access to a court and the need for legal representation are not particularly instructive, given that the issues were predominantly whether legal aid should have been provided. Therefore, the interference was caused by a lack of legal assistance, whereas the issue with the JSA is the effectiveness of the legal assistance provided.

It is possible, given the current approach of the ECtHR towards CMPs under complaints brought under different Convention rights, that the application of *A*-type disclosure may be relevant in a proportionality assessment. The compatibility would therefore rest on the UK's interpretation of *A*-type disclosure of which this chapter has demonstrated the reluctance to its application. In addition is the ECtHR's approach which shows varying degrees of its application dependent on the Convention right and factual circumstances.

7.4. Concluding observations

This chapter has illustrated that the conventional approach at Strasbourg in its assessment of special advocates, is to view their use as a safeguarding mechanism to offset the negative impact of CMPs. This reflects the portrayal of special advocates domestically and how the mechanism is presented to the ECtHR. In such an analysis,

[1363] *Cudak v Lithuania* (App 15869/02) (ECtHR, 23rd March 2010) para 57; *Fogarty* (n 1203).

[1364] *Tinnelly* (n 1152) para 79

[1365] Ibid, para 82.

special advocates are examined at the second stage of the ECtHR's assessment, namely whether the interference is justifiable. This thesis contends that the ECtHR's deferential interpretative principles are more prominent at this second stage of its assessment. The danger being in the context of national security, that the deferential standard of review will trump the ECtHR's interpretative principles that enhance rights protection which are more prominent at the first stage of its assessment.

The landmark ruling of the Grand Chamber in *A*, stated that special advocates could constitute a safeguard capable of counterbalancing the negative impact of CMPs, if the individual was provided with *A*-type disclosure. This level of disclosure was considered necessary in order for the individual excluded from the CMP to give effective instructions regarding their case to the special advocate who represented their interests. However, whilst the judgment is to be welcomed, subsequent case law illustrates difficulties in its application. These include, the context specific approach to interpretation which has resulted in finding the use of CMPs Convention compliant with the special advocate has a sufficient counterbalancing mechanism, without the provision of *A*-type disclosure. It is argued here, that these decisions represent the danger of a lower level of scrutiny of the effect of the shortcomings of the special advocate system. In addition, there are difficulties evident in the application of *A*-type disclosure in the contexts it is deemed to apply.

Consequently, this chapter has advanced an alternative framework by which to examine the use of special advocates in CMPs, which lays the foundations for a higher level of scrutiny of the restrictions placed on the ability to carry out their role. The alternative framework is advanced on the basis that, the special advocate system provides an important mitigating tool in the context of CMPs in relation to their perceived unfairness to the excluded individual. However, the overall effect still falls short of the acceptable standard of fairness in accordance with ECHR standards. It is argued here, that it is the overall effect on the standard of fairness that should be the focus of an analysis of the system and rights protection. Therefore, this thesis presents a more holistic approach to an assessment of compatibility of CMPs, including the central role played by special advocates, with Article 6(1). Chapter 7 has specifically examined the role of the special advocate and the right to effective legal assistance as an aspect of the right to access a court. The relationship between the special advocate and the individual, the restrictions on communication, and the application of *A*-type disclosure, directly

affect the ability of the individual to give effective instructions to the special advocate who represents their interests. This chapter has established that these limitations mean that the sufficiency of effective legal assistance provided for by the JSA, is capable of raising questions of compatibility with Article 6(1).

Nevertheless, the interference with the right to access a court that the limitations on special advocates can give rise to, can be justified. In this regard, it is difficult to predict the outcome of a proportionality assessment, because the framework advanced in this chapter is a new approach. It is suggested here that it could likely involve questions by the ECtHR as to the application of *A*-type disclosure as this is capable of alleviating some of the difficulties special advocates may face at the preliminary stage in the proceedings.

If a case brought to Strasbourg was challenged on these grounds, and the interferences were found to be justified, then the applicant could challenge the effectiveness of special advocates during the conduct of the proceedings. This will be examined in detail in Chapter 8, in light of the equality of arms and the right to adversarial proceedings. The essence of which is the ability for the parties to participate effectively in proceedings, on an equal footing.

Chapter 8 The Role of Special Advocates: equality of arms and the right to adversarial proceedings

The principle of equality of arms and the right to adversarial proceedings are implied rights and regarded as inherent in the notion of the right to a fair trial.[1366] They are applicable to both criminal and civil proceedings.[1367] The two procedural principles are intertwined,[1368] and both emphasise the importance of the parties to a case being able to participate as far as possible in the proceedings.[1369] Moreover, an examination of the case law evidences a link between the equality of arms and the right to adversarial proceedings and the right to disclosure of all relevant evidence.[1370] Critics of Part 2 of the JSA, in response to the *Green Paper* proposals, argued that CMPs by their very nature seriously undermined the principle of equality of arms.[1371] During the JSA's Parliamentary passage, similar assertions were made in both Houses in relation to CMPs, as provided for by the legislation, not meeting the equality of arms and the need for amendments to improve the position for the excluded individual.[1372] Such

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[1366] *Delcourt v Belgium* (App 2689/65) (1979-80) 1 EHRR 355, para 28; *Feldbrugge v Netherlands* (App 8562/79) (1986) 8 EHRR 425; *Bonisch v Austria* (App 8658/79) (1987) 9 EHRR 191, para 32; *Brandstetter v Austria* (App 11170/84, 12876/87 & 13468/87) (1993) 15 EHRR 378, para 66.

[1367] *Dombo Beheer BV v Netherlands* (App 14448/88) (1994) 18 EHRR 213, para 33; *Lobo Machado v Portugal* (App 15764/89 (1997) 23 EHRR 79, para 31.

[1368] Piero Leanza and Ondrej Pridal, *The Right to a Fair Trial* (Kluwer Law International, 2014) 124. The ECtHR often deals with the two guarantees together, consequently it is not always easy to distinguish between the two.

[1369] John Jackson 'Justice, security and the right to a fair trial: is the use of secret evidence ever fair?' [2013] *Public Law* 720, at 730.

[1370] E Nanopoulos 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 78(6) MLR 913, 922 Nanopoulos contends that the right to disclosure is implied by both guarantees.

[1371] *Responses to the Green Paper*: Special Advocate, para 23; Public Interest Lawyers, p.4; Bingham Centre for the Rule of Law, para 19.

[1372] In the House of Lords see in particular: HL Deb, 11 July 2012, vol 738, col 1182 and 1198 Lord Falconer; and col 1180 Lord Hodgson; HL Deb, 17 July 2012, vol 739, col 145, Lord Hodgson; HL Deb, 21 November 2012, vol 740, col 1889, Lord Strasburger. In the House of Commons see: HC Deb, 31 January 2013, vol 556 where Andy Slaughter (Labour MP) advances strong support for making amendments to go any way towards equality of arms; HC Deb, 4th March 2013, vol 576, col 696, Sadiq Khan (Shadow Justice Secretary) who is critical of the Government's view of what it takes to ensure equality of arms in the legislation.

contentions are unsurprising given that the basic premise of a CMP is that one of the parties is excluded from the closed session and unable to access certain relevant evidence, consequently inhibiting their ability to participate in the proceedings.

The conventional approach of the ECtHR so far has focused not on 'any inherent incompatibility of a closed material procedure with Article 6, but on the safeguards which Article 6 requires a closed material procedure to include.'[1373] Special advocates are considered as an important safeguard, and in this sense have been considered as a positive mechanism capable of offsetting the negative impact a CMP may have on the fairness of the proceedings. On this presentation of the system, the ECtHR examines the shortcomings of the special advocate system at the second stage of its analysis. Therefore, in its assessment as to whether the interference with the Convention is justified. This thesis contends that this approach brings with it the danger that the restrictions placed on special advocates can escape a high level of scrutiny. Whilst special advocates are an important mitigating tool, the overall impact of the restrictions can still fall short of the requisite standards of fairness in accordance with the ECHR. Chapter 7 presented an alternative framework by which to examine the shortcomings of the special advocate system. The basis of this is a holistic approach to assessing the system of CMPs, which includes these shortcomings, at the first stage of the ECtHR's assessment. This chapter examines the limitations on special advocates that could raise issues with the equality of arms and adversarial proceedings. The essence of these implied Article 6(1) guarantees is that individuals' should be able to participate as far as possible in the proceedings to which they are a party. This chapter proceeds on the holistic approach to the analysis of the compatibility of CMPs with the ECHR, including the central role played by special advocates. The argument being that, in certain circumstances, the limitations could inhibit their ability to carry out their role in such a way that this constitutes an interference with Article 6(1).

Consequently, this chapter will assess the ability of the special advocate to participate in the proceedings on behalf of the individual, in accordance with the requirements of the equality of arms and the right to adversarial proceedings. It is argued here that this approach entails heightened scrutiny of the ability of special advocates to carry out their

[1373] *Tariq v Home Office* [2010] EWCA Civ 462 at [24].

functions, and that the use of special advocates in CMPs can itself constitute an interference with these guarantees.

Sections 8.1 and 8.2 illustrate the meaning of equality of arms and the right to adversarial proceedings, and will demonstrate the ECtHR's interpretation and application of the guarantees. Section 8.3 will examine the effectiveness of the special advocates' ability to participate in the proceedings, on behalf of the individual whose interests they represent. This examination is within the alternative framework established in Chapter 7 in which the limitations on special advocates' are considered within the assessment of whether there exists an interference with Article 6(1). Nevertheless, even if an interference can be established, equality of arms and the right to adversarial proceedings are not absolute rights. Therefore, Section 8.4 illustrates the ECtHR's approach in its assessment of whether interferences with the guarantees are justified. This will highlight factors that the ECtHR may take into consideration and assist in determining the likelihood of a successful challenge at Strasbourg.

8.1. The meaning and application of the equality of arms

The principle of equality of arms simply means procedural equality between the parties. It is often defined in a broad sense; the basic idea being one of fair balance between the parties. The origins of the principle are not entirely clear.[1374] It is not well established that the equality of arms is about achieving a fair balance between the parties; and therefore one party is not in a more advantageous position in the proceedings.[1375] The equality of arms is applicable to both criminal and civil contexts.[1376]

[1374] *Neumeister v Austria* (1979-80) (1979-80) 1 EHRR 91 and *Delcourt* (n 1366), appear to be the first cases referring to the term 'equality of arms'. However Summers states that the concept was introduced in an earlier case concerning civil proceedings, namely: *X v Sweden* (App 434/58, (1959) 2 YB 354, 370, Sarah Summers, *Fair Trials: the European criminal procedural tradition and the European Court of Human Rights* (Hart: 2007) 104.

[1375] *Delcourt* (n 1366) para 34; *Feldbrugge* (n 1366) para 44; *Bendenoun v France* (1994) 18 EHRR 54, para 52; *Nideröst-Huber v Switzerland* (App 18990/91) (1998) 25 EHRR. 709, para 23; *Ankerl v Switzerland* (App 17748/91) (2001) 32 EHRR 1, para 39; *Lizarraga v Spain* (2007) 45 EHRR 45, para 56.

[1376] *Dombo Beheer* (n 1367) para 33; *Steel and Morris v United Kingdom* (App 68416/01) (2005) 41 EHRR 22, para 59; *Voloshyn v Ukraine* (App 15853/08) (ECtHR, 10th October, 2013).

In essence it requires that:

> each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.[1377]

The principle of equality of arms does not guarantee specific rights, rather it ensures that rights that are guaranteed are applied fairly.[1378] What it guarantees is that if one party is afforded the right to be heard, then the other party must be afforded the same opportunity. So in *Monnell and Morris v UK*,[1379] the individual's application for appeal was heard without them being present or being represented. However, the prosecution was not present either therefore there was no breach of the equality of arms.[1380] The court reasoned that the principle requires equal treatment between the parties, and there would be no breach if both parties were at the same disadvantage.[1381]

A second point to note about the Strasbourg approach regarding equality of arms cases is that it often emphasises that the principle is just, 'one of the elements of the broader concept of a fair trial'.[1382] Summers notes the 'methodological significance' of this phrase. First, the court will establish whether there is an imbalance; it will then go on to assess the effect that imbalance has on the proceedings as a whole. [1383] The mere finding of an imbalance, without ascertaining the effect on the fairness of the proceedings as a whole, will not in itself amount to a violation of Article 6(1). The ECtHR's use of the 'proceedings as a whole' test is one way in which it restricts the scope of the principle of equality of arms. This will be addressed in more detail below.

8.1.1. Inequalities

The best way to clarify the meaning of equality of arms is to discern the circumstances in which the ECtHR has found there to be an imbalance between the parties. First and

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[1377] *Dombo Beheer* (n 1367), para 33.

[1378] Summers (n 1374 104.

[1379] *Monnell and Morris v UK* (App 9652/81 9818/82) (1988) 10 EHRR 205.

[1380] Ibid, para 62.

[1381] *Monnell* (n 1379) para 62. See also *Nideröst* (n 1375) para 23, there was no infringement of the equality of arms because the Court's observations were not submitted to either party.

[1382] *Nideröst* (n 1375), para 23; *MS v Finland* (App 46601/99) (2006) 42 EHRR 5, para 30.

[1383] Summers (n 1374) 105.

foremost, an inequality of arms has been found where one party has been permitted to be heard and the other party has not.[1384] Although the ECtHR has stated that the requirements inherent in Article 6(1) are not necessarily the same in civil cases as they are in criminal proceedings.[1385] The ECtHR has found these circumstances to amount to an inequality of arms in both criminal and civil contexts.[1386] In *Karakasis v Greece*, the court proclaimed that, 'a procedure whereby civil rights are determined without ever hearing the parties submissions cannot be considered compatible with Article 6(1).'[1387] In this case the applicant's entitlement to compensation for his detention on remand was ruled on by the Court of Appeal without giving the applicant the opportunity to submit his arguments to the court, or challenge the ruling.[1388] The ECtHR concluded, on these circumstances, that there was a violation of Article 6(1) in respect of the Court of Appeal's 'failure to hear the applicant.'[1389] It is unclear if the fact that the applicant was not able to challenge was a significant factor in the ECtHR's finding of a violation, or whether the failure to hear the applicant was sufficient to amount to inequality of arms. The importance attributed to providing individuals with the opportunity to be heard, even in respect of civil proceedings, illustrates why the equality of arms is regarded of direct relevance to assessing the compatibility of CMP,[1390] given that the individual is excluded completely from the CMP and not permitted to make submissions. However, it is noteworthy that ECtHR has stressed that Article 6(1) does not guarantee, 'an absolute right to personal presence before a civil court.'[1391] Instead the decision will be made in consideration of whether the parties have had a, 'substantially comparable

[1384] *Feldbrugge* (n 1366) paras 42–44;

[1385] *Dombo* (n 1367) para 31.

[1386] E.g. Criminal proceedings: *Dombo* (n 1367); *Belziuk v Poland* (App 23103/93) (2000) 30 EHRR 614. Civil proceedings: *Feldbrugge* (n 1366); *Georgiadis v Greece* (1997) 24 EHHR. 606; *Karakasis v Greece* (2003) 36 EHRR 29.

[1387] *Karakasis* (n 1386) para 26. See also *Georgiadis* (n 1386) para 40.

[1388] *Karakasis* (n 1386) para 26.

[1389] Ibid.

[1390] That CMPs are in violation of Equality of Arms was one of the more specific references to human rights concerns voiced by critics of Part 2 of the JSA from the publication of the *Green Paper* and throughout the parliamentary passage.

[1391] *Ternovskis v Latvia* (App 33637/02) (ECtHR, 29th April 2014), para 65; *Larin v Russia* (App 15034/02) (ECtHR, 20th May 2010), para 35.

opportunity to present their case to the court.'[1392] So there is a need to distinguish between being physically excluded from the CMP, and whether there is the opportunity for the individual to present their case to court. In this regard, the use of the special advocate and their ability to represent the interests of the excluded individual will need to be examined in more detail, which is the aim of section 8.4.

Other examples of inequalities include: unequal access to the case file, [1393] rejecting requests for production of materials in support of applicants' case;[1394] inequalities in communication of arguments and observations;[1395] unequal status of witnesses;[1396] and, imbalances regarding access to facilities.[1397] These examples also explain the contention by those opposed to the use of CMPs that they do not respect the equality of arms. The consequences of the exclusion of the individual and their legal representation from the CMP, and the presence of the government who is generally their opposing party, are an unequal status with regard to evidence and witnesses and accessing facilities. However, the mere existence of an imbalance is not decisive. The ECtHR goes on to examine the proceedings as a whole, and equality of arms is not an absolute right, so the interference may be justified. Therefore, it is not helpful at this stage to make assertions as to the compatibility of CMPs in this regard. The compatibility will be assessed in subsequent sections which assess in more detail the interpretation and application of the Article 6(1) guarantee.

8.1.2. The 'proceedings as a whole'

Once it is established there is an imbalance, the general approach of the ECtHR in its application of the principle of equality of arms, is to proceed to assess the effect on the

[1392] *Ternovskis* (n1391), para 65.

[1393] *Foucher v France* (App 22209/93) (1998) 25 EHRR 234, para 36 (criminal proceedings); *Pellegrini v Italy* (App 30882/96) (2002) 35 EHRR 2, paras 42 – 48; *Piechowicz v Poland* (App 20071/07) (2015) 60 EHRR 24, para 204 (Article 5(4)); *Piruzyan v Armenia* (2015) 61 EHRR 31, para 118 (Article 5(4)).

[1394] *De Haes and Gijsels v Belgium* (App 19983/92) (1998) 25 EHRR 1, para 58.

[1395] *Werner v Austria* (App 21835/93) (1998) 26 EHRR 310, para 69 (criminal proceedings); *Reinhardt and Slimane-Kaïd v France* (App 22921/93) (1999) 28 EHRR 59, para 107 (criminal proceedings); *Slimane-Kaïd v France*(App 29507/95) (2001) 31 EHRR 48, para 25 (criminal proceedings).

[1396] *Dombo Beeher* (n 1367).

[1397] *Yvon v France* (App 44962/98) (2005) 40 EHRR 41.

fairness of the proceedings as a whole.[1398] The consequence of this interpretative tool is that, in some cases, the ECtHR deems there to be an inequality of arms. However, the evaluation of the 'proceedings as a whole' reveals that the trial overall was fair.[1399] For example, in *Jorgic v Germany*[1400] the domestic court refused to call a number of witnesses named by the applicant, yet summoned the prosecution witnesses. The ECtHR reasoned that this fact did not mean that the principle of equality of arms had been disregarded, and consequently the proceedings as a whole were unfair. The ECtHR found that because the domestic court had given detailed reasons and had read written statements of some of those witnesses, and the applicant was given the opportunity to cross examine other witnesses, there was no indication the proceedings as a whole were unfair.[1401] As a result the application was declared manifestly ill-founded.[1402] Alternatively, the proceedings as a whole can be applied as such to render the proceedings as a whole, fair based on the cumulative deficiencies.[1403]

8.2. The right to adversarial proceedings: meaning and application

The right to adversarial proceedings means in principle the opportunity for parties of criminal and civil proceedings, 'to have knowledge of and comment on the observations filed or evidence adduced by the other party.'[1404] Equality of arms concerns ensuring that the opposing party is not in a more advantageous position, whereas the right to adversarial proceedings applies even if there is no imbalance between the parties. In other words adversarial proceedings are an essential element of judicial procedure.[1405] For instance, the right to adversarial proceedings will be infringed even if *neither party*

[1398] Summers (n 1374).

[1399] Treschel and Goss are critical of the ECtHR's use of 'proceedings as a whole' as an interpretative tool. See Stefan Trechsel, *Human Rights In Criminal Proceedings* (Oxford University Press 2005) 86; and, Ryan Goss, *Criminal Fair Trial Rights* (Hart: 2014) 124-138.

[1400] *Jorgic v Germany* (App 74613/01) (ECtHR, 12th July 2007).

[1401] Ibid, para 86.

[1402] Ibid, para 87.

[1403] Ola Johan Settem, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency* (Springer: 2016) 131.

[1404] *Brandstetter v Austria* (n 1366) para 76; *Ruiz-Mateos v Spain* (App 12952/87) (1993) 16 EHRR 505, para 63.

[1405] *Feldbrugge* (n 1366).

has seen a piece of evidence, and therefore there is no inequality. *Niderost-Huber v Switzerland,*[1406] is illustrative of the difference between the two requirements. In this case the observations of the lower court were not submitted to either party to the proceedings. There was therefore no infringement of equality of arms.[1407] However, the lack of communication of the domestic court's observations to the parties did infringe upon the right to adversarial proceedings.[1408]

The ECtHR first mentioned the 'right to adversarial proceedings' in *Brandstetter v Austria,*[1409] and set out its meaning in criminal cases. Nevertheless, the ECtHR soon asserted that, 'the requirements derived from the right to adversarial proceedings are the same in both civil and criminal cases.'[1410] This was in despite of the recognition that the national authorities enjoy greater latitude than in the criminal sphere.[1411]

In order to gain an understanding of the right to adversarial proceedings, it is necessary to examine the ECtHR's application of the right in its case law. There are two main aspects that the right encompasses. The first requires the communication of submissions and evidence to the parties. The second is that the parties must be provided with a 'real opportunity' to comment on them.[1412] The essence of the right being that individuals are able to 'participate properly' in the proceedings.[1413] This approach evidences the ECtHR's use of the principle of effectiveness which has been demonstrated as

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[1406] *Niderost-Huber* (n 1375).

[1407] Ibid, para 23.

[1408] Ibid, para 32.

[1409] *Brandstetter* (n 1366). Although the ECtHR first made reference to "adversarial procedure" in *Barbera, Messegue and Jarbado v Spain* (App 10588/83, 10589/83,10590/83) (1989) 11 EHRR 360, which concerned the attendance and examination of witnesses.

[1410] *Niderost-Huber* (n 1000) para 28.

[1411] Ibid.

[1412] *Oao Neftyanaya Kompaniya Yukos v Russia*(App 14902/04) (2012) 54 EHRR 19*;* at para 65; *Krčmář v Czech Republic* (App 35376/97) (2001) 31 EHRR 41*; Brandstetter* (n 1366) paras 67 and 68; *Ruiz-Mateos* (n 1404) para 68*; Milatová v Czech Republic* (App 61811/00) (2007) 45 EHRR 18 at [41] – [45]

[1413] *McMichael v UK* (App 16424/90) (1995) 20 EHRR 205, para 80; *Mantovanelli v France* (App 21497/93) (1997) 24 EHRR 370, para 33; *Kerojarvi v Finland* (App 17506/90) (2001) 32 EHRR 8, para 42.

particularly prominent in the interpretation of Article 6(1) in general:[1414] the Convention was intended to guarantee rights that are 'practical and effective' as opposed to 'theoretical or illusory'.[1415] This focus on the effectiveness of the right is instructive in considering the compatibility of Part 2 of the JSA with the right to adversarial proceedings, given that at domestic level, the special advocate has been considered not to provide effective assistance given the restrictions they face.[1416] Therefore, the question arises as to how can the excluded individual be said to be able to 'participate properly' in the proceedings? This point will be investigated further in subsequent sections whereby the relevant Convention case law is considered in light of specific issues with the legislation.

In summary there are various circumstances that the ECtHR has held amount to a violation of the right to adversarial proceedings. These include: failure to communicate the submissions made by the lower court to the appeal court;[1417] hearing held in absence of the applicant;[1418] crucial documents not disclosed;[1419] submissions of the Attorney General not communicated to the applicant;[1420] failure of the appellate court to hear the applicant before delivering its decision, or not affording the applicant an opportunity to challenge such ruling.[1421]

[1414] Chapter 4, Section 4.5.2.

[1415] *Airey v Ireland* (App 6289/73) (1979-80) 2 EHRR 305, para 24; *Artico v* Italy (App 6694/74) (1981) 3 EHRR 1, para 33; *Imbrioscia v Switzerland* (App 13972/88) (1994) 17 EHRR 441, para 38; *Wos v Poland* (App 22860/02) (2007) 45 EHRR 28, para 99; *Salduz v Turkey* (App 36391/02) (2009) 49 EHRR 19, para 51.

[1416] *Al Rawi and others v The Security Service and others* [2011] UKSC 34, para 94 *per* Lord Kerr.

[1417] *Niderost-Huber* (n 1375).

[1418] *Khodorkovskiy v Russia* (App 11082/06, 137772/05) (2011) 53 EHRR 32; *Shtukaturov v Russia* (App 44009/05) (2012) 54 EHRR 27.

[1419] *Barbera, Messegue and Jabardo v Spain* (n 1409); *McMichael* (n 1413); *Papageorgiou v Greece* (2004) 38 EHRR 30; *Fortum Corp v Finland* (2004) 38 EHRR 36; *Mooren v Germany* (2010) 50 EHRR 23.

[1420] *Voisine v France* (2001) 33 EHRR 23; *Lobo Machado v Portugal* (1997) 23 EHRR 79; *Van Orshoven v Belgium* (1998) 26 EHRR 55; *JJ v Netherlands* (1999) 28 EHRR 168

[1421] *Karakasis* (n 1386).

In addition to utilising the principle of effectiveness, the ECtHR stresses the importance of the applicants' confidence in the workings of the justice system.[1422] The court expresses the opinion that this confidence is based on the knowledge that they are afforded the opportunity to express their views on every document in the case file.[1423]

Although the ECtHR has stated that what is at stake for the applicant in the proceedings is relevant,[1424] it has also reasoned that, the effect of the material that has not been communicated to the parties had on the judgment of the domestic courts will have little bearing on the ECtHR's conclusion that the right to adversarial proceedings has been breached.[1425] Adversarial procedure means that it is for the applicant to decide whether the submissions or evidence are relevant or not, thus the ECtHR does not weigh up the nature of the material and its effect on the outcome of the applicant's case.[1426] In addition, the ECtHR conforms with the general approach to applying the Article 6 guarantees taking into consideration the entirety of proceedings. Therefore, any defects at first instance may be remedied by subsequent and extensive review.[1427] For example in *ILJ, GMR and AKP v United Kingdom*,[1428] the applicants' complained that the non-disclosure of evidence relevant to their defence interfered with their right to an adversarial procedure. However, the ECtHR found that there had not been a violation of Article 6(1) on the grounds that the subsequent hearing before the UK Court of Appeal had remedied the earlier defect.[1429] The relevant materials had been disclosed by that

[1422] *Nideröst-Huber* (n 1375) para 27; *Krcmar* (n 1412) para 43; *Steck-Risch v Liechtenstein* (2006) 42 EHRR 18, para 57.

[1423] Ibid.

[1424] *Quadrelli v Italy* (App 28168/95) (2002) 34 EHRR 8, para 34; *Van Orshoven v Belgium* (1998) 26 EHRR 55, para 41.

[1425] *Nideröst-Huber* (n 1375) paras 27 and 29; *Bulut v Austria* (App 17358/90) (1997) 24 EHRR 84, para 49; *Ferreira Alves v Portugal (No 3)* (App 25053/05) (ECtHR, 21st June 2007), para 41.

[1426] Ibid.

[1427] *ILJ, GMR and AKP v United Kingdom* (App 29522/95, 30056/96, 30574/96) (2001) 33 EHRR 11

[1428] Ibid.

[1429] Ibid, para 117.

stage and the court of appeal considered the impact of the material in light of detailed arguments from the applicants' legal representation.[1430]

8.3. Can the special advocate 'participate properly' in the proceedings on behalf of the individual?

Chapter 5 illustrated that the courts approach to ordering the use of a CMP under section 6 of the JSA, has been to take into consideration the amount of relevant sensitive material that the government advances.[1431] It would appear on its reasoning so far that the greater the amount of sensitive material, the higher the chance the court will be satisfied that it is in the interests of, 'fair and effective administration of justice' to use a CMP and alternative measures are inappropriate.[1432] Therefore, an interference with the equality of arms and the right to adversarial proceedings is straightforward to establish given that the individual and their legal representation are excluded from the CMP; and the substantial part of the case is likely to be heard in the CMP.[1433] Nevertheless, if the special advocate is viewed as a safeguard by the ECtHR, the reasoning will proceed immediately to an assessment as to whether interferences are justified and whether the special advocate counterbalances the unfairness of the CMP. On this approach, it is argued here that the limitations on special advocates have escaped intense scrutiny in some cases. This section illustrates that the limitations could inhibit the special advocates' ability to carry out their role in such a way as to amount to an interference with equality of arms, and the right to adversarial proceedings. This is based on a holistic approach to the assessment of the compatibility of CMPs, including the use of special advocates, with Article 6(1). Therefore, on the basis of the essence of the guarantees Section 8.4 examines whether the special advocate can be said to be able to participate effectively in the CMP in conformity with ECHR standards of fairness. The section specifically looks at the second group of issues of limitations on special advocates highlighted in Chapter 8: those relating to the conduct of the proceedings.

The right to have access to all relevant evidence is of key importance in criminal proceedings, however it is also of relevance to civil proceedings as it is strongly

[1430] Ibid, 118-119.

[1431] Chapter 5, section 5.3.

[1432] Ibid.

[1433] Chapter 7, Section 7.1.

connected to the requirements of equality of arms and the right to adversarial proceedings.[1434] This is demonstrated in cases such as *Jasper v United Kingdom*,[1435] and *Rowe and Davis v United Kingdom*,[1436] where the ECtHR found that the non-disclosure of relevant material to the individual and the public, interfered with both Article 6(1) guarantees. These cases are returned to in more detail in Section 8.4 as they are instructive of the ECtHR's approach to its assessment of whether interferences are justified.

Whilst special advocates have full disclosure of the closed material, they face many practical difficulties which inhibit this access and arguably negatively affect their ability to perform their functions effectively. These difficulties primarily emanate from the government's approach to the proceedings, and the nature of the national security context. This demonstrates that even if *A*-type disclosure applied and therefore the impact on not being able to receive instructions was slightly diminished, it is doubtful as to whether the special advocates can provide a 'meaningful challenge'.[1437]

First, is the reliance on the government to disclose relevant material. In CMPs the national courts and the special advocates are excessively dependent on the views of the security services as to what is exculpatory material, which is essential to the special advocate in order to represent the interests of the individual.[1438] Despite the government claiming to take its obligation to disclose exculpatory material 'seriously',[1439] it was reported that in some cases special advocates became coincidently aware of important exculpatory material that was not disclosed, due to the same special advocate appearing in two different cases.[1440] The difficulty in mounting a challenge on this basis is that the

[1434] Leanza and Pridal (n 1368).

[1435] *Jasper v UK* (App 27052/9) (2000) 30 EHRR 442.

[1436] *Rowe and Davis v United Kingdom* (App 28901/95) (2000) 30 EHRR 1.

[1437] Tamara Tulich, 'Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom' (2012) 12:2 OUCLJ 341, 362.

[1438] Chapter 2, Section 2.6.4.

[1439] *The Government's Reply to the Nineteenth Report from the JCHR Session 2006-07 HL Paper 157, HC 394* (Cm 7215) p.13.

[1440] Forcese and Waldman *Seeking Justice in an Unfair Process: Lessons from Canada, the Uk and New Zealand on the Use of 'Special Advocates' in National Security Proceedings* (August 2007), p.41.

court, which is also dependent on the security services, would also not be able to discern whether the government had not complied with its obligation. This in turn may be problematic at ECHR level, due to the ECtHR's context-specific approach to interpretation. The special advocate would have to point to a specific circumstance. Therefore, the special advocate would have to have become aware of the government's lack of disclosure and demonstrate how it had impacted their ability to participate effectively in the proceedings.

Moreover, in relation to accessing evidence special advocates have reported that the nature of the closed material widely differs.[1441] For example, in certain cases full transcripts of intercepted communications have been received, in others merely a summary which is prepared by the security services.[1442] Forcese and Waldman reported that the result can be that the special advocate receives material that is 'geared in one direction.'[1443] They suggest that with regard to the summaries the concern is that the summary is 'selective' and reflective of the government's position.[1444] This appears to give rise to an imbalance between the parties consequently raising issues with the equality of arms.

In relation to accessing material, the government often discloses the materials at a late stage leaving special advocates with a minimum amount of time to prepare. The JCHR have reported on this issue, and raised awareness of the insufficient time this leaves special advocates to sufficiently scrutinise the material, and construct strong arguments for more material to be heard in the open proceedings.[1445] Due to the potential negative effect this has on their ability to represent the interests of the appellant, the practice of late disclosure carries with it the 'risk of serious miscarriages of justice'.[1446] This practice has continued beyond the JSA, and was recognised by the court in the *Sarkandi* litigation however the, 'deficiencies were not such as to affect the outcome of the

[1441] Chapter 2, Section 2.6.4.

[1442] Forcese and Waldman (n 1440) 40.

[1443] Ibid.

[1444] Ibid.

[1445] *JCHR Sixteenth Report* (n 336) paras 63 – 65.

[1446] Ibid, [65].

appeal'.[1447] In terms of the right to adversarial proceedings, the practice of late disclosure could affect the special advocates' ability to have a 'real opportunity' to comment on the evidence and submissions. Consequently, if the special advocates' have received the closed material at a late stage, and this inhibits their ability to comment on the evidence, this could raise an issue with Article 6(1) compatibility.

The government's reluctant approach following *AF* and the irreducible minimum of disclosure requirement has led to the practice of iterative disclosure.[1448] This is where the government will only provide limited disclosure and will only go on to disclosure further if that is found to be insufficient by the court.[1449] Tulich asserts that practices such as this on the part of the government highlight 'how the adversarial process may be co-opted and manipulated when the parties involved do not stand on an equal footing.'[1450]

The Civil Procedure Rules state one of the functions of the special advocate as being to adduce evidence and cross-examine witnesses.[1451] The presentation of evidence in criminal proceedings can also be assessed in light of the guarantees in Article 6(2) and (3), however civil proceedings do not benefit from the same level of protection. While Article 6(1) does not expressly guarantee the right to adduce evidence or have witnesses called in civil proceedings, Strasbourg makes clear that restricting the right to call witnesses and adduce evidence must be consistent with the requirements of a fair trial, including equality of arms and adversarial proceedings.[1452] Although special advocates are permitted in principle to adduce evidence they face a number of difficulties which calls out their ability to carry out this function in practice. These difficulties may amount to a challenge in light of the main requirements of equality of arms and

[1447] *R (on the application of Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWHC 2359 (Admin) at [42]; *R (on the application of Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687 at [27].

[1448] Chapter 2, Section 2.7.

[1449] *JCHR Sixteenth Report* (n 336) paras 17 – 18.

[1450] Tulich (n 1437) 363.

[1451] CPR Rules 82.10.

[1452] *Wierzbicki v Poland* (App 38275/97) (2004) 38 EHRR 39, para 39.

adversarial proceedings as being providing individuals' with the 'real opportunity' to comment on the material and participate properly in the proceedings.

First, this function is inhibited as a consequence of not receiving 'effective instructions' from the individual whose interests they represent. Special advocates are in effect taking 'blind shots at a hidden target'.[1453] Without instructions it will be difficult to discern who to call, or what evidence to adduce. In this respect it is possible that the ECtHR will be less likely to see this hampering their abilities in cases heard under Part 2 of the JSA. This is because the types of cases that have arisen involve the individual bringing a claim against the State. In *CF v The Security Services*, Irwin J found this aspect of the circumstances to 'diminish' the disadvantages of the CMP.[1454] It is argued here that whilst it can be envisaged that in certain circumstances the inability to adduce evidence and call witnesses may be less difficult than in cases where the State has brought allegations against the individual; this will not be true of every case. For instance, an individual seeks judicial review of the Foreign Secretary's decision to place him on a sanctions list and the remedy is removal from the designation. The closed material contains the material that led to the Foreign Secretary's designation in the first place, which includes allegations that the individual would need to rebut in order to show that the designation was unlawful in the first place. In this situation it would be incredibly difficult for the special advocate to adduce evidence and call witnesses to rebut such allegations without having received effective instructions.

In reference to the provision that special advocates could adduce experts Andrew Nicol QC, a special advocate, stated that to be of any use the experts would need to be individuals with relevant expertise and 'inside knowledge'.[1455] Such as someone recently retired from the security services.[1456] However, the Government have deemed it inappropriate to permit special advocates to be able to call serving or former employees of the security services as witnesses.[1457] There is the added problem that even if this

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[1453] *R. (on the application of Roberts) v Parole Board for England and Wales* [2005] UKHL 45 [18] *per* Lord Bingham.

[1454] *CF & Mohamed v Secretary of State for the Home Department* [2013] EWHC 3402 (QB) at [53].

[1455] *JCHR Sixteenth Report* (n 336) para 57.

[1456] Ibid.

[1457] *Green Paper*, Appendix F para 4.

were permitted by the Government, the impartiality and independence of former or serving security service employees would be called into question by the special advocates themselves.[1458] Ken Clarke, in evidence to the JCHR, claimed that 'there is no reason why they cannot call witnesses; they can call expert witnesses if they have expert witnesses.'[1459] This statement has rightly been regarded as 'unsustainable' according to commentator Otty.[1460] In addition to the problem already stated, other witnesses which the special advocate may call would have access to the closed material and would therefore need security clearance. Such a process would be lengthy.[1461] The alternative would be to pose the questions in open court following notification to the Home Secretary.[1462] Unsurprisingly, Otty claimed in 2012 that to his knowledge since the introduction of the special advocate in the UK, the special advocates had not called a single witness.[1463] It is important to state here that the difficulty is to find and to commission the expert witness not that there is a refusal to hear witnesses. There have been cases involving special advocates which have involved experts called in support of the individual's case, these witnesses have been called by the open advocate.[1464]

In summary, there is the danger that special advocates may be required to challenge the government's case and argue for more disclosure without, in practice, being able to adduce evidence or call witnesses and independent witnesses. This on the face of it appears to present an imbalance between the parties, and prevent the special advocate from participating properly in the proceedings on behalf of the excluded individual. Strasbourg has also held there to be a breach of equality of arms due to an inability to

[1458] *JCHR Sixteenth Report* (n 336).

[1459] Ibid, Oral evidence 6 March 2012. Q 170 – 232.

[1460] Tim Otty, 'The slow creep of complacency and the soul of justice: observations on the proposal for English courts to adopt "closed material procedures" for the trial of civil damages claims' (2012) EHRLR 267, 269.

[1461] Ibid.

[1462] *Green Paper*, Appendix F para 4.

[1463] Otty (n 1460) at 269.

[1464] For example, in SIAC, see: *AHK v Secretary of State for the Home Department*, SN/5/2014, 12 August 2015; and, *BB, PP, QJ and Y v Secretary of State for the Home Department*, SC/39/2005, 18 April 2016.

adduce evidence on the part of the applicant in both criminal[1465] and civil[1466] contexts. This case law is of relevance to this discussion in demonstrating that adducing evidence is significant to ECHR standards of fairness in accordance with Article 6(1). Therefore, the restrictions on special advocates' ability in this regard could affect the compatibility of Part 2 of the JSA with Article 6(1), in certain circumstances.

In *De Haes and Gijsels v Belgium*, the outright refusal of the applicant's application to produce documents during defamation proceedings likely to prove or disprove the truth of the applicant's applications was found to have put the applicant at a substantial disadvantage vis-a-vis the plaintiffs and therefore a breach of equality of arms.[1467] On the other hand in *Wierzbicki v Poland*,[1468] the inability to adduce evidence did not breach Article 6(1) as the ECtHR held that the applicant should have been aware that the documents were covered by official secrecy and could only be disclosed in criminal proceedings.[1469] The ECtHR had regard to the obligation to keep the information secret and reasoned that it was satisfied that the domestic courts had examined the applicant's requests and given detailed reasons for their refusals.[1470] The jurisprudence clarifies that refusal to hear a witness or presentation of a piece of evidence on behalf of a party to proceedings requires reasons to be given. This does not mean that merely providing reasons will be sufficient. For example, in *Peric v Croatia*, the reasons provide by the national courts did not result in the proceeding in their entirety being regarded as fair by the ECtHR. It was found that the reasons provided were inconsistent with the court's hearing of witnesses for the other side.[1471] The ECtHR's focus on the reasons provided by the national authorities[1472] however may result in the likelihood of finding a violation in relation to the special advocates' ability to adduce evidence and call witnesses. The reasons provided by the Government is the protection of national security. As we have

[1465] *Hentrich v France* (App 13616/88) (1994) 18 EHRR 440.

[1466] *De Haes* (n 1394).

[1467] Ibid, para 58.

[1468] *Wierzbicki* (n 1452).

[1469] Ibid, para 43.

[1470] Ibid, paras 45-46.

[1471] *Peric v Croatia* (App 34499/06) (ECtHR, 27 March 2008) paras 24-25.

[1472] See Karen Reid, *A Practitioner's Guide to the interpretation of the European Convention on Human Rights* (4th ed, Sweet and Maxwell, 2012) para 11-075.

already seen Strasbourg accords a wide margin of appreciation to the contracting states where national security is said to be at stake. [1473]

The ECtHR has found there to be an inequality of arms in civil proceedings due to the refusal to hear a witness for the applicant. In *Dombo Beheer v France*,[1474] the applicant's company brought civil proceedings against a bank over the existence of an oral agreement between the managing director of the company and a branch manager of the bank. The national court refused to permit the then managing director of the company to testify as a witness due to a rule prohibiting parties to proceedings to be heard as witnesses. However, the branch manager of the bank was heard as a witness on the basis that he was not a party to the proceedings. The ECtHR found that this presented an inequality of arms between the parties. It reasoned that whilst Contracting States have a:

> greater latitude over the concept of 'fair hearing' in civil proceedings than they do in criminal proceedings, the requirement of "equality of arms" in the sense of a 'fair balance' between the parties applies in both types of proceedings.[1475]

The ECtHR went on to stress that each party must be afforded a 'reasonable opportunity' to present his case including evidence. It concluded that the managing director was the only first-hand witness of the disputed facts, and as he was not permitted to testify whereas the defendant's witness was heard and the equality of arms had been breached.[1476] Additionally, in *Olujic v Croatia*, the ECtHR held that there was inequality of arms where the national court had refused to hear any witnesses called by the applicant to substantiate his defence, although all proposals to hear evidence from witnesses for the government were admitted.[1477] However, regarding witnesses the ECtHR has held that the Convention does not require that every witness be called, the aim is the equality of arms[1478] and the ECtHR will assess whether the fairness of the

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[1473] Chapter 4, section 4.6.3.

[1474] *Dombo Beheer* (n 1367).

[1475] Ibid, paras 32-33.

[1476] Ibid, paras 34-35.

[1477] *Olujic v Croatia* (App 22330/05) 52 EHRR 26, para 85.

[1478] *Engel and others v. Netherlands* (App 5100/71, 5101/71, 5102/71, 5354/72, 5370/72) (1979-80) 1 EHRR 647, para 91; *Pisano v Italy* (App 36732/97) (2002) 34 EHRR 27, para 21. Cases concern criminal proceedings and Article 6(3)(d) in light of Article 6(1) so applied by analogy.

proceedings has been impaired in any given case.[1479] For example in *Kozak v Poland*, the domestic courts had considered that what the applicant sought to be proven by calling the witness, had been conclusively proven on the basis of the evidence that the applicant had given himself.[1480] Therefore, there was no breach of equality of arms in relation to the refusal to hear the witnesses in these circumstances.[1481]

In addition to the difficulties in calling witnesses, are the difficulties that special advocates' may face in the cross-examination. In this respect, the prohibition on communication between the special advocate and the individual whose interests they represent presents difficulties regarding witnesses. First, if the special advocate is unable to communicate with the excluded individual following disclosure of the closed material, it is increasingly difficult to know who to call to assist with the case. In addition, any meaningful cross examination may be virtually impossible without any consultation with the excluded individual regarding the case, with regard to formulating questions that would assist in arguing the individual's case. On the other hand the government would not experience the same difficulty, as a result this limitation could give rise to an issue with the equality of arms. In *Mantonelli v France*,[1482] the ECtHR found an inequality of arms because the applicants weren't able to cross examine expert witnesses in the same way as the opposing party. In addition, the inability to effectively cross-examine a witness could amount to the special advocate not being deemed to have had a 'real opportunity' to comment on the submissions. This would give rise to an issue with the right to adversarial proceedings.

Finally, there is the issue of the status of expert witnesses. In relation to the procedures in SIAC[1483] Martin Chamberlain QC, a special advocate, submitted that Security Service witnesses are treated as experts regarding the closed material.[1484] This presents an imbalance between the parties as the security service witnesses are witnesses for the executive who is the other party to the case. The special advocates are prevented from

[1479] *Pisano* (n 1478) para 21.

[1480] *Kozak v Poland* (App 13102/02) (2010) 51 EHRR 16, para 53.

[1481] Ibid, para 53.

[1482] *Mantovanelli v France* (App 21497/93) (1997) 24 EHRR 370.

[1483] Virtually the same as Part 2 of the JSA.

[1484] *Constitutional Affairs Committee, The Operation of SIAC, Vol 2*, Q61 Martin Chamberlain.

calling former or current security service employers; consequently there is no expert on the other side.[1485]

In the application of the principle of equality of arms, the ECtHR has found that inequality in the status of expert witnesses would be incompatible with Article 6(1).[1486] Analogies may be drawn with the contrasting reasoning in two ECtHR cases here, although both cases involved criminal proceedings an analogy may be drawn as the ECtHR decided to examine the applicant's complaint under the "general rule" in Article 6(1).[1487] In *Bönisch v Austria*,[1488] the court appointed expert was considered by the ECtHR to be essentially a witness against the accused given that there was little opportunity for the applicant to appoint a counter expert this was held to breach the equality of arms.[1489] In reaching its conclusion it noted the *appearance* of the court appointed expert and the doubts as to his neutrality that are likely to arise when it was such expert's report that had prompted the applicant's prosecution. In contrast, is the decision reached in *Brandstetter v Austria*,[1490] where even though the court appointed expert was a member of the same institute that had initially raised suspicions concerning the applicant, this was not held to justify fears as to his neutrality.[1491]

The status of witnesses has also amounted to an imbalance between the parties in civil proceedings. For example in *Sara Lind Eggertsdóttir v Iceland*,[1492] the experts appointed by the national court worked for the hospital which was the defendant. The ECtHR reasoned that this favoured the position of the defendant and therefore the applicant's procedural position was not equivalent to that of her adversary which was incompatible with the equality of arms.[1493] Similarly in *Yvon v France*, in expropriation

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[1485] Ibid. See also Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) MLR 836 at 856-7.

[1486] *Bönisch* (n 1366).

[1487] *Bönisch* (n 1366) para 29; *Brandstetter* (n 1366) para 42. Need to bear in mind the ECtHR said it would have, 'due regard to the guarantees of paragraph (d)'.

[1488] *Bönisch* (n 1366).

[1489] Ibid, para 32.

[1490] Brandstetter (n 1366).

[1491] Ibid, para 45.

[1492] *Sara Lind Eggertsdóttir v Iceland* (App 31930/04) (2009) 48 EHRR 32.

[1493] Ibid, paras 48 – 52.

proceedings the Government Commissioner played the role of both the expert and the party.[1494] The ECtHR reasoned that he therefore held a, 'dominant position in the procedure', exercising 'significant influence on the appreciation by the judge.'[1495] This accordingly created an imbalance disadvantaging the applicant and incompatible with the principle of equality of arms.[1496]

Therefore, the special advocates' ability to access and adduce evidence, and call and cross examine witnesses can affect their ability to participate properly in the proceedings. The principle of effectiveness is of particular assistance in this regard as it facilitates the ECtHR's requirement for effective participation. This could give rise to interferences with the right to equality of arms, and the right to adversarial proceedings under Article 6(1). The contention here is that, each limitation in itself may not amount to an interference in the eyes of the ECtHR. However, it can be argued that their cumulative effect would be sufficient to amount to an interference. This would be in conformity with the 'proceedings as a whole' test, which can have the negative impact of rendering a trial unfair in despite of an imbalance. However, it is not inconceivable that in these circumstances the overall effect of the limitations could be assessed. The key challenge for special advocates to demonstrate that the limitations are as such as to amount to an interference with an individual's Article 6(1) guarantees, is the ECtHR's context-specific approach to interpretation. This approach can be problematic in the context of secrecy because it may be difficult to point to the specific circumstances that have led to a breach without damaging national security.

If the ECtHR found that the use of special advocates interfered with an individual's right to equality of arms and the right to adversarial proceedings, the interference could still be deemed to be justified. Section 8.4 demonstrates the ECtHR's approach to the assessment.

[1494] *Yvon* (n 1397) para 37.

[1495] Ibid.

[1496] Ibid.

8.4. Justifying interferences with the equality of arms and the right to adversarial proceedings

The principle of equality of arms and adversarial proceedings are primarily concerned with an individual's right to participate in the proceedings, and this includes access to evidence. Nevertheless, the ECtHR has held that it may be necessary to withhold certain material in order to protect the rights of another individual, or in the public interest. National security is considered by the ECtHR to be one of the 'strong countervailing interests' that may justify a restriction.[1497] Such restrictive measures will only be permissible if they are 'strictly necessary', and any difficulty cause to the individual must be, 'sufficiently counterbalanced by the procedures followed by the judicial authorities.'[1498]

It appears significant that the ECtHR once again stresses that the necessity test in this context is one of 'strict necessity' which suggests a stringent test in conformity with the fundamental importance the ECtHR accords to the right to a fair trial. Nevertheless, in cases where evidence is withheld, the ECtHR does not see it as within its role 'to decide whether or not such non-disclosure was strictly necessary."[1499] This corresponds with the general rule that, 'it is for the national courts to assess evidence before them.'[1500] Furthermore, the ECtHR has asserted that it is beyond its role to even attempt to weigh the public interest in non-disclosure against the accused's interest in disclosure seeing that the ECtHR has not itself seen the evidence.[1501] Instead the ECtHR states that its role it to, 'ascertain whether the decision making procedure applied in each case complied, as far as possible with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.'[1502] The reasoning of the court in this respect illustrates how the application of the principle of subsidiarity, and the fourth instance doctrine, can result in a lower level of scrutiny, or a less-interventionist stance.

[1497] *Rowe and Davis* (n 1436) para 61.

[1498] Ibid; *Jasper* (n 1435) para 52; *Fitt v UK* (App 29777/96) (2000) 30 EHRR 480, para 45.

[1499] *Rowe and Davis* (n 1436) para 53; *Fitt* (1498) para 46.

[1500] *Edwards & Lewis v UK* (Grand Chamber) (App 39647/98 40461/98) 40 EHRR 24, para 34.

[1501] *Jasper* (n 1435) para 53.

[1502] *Rowe and Davis* (n 1436) para 62.

Therefore, the ECtHR changed from an approach based on necessity to scrutinising the decision making procedure. Goss is critical of this approach stating that in doing so the ECtHR 'abdicates responsibility' for assessing whether the restriction is necessary.[1503] In addition, it contradicts the ECtHR's use of its own interpretative tool which is to assess whether the proceedings as a whole are fair.[1504] The effect of the ECtHR's approach is the opposite, it is not assessing the entirety of proceedings, it is assessing the decision making procedure.[1505] This is difficult to reconcile with the ECtHR's holistic approach to the interpretation of Article 6.

In seeking to ascertain whether the decision-making procedure applied in each case complied with the requirements of equality of arms and adversarial proceedings, the ECtHR has focused on the role of the trial judge in the decision making procedure. The ECtHR has stressed the importance of the trial judge's involvement in the decision as to whether the material should be disclosed.[1506] For example in *Jasper v United Kingdom*, the ECtHR found there to be no violation of Article 6(1) as the decision making procedure had complied with the requirements of equality of arms and adversarial proceedings.[1507] The ECtHR placed significance on the fact that the trial judge examined the material that the prosecution applied to withhold and made the decision that it should not be disclosed.[1508] This was also the ECtHR's finding in *Fitt v United Kingdom* that there was no violation of Article 6(1).[1509] On the contrary, in *Rowe and Davis v United Kingdom* the non-disclosure of evidence was found to breach the equality of arms.[1510] The distinguishing fact was that in *Rowe and Davis*, the prosecution had not notified the trial judge that they were withholding evidence, hence giving the judge no opportunity to rule on disclosure.[1511] The ECtHR followed the same

[1503] Goss (n 1399) 130

[1504] Ibid.

[1505] Goss refers to this practice as 'trial within a trial'.

[1506] *Lagutin and others v Russia* (App 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09) (ECtHR, 24th April 2014) para 99.

[1507] *Jasper* (n 1435) para 58.

[1508] Ibid, para 55.

[1509] *Fitt* (n 1498).

[1510] *Rowe and Davis* (n 1436) para 67.

[1511] Ibid, para 63.

reasoning in *Dowsett v United Kingdom*, and stated that a procedure whereby the prosecution decides to withhold information and attempts itself to weigh the importance of disclosure against the public interests 'cannot comply' with Article 6(1).[1512]

The ECtHR's scrutiny of the decision making procedure in these cases is relevant to the examination of the compatibility of CMPs with regard to the application stage of the CMP as provided for by section 6 of the JSA. Chapter 5 demonstrated that section 6 can be said to give the appearance of judicial decision making powers at this stage. However, due to other shortcomings in the legislation the judicial discretion is fettered.[1513] This point should be taken into consideration in an examination of compatibility with Article 6(1), given the importance Strasbourg has placed on the role of the judiciary in making the initial decision of whether the material should be disclosed. In the absence of meaningful judicial decision making powers at the crucial stage of ordering the use of a CMP in any given case, it is possible to call into question the role of the judge in making that initial decision that the material should not be disclosure. Hence, the possibility of raising an issue with the decision making procedure being able to provide an adequate safeguard counterbalancing the difficulties caused to the individual subjected to a CMP.

The ECtHR has also stressed in relation to PII proceedings that the trial judge assessed the need for disclosure throughout the proceedings provided an important safeguard.[1514] This contributed to the ECtHR's finding *Jasper*, and *Fitt*, that there was no violation of Article 6(1) in respect of the requirements of equality of arms and adversarial proceedings. The ECtHR found that the trial judge was well-informed of all the issues and evidence in the proceeding and "in a position to monitor the relevance to the defence of the withheld information bother before and during the trial."[1515] This reasoning was also followed in *Rajcoomar,* an admissibility decision, and led to the ECtHR's decision that the applicant's complaint was manifestly ill-founded.[1516] In

[1512] *Dowsett v United Kingdom* (App 39482/98) (2004) 38 EHRR 41, para 44.

[1513] Chapter 5, Section 5.3 and 5.4.

[1514] *Jasper* (n 1435) para 56; *Fitt* (n 1498) para 49; *Rajcoomar v United Kingdom* (Admissibility) (App 59457/00) (2005) 40 EHRR SE20, 184.

[1515] *Jasper* (n 1435) para 56.

[1516] *Rajcoomar* (n 1514)

McKeown the applicant claimed that his case could be distinguished from *Jasper* because there was no effective monitoring of the need for disclosure throughout the proceedings.[1517] McKeown maintained that the trial judge could not effectively monitor because he had not had sight of the disclosed material, and the disclosure judge could not effectively monitor because he was not kept informed of the progress of the trial.[1518] Therefore, it was only the prosecution who could refer back to the disclosure judge if they felt it was necessary which McKeown argued was not an adequate safeguard.[1519] However, the ECtHR gave weight to the fact the judge who was 'fully aware' of all the issues in the case had concluded that there was nothing in the undisclosed material that would assist the defence, and that he could not see any circumstances which would result in the material, 'becoming of value to the defence.'[1520] In addition, the ECtHR noted that the applicant had not referred to any part of the proceedings where the prosecution should have submitted the issues back to the disclosure judge.[1521] The ECtHR's reference to the disclosure judge's assertion that if an issue did arise, the prosecution could be 'relied upon' to alert the trial judge, appears to be at odds with the importance given to the equality of arms and the appearance of fair proceedings. This apparent deference to the domestic court's reliance on the prosecution effectively to monitor the need for disclosure, doesn't reconcile with the judgement's in *Jasper* and *Fitt* that the trial judge's continuous assessment of the fairness of proceedings and need for disclosure provided an adequate safeguard.

The ECtHR's view that the judge's ability to keep the fairness of the proceedings under assessment, throughout the course of the proceedings, is likely to mean that the ECtHR will look favourably on Part 2 of the JSA's review provisions. Section 7 of the Act places a duty on the court to keep the section 6 declaration for the use of a CMP under review, and to revoke it once the pre-trial disclosure exercise has been completed. Following *Fitt* and *Jasper* this is likely to be considered as an important safeguard in

[1517] *McKeown v United Kingdom* (App 6684/05) (2012) 54 EHRR 7, para 51.

[1518] Ibid.

[1519] Ibid.

[1520] *McKeown* (n 1517) para 52.

[1521] Ibid.

respect of its scrutiny of the national authorities' decision making procedure used to rule on disclosure.

However, the ECtHR also noted with approval the principles that the domestic courts applied in the decision to order PII certificates; namely, the *Wiley* balance.[1522] The ECtHR noted that, in weighing the public interest in non-disclosure against the interest of the accused in disclosure, 'great weight should be attached to the interests of justice.'[1523] Part 2 of the JSA notably does not provide for judicial balancing in relation to the decision to order a CMP. This has been identified as one of the primary contentions with Part 2 of the JSA at the time of the parliamentary passage, which was the lack of judicial balancing at the application stage of CMPs.[1524] The discussion demonstrated that this was widely debated, particularly in the Lords who inserted an amendment inserting the *Wiley* balance into the legislation. This amendment was removed by the Government and is not a provision of the JSA, as enacted.[1525] The government's replacement for judicial balancing was section 6(5) of the Act which provides that the use of a CMP can only be ordered if it is in 'the interests of the fair and effective administration of justice'.

However, Chapter 5 demonstrated that the courts have interpreted section 6 as such that does not adequately provide for the interests in open justice to be taken into account. Rather, 'fair and effective' has been interpreted in terms of the amount of sensitive material, and the need to place this all before the judge to determine the legal issues.[1526] Emphasis has been placed on the need to ensure the case is not struck out.[1527] This reasoning illustrates a lack of regard for the value of evidence withstanding challenge, and more importantly the importance in the open administration of justice. This is not in conformity with the ECtHR's emphasis on the need to maintain public confidence in the administration of justice, and pronouncements regarding the importance of transparency. Therefore, the contention here is that there is scope to formulate a

[1522] *Jasper* (n 1435) para 56.

[1523] Ibid.

[1524] Chapter 3, section 3.3.3.2.

[1525] Ibid.

[1526] Chapter 5, Section 5.3.

[1527] Ibid.

complaint against the decision-making procedure at the application stage of the CMP as provided for by section 6 of the JSA.

In addition, in its examination of the decision making procedure in the PII cases, Strasbourg has also stated it to be relevant as to whether the defence were kept informed and entitled to make submissions, and participate as much as possible without disclosing the material.[1528] Therefore, the provision in the JSA stating that all parties shall be notified of an application to use a CMP and the outcome, could also be considered as a safeguard in the view of the ECtHR. This is in addition to the provision that the individual's special advocate may be present during this stage.

8.5. Concluding observations

This chapter contends that in certain circumstances the limitations on special advocates may inhibit to carry out their functions in such a way as to contribute to the finding of an interference with the principle of equality of arms, and the right to adversarial proceedings. This is in contrast to the conventional approach to the assessment of the special advocate system, which presents special advocates as a safeguard capable of counterbalancing the perceived unfairness of a CMP. This has entailed an examination of special advocates in a proportionality analysis at the second stage of the ECtHR's analysis. It is argued here, that this alternative approach to an analysis of the shortcomings of the system, could attract a higher level of scrutiny of the ability of special advocates to carry out their functions effectively. This is because the ECtHR would be required to examine more closely the limitations that work under at the first stage of its assessment. On this basis, this chapter has demonstrated that their ability to participate in the proceedings can be severely hampered due to the lack of effective instructions they may receive from the individual, and the nature of the national security context and the government's approach to the proceedings. This in turn could raise issues with the equality of arms and the right to adversarial proceedings.

The ECtHR's application of the guarantees illustrates the prominence of the use of the principle of effectiveness with regard to establishing interferences. For example, emphasis is placed on the ability to participate effectively and be accorded with a real opportunity to comment on all the evidence and submissions. On this basis, and in

[1528] *Jasper* (n 1435) para 55; *Fitt* (1498) para 48.

conjunction with the proceedings as a whole test, it is possible that the difficulties faced by special advocates alongside the impact of a CMP could an interference with Article 6(1). However, the ECtHR will then carry out the second stage in its assessment of whether the interferences can be justified. The examination of case law regarding PII demonstrated the possibility for the principle of subsidiarity, and the fourth instance doctrine, to be used by the ECtHR in their non-interventionist stance on matters of the admissibility of evidence and national security.

Nevertheless, the use of these principles leads the ECtHR to scrutinise the decision-making procedure of the member-States on the decision to order the non-disclosure of relevant material in the first place. The argument here is that when scrutinising that decision-making procedure the ECtHR will emphasise the role of the court and therefore the independence of the judiciary. As a result, the importance of maintaining public confidence in the administration of justice will be affirmed and influence the final decision of the ECtHR as to whether interferences with the equality of arms and the right to adversarial proceedings can be justified. The provisions for the initial decision to order a CMP in the JSA, provide scope for diminishing transparency; and, vesting decision making powers in the court that are illusory as opposed to meaningful. This leaves open the possibility for the ECtHR's to consider the decision-making procedure as inadequate to justify the interference. Of course, it is difficult to provide a definitive conclusion as to the outcome of a challenge to Strasbourg. However, this chapter argues that if the limitations special advocates operate under are examined by the ECtHR in the first stage of its assessment, as to whether there is an interference, then this leaves open the possibility that the decision-making process to order a CMP will be examined at the second stage as to whether the interference can be justified. This would increase the likelihood of a successful challenge, if the ECtHR's emphasis becomes on maintaining public confidence in the administration of justice.

Chapter 9 Conclusion

The use of CMPs has proliferated since they were first introduced as an exceptional measure to deal with the use of secret evidence. This proliferation has occurred both across borders and across contexts within the UK, in despite of the controversy that has surrounded their use. Part 2 of the JSA then significantly extended the availability of CMPs to all civil proceedings. The cross-border and cross-context policy transfer demonstrates the need to subject exceptional measures to a rigorous analysis, before such policy transfer occurs. This thesis contends that nuances can be lost in translation with the danger of adopting a system that provides a lower level of rights protection. Consequently, this thesis has subjected the use of CMPs under Part 2 of the JSA to a rigorous analysis within the framework of the ECtHR's Article 6(1) jurisprudence. This is necessary due to the ambit of the legislation to provide for the use of CMPs in all civil proceedings, which requires its compatibility with the civil limb of Article 6. Moreover, the decision to subject the JSA to this analysis within the framework of the ECHR has been made because it has been shown that there is the potential for the ECtHR to indirectly facilitate policy transfer, with an outcome that poses the risk of providing a lower level of rights protection to individuals.

This central hypothesis of this thesis is that the use of CMPs within the scheme of the JSA is potentially incompatible with the ECHR; however, in line with the ECtHR's jurisprudence the outcome is ultimately dependent on the circumstances of each individual case. This is in itself inherently problematic given the innate secrecy of CMPs. This thesis began by setting out this research statement and the three core objectives that flow from this position. The first being the rigorous examination of the legislative framework for Part 2 of the JSA, with a view to identifying potential human rights concerns and issues with the relevant Article 6(1) guarantees. The second was to provide an analysis and critique of the ECtHR's Article 6(1) jurisprudence in relation to the relevant fair trial guarantees, with reference to national security and sensitive issues in civil proceedings. The third objective was to provide a structured framework for the assessment of compatibility of CMPs under the JSA with the relevant Article 6(1) guarantees, the purpose being to provide an aid to interpretation. This aid to interpretation is established both with a view to an assessment based on the ECtHR's current approach to interpretation, and to advance an alternative framework by which the JSA can be examined with the desire to attract a more stringent protection of fair

trial guarantees. Chapter 9 serves as the conclusion to this thesis, and it will demonstrate how this piece of doctoral research has proven the central hypothesis and met the three core objectives.

First, this chapter calibrates the stands of analysis presented in chapters 5 to 8 in relation to the examination of the relevant fair trial guarantees. This is in order to explore the interplay between these strands of analysis, and build an understanding of the circumstances in which there may be doubt about the compatibility of the use of CMPs with Article 6(1), in any given case. This is based on the research undertaken in relation to the second thesis objective, which was to provide an analysis and critique of the ECtHR's Article 6(1) jurisprudence. Therefore, section 9.1 presents the benchmarks of each relevant fair trial guarantee and interpretative guidelines in a grid. The aim is to provide an aid for conducting an assessment of the compatibility of Part 2 of the JSA with Article 6(1). It is intended to provide a pragmatic approach, which corresponds with the ECtHR's context specific approach to interpretation. In this manner, section 9.1 also begins to illustrate how the thesis meets its third core objective.

Subsequently, section 9.2 uses three case studies to highlight how the analysis and critique of the Article 6(1) guarantees can be applied to the types of cases that will be heard under the JSA involving CMPs. The case studies highlight the potential human rights concerns with Part 2 of the JSA that were identified in the rigorous analysis of its legislative framework, in relation to meeting the first core thesis objective. This analysis is undertaken using the interpretative guidelines as set out in the grid in section 9.1., and will demonstrate how this thesis can provide an aid to the interpretation of Article 6(1) to CMPs within the scheme of Part 2 of the JSA. Therefore, meeting the third core thesis objective. These case studies are based on the facts of the small body of case law currently emerging. Case studies are used, as opposed to real cases, because of the difficulty in accessing reported judgments in relation to all stages in the proceedings. One of the reasons for this is that the JSA is recently enacted. In addition, one of the aims of this thesis is to advance alternative frameworks to the conventional approach of examining CMPs in light of human rights standards. Therefore, facts are presented based on shortcomings in the system that have not necessarily arisen in the case law, as they have not formed the basis of a challenge based on the approach to date in challenging the use of CMPs.

Section 9.2 demonstrates that Part 2 of the JSA is potentially incompatible with Article 6(1), however the outcome of each case is ultimately dependent on the individual circumstances. This is in line with the ECtHR's context specific approach to interpretation, and the general principle that a breach of Article 6 requires a real detrimental action, rather than a theoretical detriment. This is in itself is problematic given the innate secrecy of CMPs, which can make it difficult to pinpoint the specific circumstances that could amount to an interference with the ECHR. This demonstrates the challenges posed by secrecy, and the concomitant importance of judicial control over the use of CMPs and general oversight mechanisms. Section 9.3 reiterates this point. It summarises the issues found in relation to judicial decision-making and general oversight mechanisms, in Part 2 of the JSA, which transpired as a result of the analysis of the legislation. Finally, section 9.4 presents the concluding observations to this thesis. It will illustrate the importance of this study, and the broader lessons to be taken as a result of this doctoral research.

9.1. A nuanced approach to ECHR compatibility

This thesis has provided an analysis and critique of the ECtHR's Article 6(1) jurisprudence in relation to the relevant fair trial guarantees, with reference to national security and sensitive issues in civil proceedings. This section seeks to calibrate the strands of analysis presented in this regard in chapters 5 to 8. This nuanced analysis seeks to provide a coherent and comprehensive framework that will enable an assessment of the likelihood of an effective challenge before the ECtHR. Section 9.1. has two objectives. First, it presents a comprehensive means by which to address ECHR compatibility in accordance with the current approach of the ECtHR. Second, it advances alternative frameworks by which the system under Part 2 of the JSA can be examined. These are advanced with the view of attracting a higher level of scrutiny, and to increase the likelihood of a successful challenge at Strasbourg. This thesis recognises that not every line of argument will be relevant in each case and this will be dependent on the circumstances. This is in keeping with the ECtHR's context-specific approach to interpretation, and accordingly a pragmatic approach is presented.

The grid below is presented as an aid to the interpretation and application of the relevant Article 6(1) guarantees. The first column of the grid states the individual fair trial guarantees that have been examined in Chapters 5 to 8 of this thesis. The second

column states the rationale underpinning the jurisprudence, and the third column outlines the core principles. The fourth column outlines the interpretative guidelines with regard to the ECtHR's assessment of whether there is an interference with the right, and then whether the interference can be justified.

Section 9.2. uses three case studies to illustrate how Article 6(1) may be applied to cases involving a CMP under Part 2 of the JSA. The case studies are paradigm cases, as opposed to real cases that have been heard under the JSA. Case studies A and B present facts that are based on those of real cases, and then assesses these in light of all the relevant fair trial guarantees that are the subject of this piece of doctoral research. Case study C is slightly different in that its focus is on the right to access a court. The basis facts are similar to those in the small existing body of case law. However, the focus is then on the role of the special advocate. This case study is presented in this way, and sets out a hypothetical scenario, as it focuses on the alternative framework for the holistic approach to the examination of the shortcomings of the special advocate system introduced in Chapter 7. The system has not been presented in this manner before the ECtHR before.

The application of the fair trial guarantees to the case studies illustrates the tensions that exist between the ECtHR's interpretative principles. These tensions and how they are resolved can affect the outcome of a case at Strasbourg, which is argued here to result in indeterminacy. This raises questions as to whether it is possible to reconcile conflicting principles and, if not, which should be prioritised. These questions contribute to the difficulty of applying Article 6(1) to CMPs as it is not straightforward to discern how the ECtHR itself addresses these questions. Hence, generalised claims advanced in relation to the perceived unfairness of CMPs are unsustainable.

1. Fair trial guarantees	2. The rationales underpinning the jurisprudence	3. Core principles	4. Interpre
Independence and impartiality (Chapter 5)	The ECtHR places a strong emphasis on the importance of the appearance of independence and impartiality and maintaining public confidence in the fair administration of justice	The independence of the judiciary from the executive in relation to: (i) Retaining the power to make a judicial decision (ii) How that power is exercised	The ECtHR retains the deferred to
Publicity (Chapter 6)	Protecting individuals from the administration of justice in secret. Maintaining confidence in the fair administration of justice	There are two aspects to the requirement of publicity: (i) Public hearing (ii) Public judgment	The ECtHR However o margin of a In its assess focused on
The right to access a court (Chapter 7)	ECtHR places a strong emphasis on the principle of effectiveness	There are two aspects to the right to a court: (i) Constitutional safeguard (ii) Effective access	It is not enc have the po An interfer legitimate a the right
Effective legal assistance (as an aspect of the right to a court) (Chapter 7)	In certain circumstances the right to access a court requires the individual is provided with legal assistance.	Effective legal assistance requires: (i) Relationship of confidence (ii) Professional secrecy (iii) Private communications	Establishin volume of t individual. Once the n the assistan
Equality of Arms (Chapter 8)	Equal opportunity to participate in proceedings	The essence of both guarantees is participation which includes: (i) Right to disclosure of evidence (ii) Access to evidence (iii) Ability to adduce evidence and call witnesses	The guaran interference measures a The ECtHR necessary i appreciatio scrutinises the role of t
The right to adversarial proceedings (Chapter 8)	All evidence and submissions are communicated to the parties and they have an opportunity to comment on them.		

9.2. Case studies

Three case studies are presented in turn below. The examination of the facts in accordance with Article 6(1), will proceed the facts of each case study. Reference is made in the footnotes to the relevant column on the grid to demonstrate how it can be used an aid to interpretation in an assessment of compatibility. In addition, authority for the assertions in the analysis are referenced in the footnotes directing the reader to the relevant part of discussion in chapters 5 to 8. Leading case law is also referred to where applicable. The case studies are based on the facts of real cases involving CMPs and/or heard under Part 2 of the JSA, the cases on which the facts are based are referenced in the footnotes where this is of relevance.

9.2.1. Case study A

The facts:

X is suspected of being involved with a known terrorist group. In January 2010 the Foreign Secretary applied to the UN for sanctions freezing assets and imposing a travel ban. The decision to propose for listing was made on the basis that X was 'associated with' Al Qaida.[1529] X was added to the list in February 2010. The open material suggested that X was in regular contact with a number of known extremists, including ones involved in terrorist activities. The open material did not name the individuals it was alleged X had links to. The decision to propose X for listing was made by the Foreign Secretary following ministerial submissions. The consequence of the UN listing was that X was made the subject of sanctions.

In January 2011, X issued judicial review proceedings to challenge the Foreign Secretary's decision to propose his designation on the UN sanctions list. The principal remedies sought were a declaration that the designation proposal was unlawful, and an order requiring the Foreign Secretary to propose to the UN that X be delisted from the sanctions list. In March 2011, the Foreign Secretary decided to request that X be removed from the UK list. However, X remained on the UN list due to an action from

[1529] In *Kamoka and others v Security Service and others* [2015] EWHC 60 (QB), the UN Sanctions Committee imposed sanctions freezing the claimant's assets and imposing a travel ban on the ground that he was associated with a terrorist organisation. See also, *Khaled v Security Service* [2016] EWHC 1727 (QB).

another state until January 2013.[1530] In May 2013, X sued for misfeasance in public office.[1531] X's claim is made on the basis that the Foreign Secretary and members of the Security Service knew that the information they relied upon in making their proposal was unreliable and illegally obtained. X claimed that the information relied upon was obtained by torture or inhuman and degrading treatment.[1532]

In August 2013, the Foreign Secretary made an interlocutory application for the use of a CMP in the proceedings concerning the claim for misfeasance in public office. In September 2013, the court issued a section 6 declaration under Part 2 of the JSA authorising the use of a CMP. The judge reasoned that the two conditions in section 6 were satisfied. As for the first, provided by section 6(4) that a 'party to the proceedings would be required to disclose sensitive material in the course of the proceedings' the judge ruled that she was satisfied that the sensitive material would be required to be disclosed and relates to important issues in the proceedings. With regard to the second condition in section 6(5) that a CMP can only be used, 'in the interests of the fair and effective administration of justice', the judge held that this was satisfied. In coming to her conclusion, she stated that the use must be shown to be necessary, which included considering less unsatisfactory alternatives. On the facts of the case, she did not consider a PII certificate, or any other alternative to be appropriate.[1533] Section 6(5) was also satisfied.

In the same hearing the judge held that in the circumstances of the case *A*-type disclosure was not required, although under section 8 of the JSA the Foreign Secretary should consider providing a summary of the closed material to X. Counsel for X argued that without *A*-type disclosure he would be unable to give effective instructions to the special advocate, who consequently would be unable to effectively answer the case in

[1530] See *Kamoka and others v Security Service and others* [2016] EWHC 1727 (QB), at [9] – [10].

[1531] *Kamoka*, ibid, at [11].

[1532] Ibid.

[1533] To date, there is yet to be case concerning a section 6 declaration under Part 2 of the JSA where PII has been considered as a satisfactory alternative to a CMP in the circumstances. For example, see: *R (on the application of Sarkandi) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687, at [63]; *Re Gallagher's Application for Judicial Review* [2016] NIQB 95, at [17].

the closed material. X submitted that whilst he had brought the claim in this case, it concerned the decision to refer him for listing on the UN sanctions list which had been based on allegations against him he had not been given sufficient information about to challenge. Whilst the court recognised the allegations of X to be serious human rights violations, and that being subjected to sanctions placed serious restrictions on his personal freedom, the court distinguished from the circumstances in *AF* that had led the court to conclude that *A*-type disclosure was applicable. The court was mindful that the restrictive measures were no longer in force, and that this was a civil claim for damages.[1534]

The final judgment determining the substantive proceedings concerning the civil claim for damages was handed down in closed and open hearings in January 2014. The special advocates noted the difficulty they had faced in cross-examining witnesses and adducing evidence, as they had been unable to communicate freely with X following their sight of the closed material. The open material was not able to pinpoint to any specific details in this regard. It would have been damaging to national security to state in open proceedings the particular witnesses, or the allegations which the difficulty of adducing evidence to rebut related to.[1535] The court acknowledged the difficulties special advocates had to work under. However, whilst the position was not perfect the special advocates had been able to enhance the procedural fairness of the proceedings and represent X's interests. X's claim was ultimately rejected on the basis that he had not sufficiently shown that the material upon which the Foreign Secretary relied was unlawfully obtained.

The following analysis will illustrate the potential for the circumstances in Case Study A to give rise to issues with the requirements of independence and impartiality;

[1534] In *Khaled* (n 1530), Irwin J held that *A*-type disclosure was not applicable to the circumstances of the case. He likened the circumstances to those in *CF and Mohammed* [2014] 1 WLR 1699, emphasising that the case concerned a civil claim for damages. He distinguished from *Bank Mellat v Her Majesty's Treasury* [2016] 1 WLR 1187, on the basis that the restrictive measures placed on the claimant were no longer in force and therefore this was not a case where a loss of liberty or incursion on the individual's Article 8 ECHR rights were in prospect. See *Khaled* (n 1530) at [33] – [42].

[1535] Some of the limitations placed on special advocates ability to carry out their functions have been discussed in the case law, this includes the ECtHR's judgment in *A v United Kingdom*, in which the Grand Chamber had the benefit of submissions from special advocates themselves.

publicity; and the equality of arms and adversarial proceedings. This is on the basis of the current approach of the ECtHR in assessing the compatibility of CMPs with the Convention. In addition, the circumstances in Case Study A will be examined using the alternative framework advanced in Chapter 8. Namely an assessment of whether considering the restrictions under which special advocates operate at the first stage of the ECtHR's assessment, would affect the likely outcome of the exercise.

Independence and impartiality

Issues of the independence of the judiciary, as guaranteed by Article 6(1), may arise in relation to judicial decision-making powers in two respects.[1536] First, if the executive is deemed to make a judicial decision.[1537] Second, if in certain circumstances the national court explicitly defers to the executive's opinion on a judicial decision.[1538] Chapter 5 illustrated that with regard to the assessment as to whether the material is sensitive, the court will assign a higher level of deference to the executive, and merely review their assessment.[1539] This is within the appropriate role of the respective institutions and is unlikely to give rise to an issue with the requirement of judicial independence. However the court must retain control over judicial procedure and therefore must subject the government's application to use a CMP in the circumstances to intense scrutiny.[1540] In Case Study A the court has issued a section 6 declaration to use the CMP. Chapter 5 demonstrated that whilst section 6 gives the appearance of judicial decision-making powers, the legislation provides scope for that power to be exercised in such a way that the court is overly deferential to the executive. If the power is exercised to this effect it does not appear to be in conformity to the ECtHR's underlying rationale for the requirements of independence and impartiality. Namely, the need to maintain public

[1536] Grid: Independence and Impartiality, Column 3; Chapter 5, section 5.1.2.1.

[1537] Grid: Independence and Impartiality, Column 3; Chapter 5, section 5.1.2.1: *Bryan v United* Kingdom (App 19178/91) (1996) 21 EHRR 342; *V and T v United Kingdom* (App 24888/94) (2000) 30 EHRR 121; *Stafford v United Kingdom* (App 46295/99) (2002) 35 EHRR 32; *Easterbrook v United Kingdom* (App 48015/99) (2003) 37 EHRR 40.

[1538] Grid: Independence and Impartiality, Column 3; Chapter 5, section 5.1.2.1: *Beaumartin v France* (App 15287/89) (1995) 19 EHRR 485.

[1539] Chapter 5, section 5.2; and, Section 5.3.1. and 5.3.3.

[1540] Chapter 5, section 5.3.

confidence in the fair administration of justice.[1541] Whether an issue would arise in this regard would be dependent on the circumstances in an individual case. This is in accordance with the ECtHR's context-specific approach to interpretation.

The interpretation of section 6 by the court in Case Study A does not appear to raise an issue with Article 6(1) in this regard on the basis of the ECtHR's current case law. The facts do not reveal that the judge deferred to the executive's opinion, stating that she herself was satisfied that the condition stipulated in section 6(4) was met. Whilst the open judgment does not contain detailed reasons, the ECtHR would be unlikely to infer that the court had deferred to the executive. This would, in part, be due to the fact that the ECtHR will not question the classification of evidence due to the wide margin of appreciation given to national authorities in the national security context.[1542]

In addition, the ECtHR takes the view that is for the national authorities to assess the evidence in accordance with the principle of subsidiarity and doctrine of Fourth Instance.[1543] Therefore it is unlikely that the ECtHR would take an interventionist stance here given that the interpretation of section 6(4) by the national courts require an assessment as to the relevance of the evidence to the proceedings.

In its consideration of section 6(5), the court in Case Study A applied a test of necessity and considered alternative less restrictive measures. This is likely to be looked upon favourably by the ECtHR given its own routine test of necessity, when assessing interferences with the Convention.[1544] Therefore, it is unlikely that X could mount a challenge to his right to an independent and impartial tribunal on the basis of a lack of judicial independence.

Publicity

A substantial part of the case was heard in the CMP therefore excluding the public; and the majority of the reasoning was contained in closed judgments. Therefore, it is likely that this would give rise to an interference with the requirements of publicity under

[1541] Grid: Independence and Impartiality: Column 4.

[1542] For example see: *Fazliyski v Bulgaria* (App 40908/05) (ECtHR 16th April 2013).

[1543] Chapter 4, section 4.6.2.

[1544] Chapter 4, section 4.3.

Article 6(1).[1545] Especially given the ECtHR's underlying rationale for the requirements as being to protect litigants from the administration of justice in secret.[1546] Nevertheless, the text of Article 6(1) explicitly states that there are exceptions to this requirement, including where it would be in the interests of national security.[1547] This exception would be applicable to X's case because the use of the CMP was ordered to prevent disclosure of "sensitive material" as provided for by the section 6(4). The ECtHR accords the Contracting States a wide margin of appreciation in the national security context.[1548] However, chapter 6 illustrated cases showing that the ECtHR does not take a completely non-interventionist stance.[1549] The ECtHR has placed emphasis on the need for the State to provide clear and consistent reasoning for the decision to restrict the requirements of publicity.[1550] Therefore, it would be likely to look favourably on section 6 of the JSA which on the face of it provides the court with the decision to order the CMP. This is reinforced by the reasoning of the court in Case Study A which deployed a test of necessity and appeared to take into consideration alternative, less restrictive, measures.[1551] This demonstrates the importance of the initial decision-making procedure to order the use of a CMP, not least for compliance with the Article 6(1) requirement of judicial independence.

Equality of arms and the right to adversarial proceedings

The interference with the equality of arms and the right to adversarial proceedings is unlikely to be disputed in challenges brought against CMPs to Strasbourg.[1552] In cases where there has not been full disclosure of the relevant evidence to the individual in the course of the proceedings, the ECtHR has readily acknowledged the disadvantage this causes to such individuals and the resulting impediments to effective participation in the

[1545] Grid: Publicity, Column 3.

[1546] Grid: Publicity, Column 2; Chapter 6.

[1547] Grid: Publicity, Column 4; Chapter 6, section 6.3.1.

[1548] Chapter 4, Section 4.3.3.

[1549] Chapter 6, Section 6.3.1: *Belashev v Russia* (App 28617/03) (ECtHR 4th December 2009); *Fazlisky* (n 1542).

[1550] Grid: Publicity, Column 4; Chaper 6, section 6.3.1: *Fazliyski* (n 1542),

[1551] Chapter 6, Section 6.3.1: *Belashev v Russia* (n 1549).

[1552] Chapter 7, Section 7.1.

proceedings.[1553] However the guarantees are not absolute, therefore the ECtHR proceeds to its assessment of whether the interferences can be justified.[1554] The case law demonstrates that national security is considered to be a 'strong countervailing interest' that may justify measures restricting the equality of arms and the right to adversarial proceedings.[1555] However, such measures must be 'strictly necessary' and 'counterbalanced' by adequate safeguards.[1556] Special advocates were appointed under section 9 of the JSA, to represent the interests of X in the CMP. The ECtHR has considered the use of special advocates as a means of counterbalancing procedural unfairness caused by the lack of full disclosure.[1557] X could advance the argument that the special advocates noted the difficulty they faced cross examining witnesses and adducing evidence, which was the result of not being able to receive effective instructions from X. However, the point that emerges from the ECtHR's case law following the Grand Chamber's judgment in *A*, is that the ECtHR has approved of the use of special advocates without the provision of *A*-type disclosure. [1558] This is in despite of the awareness of the difficulties special advocates' face in representing the interests of the individual. It is argued here that, whether the special advocate is considered to be an adequate safeguard should depend on whether *A*-type disclosure applies and has been accorded to the individual.[1559]

The reasoning in *A v United Kingdom*[1560] implies that the use of special advocates is only to be regarded as Convention compliant if the individual receives 'sufficient information about the allegations against him to enable him to give effective

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[1553] Chapter 7, section 7.1; Chapter 8, section 8.4. Case law examples include: *A v United Kingdom* (Grand Chamber) (App 3455/05) (2009) 49 EHRR 29; *Sher and others v United Kingdom* (App 5201/11) (ECtHR, 20 October 2015); *Jasper v United Kingdom* (App 27052/9) (2000) 30 EHRR 44.

[1554] Grid: Equality of Arms and the right to adversarial proceedings, Column 4.

[1555] Chapter 8, section 8.4; *Rowe and Davis v United Kingdom* (App 28901/95) (2000) 30 EHRR 1, para 61.

[1556] Chapter 7, section 7.1.

[1557] Chapter 7, section 7.1: *A* (n 1140); *IR v United Kingdom* (Admissibility) (App 14876/12, 63339/12) (2014) 58 EHRR SE14; *Saeed v Denmark* (App 53/12) (ECtHR, 24 June 2014).

[1558] Chapter 7, section 7.1.

[1559] Chapter 7, section 7.1: *A* (n 1553).

[1560] Ibid.

instructions.'[1561] This is referred to as *A*-type disclosure. *A*-type disclosure is applied by the UK courts following the HL decision in *AF (No 3).*[1562] However the JSA does not make provision for *A*-type disclosure. Section 7 merely provides that the court is satisfied the Home Secretary has considered providing a summary of the closed material to the excluded individual. In Case Study A, the court deemed that this wasn't possible and the circumstances didn't require it. The question is, would ECHR standards require *A*-type disclosure, if so, did X receive such disclosure?

Chapter 7 illustrated two key difficulties that have emerged in relation to *A*-type disclosure.[1563] First, because of the context specific approach, X needs to establish that his circumstances require *A*-type disclosure. If not it is likely the use of special advocates will be deemed sufficient to counterbalance the procedural unfairness of the CMP and X's claim would be unsuccessful. Second, if it can be established *A*-type disclosure is necessary then there is the question of discerning how much information will be considered sufficient. On the first point, initially there appeared to be a reluctance to apply *A*-type disclosure where an applicant had not been deprived of his liberty.[1564] However, in *Bank Mellat v Her Majesty's Treasury*,[1565] Collins J applied *A*-type disclosure to the remaining sanctions listings against the Bank with respect to the process for challenge under the Counter-Terrorism Act 2008, s.63. Collins J noted the 'utterly damaging effect' financial freezing had on the Bank and referred to his decision in *Mastafa v Her Majesty's Treasury*,[1566] in which he had applied *A*-type disclosure to an individual.[1567] In X's case, at the time the claim for damages was heard he had been removed from the sanctions list. Therefore, it is likely that the UK courts would adopt the approach of Irwin J in *Khaled v The Security Service*.[1568] In respect of the

[1561] *A* (n 1553) para 220.

[1562] Chapter 7, Section 7.2.3.3.

[1563] Chapter 7, Section 7.1.

[1564] Chapter 7, Section 7.1.

[1565] [2014] EWHC 3631 (Admin).

[1566] [2013] 1 WLR 1621.

[1567] Collins J distinguished from the ECJ decision in *ZZ (France) v Secretary of State for the Home Department (C-300/11)* as suggesting a lower standard when the liberty of the individual is not affected.

[1568] *Kamoka* (n 1530).

applicability of *A*-type disclosure, Irwin J distinguished from *Bank Mellat* as the claimant was no longer placed under such restrictions. In contrast, he drew an analogy with *Mohamed and CF v The Ministry of Defence*[1569] which was a civil claim for damages. Whilst it was acknowledged that the case raised issues of high public interest, *A*-type disclosure was not applicable and the case was not one where, 'loss of liberty, detention or incursion on the Claimant's Article 8 rights is in prospect'.[1570]

Therefore, whilst X was not deprived of his liberty the consequences of the sanctions were the freezing of his assets and a travel ban. X could argue that these constituted a severe restriction on his personal freedom and should attract the same higher level of rights protection. In addition, X alleges serious human rights violations of a high public interest. It could be argued that a higher level of protection is necessary to maintain confidence in the administration of justice. This is a principle that is prominent in the ECtHR's Article 6(1) jurisprudence. Nevertheless, the difficulty X may face in substantiating his claim that *A*-type disclosure obligations should apply is that he has been removed from the sanctions list. Therefore, an incursion on his Convention rights in relation to those restrictions is not 'in prospect'.

If *A*-type disclosure applies, the next question is whether X has received it. Chapter 7 demonstrated the difficulty in applying the reasoning from *A* as to when the disclosure requirements are satisfied.[1571] In X's case, fortunately the open material is similar to that received by one of the applicants in *A v United Kingdom,* and the ECtHR held that this was not sufficient to enable them to give effective instructions.[1572] On this basis, if X can establish that *A*-type disclosure is required in his circumstances, then the ECtHR is likely to conclude that the special advocate was not capable of counterbalancing the unfairness of the CMP. Consequently there would be a violation of Article 6(1).

The contention of this thesis is that the effect of the ECtHR's jurisprudence is that the shortcomings of the special advocate system are at risk of escaping intense scrutiny at Strasbourg. *A v United Kingdom*, shows that the presence of a special advocate does not always preclude a finding of an Article 6 violation. However, the ECtHR case law also

[1569] [2014] 1 WLR 1699.

[1570] See, *Kamoka* (n 1530) at [34] and [42].

[1571] Chapter 7, section 7.1.

[1572] Ibid.

illustrates that the context-specific approach to interpretation can be problematic in terms of requiring *A*-type disclosure in every case in which a CMP is invoked. Moreover, it has been established that the important principle set out by the Grand Chamber in *A*, was that the special advocate could only provide an effective safeguard if they received effective instructions from the individual. Hence, the requirements of *A*-type disclosure. However, subsequent case law illustrates that the link between the effectiveness of the special advocate as a counterbalancing mechanism and the provision of *A*-type disclosure has not always been adhered to. It is argued here that the result has been a lower level of scrutiny of the limitations placed on special advocates' ability to carry out their role. In seeking to address this shortcoming in the ECtHR's reasoning, this thesis has advanced an alternative framework in which to examine the use of special advocates.[1573] The framework for analysis is advanced in contrast to the conventional view that special advocates act as a safeguard for an individual subjected to a CMP, and therefore their effectiveness entails an examination at the second stage of the ECtHR's assessment as to whether an interference with the Convention is justified. In contrast, this thesis contends that the interference with an individuals' right should be assessed holistically at the first stage of the ECtHR's assessment of whether the system constitutes an interference with the Convention. This is including consideration of any limitations on the special advocates' ability to carry out their role alongside the negative impact of CMPs. This thesis argues that if the ECtHR's starting point includes examining the shortcomings of the special advocate system, alongside the perceived negative impact of the CMP, as potentially amounting to an interference; this will encourage a higher level of scrutiny by the ECtHR. This discussion will now consider the facts of Case Study A on this premise.

Equality of arms and the right to adversarial proceedings: examining the limitations on special advocates at the first stage of the ECtHR's assessment

Whilst the special advocate has access to the closed material, and the legislation provides that they are permitted to adduce evidence and call witnesses, including experts, the reality is that they face serious practical difficulties in doing so.[1574] Some of these difficulties originate in the prohibition on communication and the lack of ability to

[1573] Chapters 7 and 8.

[1574] See Chapter 2, section 2.6.4.

receive effective instructions from the individual. In X's case, the special advocates made submissions outlining the difficulties they had faced in cross examining witnesses, calling witnesses, and adducing evidence in the CMP. They claimed this was a result of the restrictions on communication with Y after the closed material had been served. Chapter 8 demonstrated that the ECtHR has held there to be an inequality of arms due to the failure to hear witnesses for the applicant.[1575] The reasoning focuses on the need for each party to have a 'reasonable opportunity' to present their case, including evidence and witnesses. This is in accordance with the ECtHR's use of the principle of effectiveness.[1576]

In addition, the ECtHR has held there to be a breach of the right to adversarial proceedings because the applicants were unable to cross-examine expert witnesses, in the same way as the opposing party.[1577] The problem that X will face in advancing his challenge on this basis is that in relation to calling witnesses, in that the legislation does provide that this is a possibility. The issue here is different, and the problem is a result of the special advocate finding this difficult in practice. In addition, regarding cross-examining witnesses *Mantovanelli v France*[1578] the breach was a consequence of the applicant having not cross-examined the expert witness at all. The problem here, again, is that the special advocate has the opportunity, and the problem is due to the inability to do so effectively in practice. Therefore, it is advanced here, that X will seek to emphasise the ECtHR's utilisation and importance given to the principle of effectiveness, and looking beyond the domestic legislation to the realities of the situation. The ECtHR's ruling on a breach is likely to come down to the importance given to this principle, as opposed to the general wide margin of appreciation in the national security context and the principle of subsidiarity in relation to the assessment of evidence.

If the ECtHR does establish, that in the circumstances, the special advocates' ability to carry out their role effectively has been inhibited in such a way as to constitute an interference with X's right to adversarial proceedings and equality of arms, these

[1575] Grid: Equality of Arms, Column 3; Chapter 8

[1576] Chapter 4, Section 4.2.2: *Mantovanelli v France* (App 21497/93) (1997) 24 EHRR 370.

[1577] Ibid, para 36.

[1578] Ibid.

guarantees are not absolute and such an interference can be justified. [1579] If the first stage of the assessment includes consideration of the limitations on special advocates' ability to perform their role effectively, the question then arises as to what the ECtHR will take into consideration in applying the test of 'strict necessity', and the State's use of adequate safeguards to counterbalance the procedural unfairness.

It is argued here that the line of cases heard by Strasbourg that concerned the non-disclosure of evidence in the public interest are instructive.[1580] These cases concerned the compatibility of the public interest immunity mechanism. Chapter 8 demonstrated that the ECtHR utilised the principle of subsidiarity, and the doctrine of fourth instance, to assert that it was beyond its role to examine whether non-disclosure was strictly necessary.[1581] Instead, the ECtHR views its role as being to 'ascertain whether the decision making procedure applied in each case complied, as far as possible with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.'[1582] In making its assessment the ECtHR has focused on the role of the trial judge in the decision making procedure, and that the decision not to disclose was kept under review by the judge throughout the proceedings.[1583] In X's case, it has already been established that the judge appeared to be in control of the decision to use a CMP, and in accordance with section 7 of the JSA the proceedings are kept under review. Section 7 also provides for a power to revoke the decision to use a CMP if it is no longer considered necessary 'in the interests of the fair and effective administration of justice.'[1584] Therefore, in X's circumstance, on the basis of the ECtHR jurisprudence examining public interest immunity certificates it is likely that the ECtHR would find that the interference with the right to adversarial proceedings

[1579] Grid: Equality of Arms and the right to adversarial proceedings, Column 4.

[1580] Chapter 8, section 8.4. For example: *Jasper* (n 1553)*; Rowe and Davis* (n 1555).

[1581] Grid: Equality of arms and the right to adversarial proceedings, Column 4; Chapter 8, section 8.4: *Rowe and Davis* (n 1555) para 53; *Fitt v United Kingdom* (App 29777/96) (2000) 30 EHRR 480, para 46.

[1582] Grid: Equality of arms and the right to adversarial proceedings, Column 4; Chapter 8, Section 8.4: *Rowe and Davis* (n 1555) para 62.

[1583] Chapter 8, section 8.4.

[1584] However, 'in the interests of the fair and effective administration of justice' at section 7 can undermine the confidence in the public administration of justice in the same way section 6 can. See Chapter 5, section 5.4.

and equality of arms caused by the use of the CMP and special advocates is justified. Therefore, there has been no violation of Article 6(1). This demonstrates the importance of the initial decision making procedure to order the use of a CMP and the court's retention and exercise of the decision making power.

In summary, the circumstances in Case Study A are unlikely to constitute an interference with the requirement of independence. There is no obvious deference to the executive on the question of judicial procedure. The national security exception would apply to the lack of requisite publicity, in this regard the ECtHR is likely to look favourably on the court's application of a test of necessity and claims to have considered alternative measures. On the current approach of the ECtHR to the equality of arms and the right to adversarial proceedings, it is likely that the circumstances will give rise to a finding of an interference. The outcome of the case is likely to rest on whether X can establish that he was entitled to *A*-type disclosure. On the alternative framework advanced by this thesis in which the limitations on special advocates' are considered at the first stage of the ECtHR's assessment, in Case Study A, the outcome of the case appears to be dependent on whether the ECtHR utilises the principle of effectiveness. This is as opposed to one of its deferential principles such as the margin of appreciation or principle of subsidiary due to the nature of the context. If an interference can be established, it is likely that the ECtHR's assessment as to whether it can be justified will rest on the court's role in the decision-making process to order the use of the CMP.

9.2.2. Case study B

Y alleged that the UK Security Service had been complicit in her false imprisonment by foreign authorities where she was allegedly ill-treated. Y brought an ordinary claim for civil damages against the Secret Service, the defendant.[1585] The defendant indicated that they intended to rely on a substantial amount of sensitive material, and applied for the use of a CMP under section 6 of the JSA. The defendant made a general denial of wrongdoing, not a denial of the specific allegations made.

[1585] In *CF v The Security Service* [2013] EWHC 402 (QB), the claimants brought a civil claim for damages against the Security Service alleging that they had been unlawfully detained, tortured and mistreated during a period of detention in Somaliland and that the defendant state authorities had been complicit in such acts.

The court concluded that the section 6(4) and (5) conditions were satisfied. With regard to the first, it was not disputed that the material in question was 'sensitive'.[1586] However, there were conflicting submissions on the part of the Security Service and the claimants as to whether the material was of relevance to the Security Service's case. Therefore, whether its disclosure would be required in the course of proceedings so as to satisfy section 6(4). Both counsel for Y and the special advocates submitted that the sensitive material on which the government wanted to rely would add nothing to either party's case as set out in the open material. The Security Service disagreed. The court found that the government was best placed to make an assessment of the evidence in the national security context, and therefore held that section 6(4) was satisfied.[1587] In considering whether the use of the CMP allowed the fair and effective administration of justice, the court did not refer to a test of necessity.[1588] That a claim for public interest immunity was appropriate was dismissed without any elaboration.[1589] The open judgment stated that the declaration to use a CMP was 'undoubtedly' in the 'interests of the fair and effective administration of justice', and that the CMP contained detailed reasoning supporting this conclusion. Consequently, section 6(5) was complied with. The court was also satisfied that the Home Secretary had considered a claim for public interest immunity before making the application. It was decided that there was no need

[1586] Whether the material is 'sensitive' is unlikely to be disputed, see Chapter 5, section 5.3.3.

[1587] In *R (on the application of Sarkandi) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] EWHC 259, [2015] EWCA Civ 687, the special advocates submitted that the closed material that the Foreign Secretary sought to withhold was of limited relevance and utility to his defence that its disclosure was not strictly required. The Foreign Secretary disagreed, and the court accepted that the section 6 conditions were satisfied and ordered the use of a CMP.

[1588] In *XH v Secretary of State for the Home Department* [2015] EWHC 2932 (Admin), the court did not refer to a test of necessity when examining whether the section 6 conditions were met. Cf. in *Sarkandi* (CA, at [61]), the Court of Appeal found that it could not be in the interests of the fair and effective administration of justice in the proceedings to make a section 6 declaration, unless it is 'necessary' to do so and this would not be so unless there are satisfactory alternatives. See also: *McCafferty v Secretary of State for Northern Ireland* [2016] NIQB 47, at [24].

[1589] To date, there is yet to be case concerning a section 6 declaration under Part 2 of the JSA where PII has been considered as a satisfactory alternative to a CMP in the circumstances. For example, see: *Sarkandi* (n 1533) at [63]; *Re Gallagher's Application for Judicial Review* [2016] NIQB 95, at [17].

to consider the necessity of *A*-type disclosure at this stage, this could be considered in the course of the substantive proceedings.[1590]

In May 2016 the final judgments for the determination of the substantive proceedings for the civil claims for damages were delivered. There was an open judgement and a closed judgment handed down on the same day. In the open judgment, the judge noted the special advocates' comments on the state of the closed material and acknowledged the difficulties they had encountered as a result of late disclosure of the closed material by the Security Service to the special advocates. However the judge held that whilst this was problematic, it was not sufficient to amount to a finding that the proceedings had been unfair.[1591] *A*-type had been said not to apply. And, whilst the proceedings were kept under review under section 7 of the Act; there had been nothing advanced to demonstrate that the CMP was no longer necessary 'in the interests of the fair and effective administration of justice.'

Independence and Impartiality

In relation to the interpretation of section 6 of the JSA, there are key differences in the reasoning of the court in Case Study B to Case Study A. It is argued here that, unlike Case Study A, the court's interpretation of section 6 in the present case study may result in a finding of incompatibility with the independence of the judiciary as guaranteed by Article 6(1). The JSA, appears to confer the initial decision making power in relation to ordering the use of a CMP on the court. However Case Study B demonstrates that the way in which the court exercised that power shows an unjustifiable deference to the executive. The judge makes this deference explicit in concluding that section 6(4) was satisfied; no reasoning is provided for dismissing the special advocates' submissions questioning the relevance of the sensitive material. Rather the judge states that the government was 'best placed to make an assessment of the evidence' in the national security context. This illustrates the difficulty with the decision-making process provided for by section 6. Section 6(4) conflates two different questions the assessment

[1590] In section 6 proceedings the court has shown a reluctance to rule on whether they should require the executive to order a summary of the closed material, or if *A*-type disclosure is applicable. For example, *XH* (n 1588) at [31].

[1591] See, *Sarkandi* (n 1587) at [42]; *Sarkandi* (n 1533) at [27].

of which is within the expertise or the court differs for each.[1592] On the question of the impact on national security and therefore whether the material is 'sensitive', the court should merely review the government's assessment. However, the management of evidence is a judicial function giving the court a greater role. It is argued here that in Case Study B the court's reliance on the government's assessment of the evidence can be deemed overly deferential. Therefore, Y may seek to argue that the court deferred to the executive's decision on a judicial question and lacked the requisite independence.[1593] This would not be in keeping with the ECtHR's emphasis on the need to maintain public confidence in the administration of justice.[1594]

Nevertheless, the outcome of a challenge to Strasbourg on this point is difficult to predict as the case law on this point is outside of the national security context. The wide margin of appreciation generally accorded to Contracting States on matters relating to national security, raises the possibility that the ECtHR would not readily find a violation of Article 6(1) on the basis of the national court's deference to the executive in these circumstances. This is compounded by the fact that the issue was the assessment of evidence, an area which the ECtHR has emphasised its subsidiary role and applied the doctrine of fourth instance.[1595]

The second problem with the court's interpretation of section 6 is the lack of reasoning provided for the conclusion that section 6(5) was satisfied; it was stated that the detailed reasoning was to be found in the closed judgement. This lack of transparency in the decision making process appears at odds with the importance attached to maintaining confidence in the public administration of justice, a prominent principle of interpretation that the ECtHR has repeatedly utilised in its application of the requirements of independence and impartiality.[1596] On the other hand, it is also difficult to state the approach of the ECHR on this point with confidence, given the national

[1592] Chapter 5, section 5.2.

[1593] Grid: Independence and impartiality, Column 4; Chapter 5, section 5.1.2.1: *Beumartin* (n 1538).

[1594] Grid: Independence and impartiality, Column 2.

[1595] Chapter 4, section 4.6.2.

[1596] Grid: Independence and impartiality, Column 2.

security context and the likelihood of a non-interventionist stance in accordance with the principle of subsidiarity.

Publicity

With regard to the requirements of publicity, as in Case Study A, the ECtHR would view the CMP in Y's case as an interference with the Article 6(1) publicity requirements.[1597] In addition the national security exception would apply.[1598] Nevertheless, due to the difference in the reasoning of the court in Case study B in the interpretation of section 6 of the JSA, there is less scope to argue that the decision was justified. Chapter 6 demonstrated that the State's decision to restrict the right to a public hearing and the public pronouncement of judgments is of relevance to the ECtHR's conclusion as to whether the restriction is justified.[1599] Y could advance the argument that the authorities did not apply a test of necessity; and, on the basis that the court did not elaborate on its conclusion that section 6(5) was satisfied, Y could submit that the authorities did not provide clear reasons for its decision. However, the ECtHR case law demonstrating this more interventionist stance in the national security context was in regard to situations where there had been complete concealment of the hearing and subsequent judgment. Bearing in mind the ECtHR's general wide margin of appreciation in the national security context, it may be that the ECtHR looks favourably on the fact that there are always open and closed judgments. In addition, the ECtHR's current view on the special advocates' ability to counterbalance the detriment caused by a CMP suggests that, at present, Y's challenge in this regard may be unsuccessful.

Equality of Arms and the right to adversarial proceedings

On the same reasoning as Case study A, it is likely that the ECtHR will readily find that Y's equality of arms and right to adversarial proceedings has been interfered with as a result of her inability to properly participate in a CMP.[1600] The question of compatibility will rest on whether the use of special advocates was an adequate safeguard to

[1597] Grid: Publicity, Column 1.

[1598] Grid: Publicity, Column 4.

[1599] Grid: Publicity, Column 4; Chapter 6, section 6.3.1.

[1600] Chapter 7, section 1.

counterbalance the procedural unfairness of the CMP.[1601] The ECtHR has approved of the use of special advocates, even acknowledging the limitations on their ability to carry out their functions. Therefore, the special advocates submissions regarding the late disclosure of the closed material and the state of the closed material received, is unlikely to make any material difference on the ECtHR's view of the safeguard they provide. Therefore, the outcome is likely to depend on the application of *A*-type disclosure. In Y's case the court also held that *A*-type disclosure did not apply. Y also alleges serious human rights violations which would attract high public interest. However, her claim is for monetary compensation for past restrictions on freedom. This may mean that the argument that *A*-type disclosure was required in her case will again be difficult to establish. If the ECtHR accepts the domestic court's reasoning in Case Study B – namely, that the different circumstances required less disclosure because Y would already know a substantial amount of the case that she was bringing – then the representation of Y's interests throughout the proceedings by special advocates will likely be viewed as an adequate safeguard without *A*-type disclosure. The challenge to Strasbourg would consequently be likely to be unsuccessful, and a finding of no violation of the equality of arms and the right to adversarial proceedings.

Nevertheless, it is possible that the ECtHR would restate its finding in *El-Masri v Macedonia*, that the investigation of such serious allegations is important not only for the individual, but in the public interest.[1602] As a result, *A*-type disclosure could be deemed to apply on the basis that there should be a 'sufficient element of public scrutiny of the investigation'.[1603] If *A*-type disclosure is deemed to apply, then the next question is had Y received the necessary level of disclosure to meet ECHR standards. From the information provided in Case Study B, it would appear Y has not. It states that the Security Service did not answer the specific allegations in the open material and merely asserted a general denial of wrong doing. This appears at odds with both the standards of specificity and proportion stated by the ECtHR in *A v UK*.[1604] A substantial amount of the material is in the closed material, and the open material contains mere

[1601] Chapter 7, section 7.1.

[1602] Chapter 7, section 2.3: *El -Masri v Former Yugoslav Republic of Macedonia* (App 39630/09) (2013) 57 EHRR 25.

[1603] Ibid.

[1604] Chapter 7, section 7.1: *A* (n 1553) para 220.

general assertions. So, if *A*-type disclosure is considered necessary in Case Study B, it is likely that the ECtHR will find that the UK authorities have not provided Y with adequate safeguards to justify the interference with these Article 6(1) guarantees. As a result, there would be a finding of a violation of Article 6(1). A claim of this nature, whereby the allegations are serious and of high public interest but the remedy is monetary compensation, is yet to be considered by the ECtHR in the context of CMPs. Therefore it is difficult to predict the ECtHR's approach to *A*-type disclosure, hence difficult to discern a likely conclusion of the finding of a violation.

Equality of arms and the right to adversarial proceedings: examining the limitations on special advocates at the first stage of the ECtHR's assessment

The following discussion considers the limitations on special advocates as part of the factual matrix that constitutes an interference with the right to adversarial proceedings, and equality of arms.[1605] This is formulated on the same basis presented in Chapter 8 and applied in Case Study A above. For an individual to have equality of arms and adversarial proceedings, the access to evidence is of key importance.[1606] Whilst the special advocate has full disclosure of the closed material, they face many practical difficulties which inhibits this access and arguably affects their ability to represent the interests of the individual effectively.[1607] In Y's case the special advocates have experienced difficulty in effectively accessing the evidence in respect of late disclosure of the sensitive material. The special advocates submitted in open proceedings that they were seriously inhibited from examining all the material due to the voluminous case file served, and the nature of the material which included intercept evidence and evidence in the Arabic language. They submitted that this was exacerbated by the lack of support that special advocates receive. The same difficulty arises here as it did in Case Study A. It is likely that Y will have to rely on the principle of effectiveness to justify her submission that these difficulties the special advocates experienced gave rise to an interference with Article 6(1). Moreover it is possible that the ECtHR could apply the proceedings as a whole test to assert that the cumulative effect of the deficiencies

[1605] Chapter 8, section 8.3.

[1606] Grid: Equality of arms and the right to adversarial proceedings, Column 3.

[1607] See Chapter 2, section 2.6.4.

rendered the proceedings unfair.[1608] Y would seek to argue that the late disclosure, and volume and nature of the closed material, meant that the special advocate could not effectively access the evidence, and not in a way that presented the opportunity to comment on it. Thus the special advocate could not "participate properly" in the CMP on behalf of Y, to the same extent that the Secret Service could; and this constituted an interference with Article 6(1).

If this was the ECtHR's conclusion, then the next step would be to assess whether that interference was strictly necessary and the national authorities provided adequate safeguards to counterbalance the procedural unfairness.[1609] Case Study A highlighted that the focus of the ECtHR's assessment here would be the scrutiny of the decision making procedure deployed in ordering the use of the CMP and special advocate in the first place.[1610] In this regard Y could contend that the deference to the executive on the question of relevance of the material, and lack of reasoning as to why the use of the CMP was 'in the interests of the fair and effective administration of justice', meant that the decision to use a CMP in her claim was not fair in accordance with ECHR standards. As a result, she would contend that the interference with the right to adversarial proceedings and equality of arms cannot be justified, which would amount to a finding of a violation of Article 6(1). However, it is argued here that it is difficult to predict the outcome as this form of assessment of CMPs has not yet arisen at Strasbourg. In addition, it remains to be seen what weight the ECtHR would give to the principle of effectiveness in the context of national security, and the question of evidence which is a matter primarily considered to be outside of its role.

In summary, Y could advance the argument that the court's decision to order the CMP under section 6 lacked transparency and the requisite judicial independence due to an apparent deference to the executive's opinion on the question of relevance of evidence, a question which is of a legal nature. Consequently, Y could argue on the basis of the inadequacy of the decision-making process that led to her exclusion from the proceedings that the interference with her right to a public hearing and public judgment could not be justified. On both points, the outcome is difficult to predict given the

[1608] Chapter 8, section 8.2.

[1609] Grid: Equality of arms and the right to adversarial proceedings, Column 4.

[1610] Ibid.

ECtHR's tendency to use its deferential principles of interpretation in the context of national security, and admissibility of evidence.[1611] With regard to the equality of arms and the right to adversarial proceedings, on the ECtHR's current approach the decision will rest on whether the detriment to Y was counterbalanced with adequate safeguards. The ECtHR's answer to this is likely to depend again on the applicability of *A*-type disclosure. Using the alternative framework advanced in Chapter 8, Y could argue that the difficulties the special advocates faced with regard to the closed material constituted an interference with her right to adversarial proceedings and the equality of arms. In the ECtHR's assessment as to whether the interference was justified, Y could again refer to the courts decision-making process under section 6.

9.2.3. Case study C

The facts:

Z brought a civil claim for damages against the Home Security for unlawfully listing him for sanctions that resulted in his assets being frozen for 5 years. He was removed from the sanctions list following a successful claim for judicial review of the decision, and now seeks monetary compensation for the losses that resulted from the sanctions. The Home Secretary claimed that the primary material she needed to rely on to defend herself was sensitive within the definition of the JSA, and therefore applied for a section 6 declaration. The judge granted the application. The judge held that section 6(4) was satisfied, it was not disputed that the information which the Home Secretary sought to rely on was sensitive. The judge rejected the submissions advanced by Z's counsel and the special advocates that the CMP was not necessary because the sensitive material did not advance the Home Secretary's case, and therefore that s.6(4) was not satisfied. The judge reasoned that whilst it was not disputed that Z's listing had been unlawful, the alleged losses and allegations of wrong doing on the part of the Home Secretary necessitated the Home Secretary being able to advance all the material that led to her decision. A substantial amount of this was sensitive, therefore the use of a CMP was necessary. On the basis of this reason the judge found that it was also in the 'interests of the fair and effective administration of justice' to use a CMP, hence his finding that section 6(5) was also satisfied.

[1611] Chapter 4, section 4.6.

Z appealed the court's decision to order the use of the CMP. He lost his appeal at the Court of Appeal and the Supreme Court. He argued that he could not adequately present his case if the majority of the evidence was heard in a CMP. He argued that due to the relationship between him and the special advocate, and the restrictions on communication, he had been unable to give effective instructions to the special advocate who represented his interests. Counsel for Z claimed that the open material contained a very general overview of the reasons for listing, the specifics were in the closed material. Because communication with the special advocates was restricted once they had seen the specifics of the reasons, they could not test the reasoning effectively because the special advocate could not receive effective instructions from Z on the closed material.

The following discussion will consider whether the circumstances in Case Study C give rise to an issue with the right to legal assistance as an aspect of the right to a court.

The right to access a court: examining the limitations on special advocates at the first stage of the ECtHR's assessment

The right to access a court applies to the preliminary stage of the proceedings. Chapter 7 demonstrated that it is not enough for an individual's case to be heard by a court if they are denied the opportunity to effectively present their case to court. Therefore the right to a court is the right of *effective* access.[1612] The ECtHR's case law illustrates that a hindrance can constitute an interference with Article 6(1) as much as an outright bar on initiating proceedings.[1613]

Chapter 7 demonstrated that in certain circumstances, effective legal assistance is considered by the ECtHR as an aspect of the right to access a court guaranteed by Article 6(1).[1614] It also established that the special advocate is the individual's only form of assistance in the CMP, therefore their use could be examined in relation to the ECHR standards of effective legal assistance.[1615] Certain aspects of the operation of special

[1612] Grid: The right to access a court, Column 3; Chapter 7, section 7.2.1: *Airey v Ireland* (1979-90) 2 EHRR 305

[1613] Grid: The right to access a court, Column 4; Chapter 7, section 7.2.2: *Golder v United Kingdom* (1979-80) 1 EHRR 524; *Vasilescu v Romania* (App 27053/95) (1999) 28 EHRR 241.

[1614] Grid: Effective legal assistance, Column 2; Chapter 7, section 7.2.2.

[1615] Chapter 7, section 7.2.3.

advocates were shown to raise issues that related to the initiation of proceedings, which then later affected the conduct of the proceedings.[1616] In examining whether the use of special advocates can constitute an interference with the right to access a court the first question to address is whether in the circumstances legal assistance will be required to respect Z's right to access a court, by the ECtHR.[1617] If yes, then the next question is whether the assistance the special advocate provided in Case Study C was sufficient to meet ECHR standards. If it wasn't, this may lead the ECtHR to conclude that there has been an interference with the right, and it will move on to assess whether such an interference can be justified.[1618]

The ECtHR has deemed the complexity of the case and the gravity of consequences for the individual as relevant in determining that effective legal assistance is required.[1619] CMPs by their very nature are complex and the evidence is voluminous. However, the ECtHR's general approach is not to rule in the abstract. Therefore, Z would need to specifically argue that this was the situation in his case. The question would be how much information the special advocate could advance regarding the case file without endangering national security. With regard to the gravity of consequences Z had been subjected to sanctions which included the freezing of his assets. The consequences of such sanctions seriously curtail an individual's personal freedom, which should result in a higher protection similarly afforded to cases involving the liberty of the individual. The difficulty Z may face is that his claim is for monetary damages as he has already been removed from the sanctions list. This is similar to Y's situation in Case Study B. It was established that it is difficult to discern the ECtHR's approach in relation to the level of protection accorded in this situation, as a challenge in this regard is yet to be brought to Strasbourg. The argument advanced here is that the cases are complex and concern severe restrictions on an individual's rights and freedoms. The States themselves appear to acknowledge this by providing for the use of special advocates in CMPs in the domestic legislation. Therefore the ECtHR should proceed on the same

[1616] Chapter 7, section 7.2.3.

[1617] Grid: Effective legal assistance, Column 4.

[1618] Ibid.

[1619] Idid; Chapter 7, section 7.2.2.

basis, and regard CMPs as proceedings whereby an individual requires legal assistance in order to effectively access a court within the meaning of Article 6(1).

If this line of argument is accepted by the ECtHR, then the next question is whether the special advocate can provide the requisite level of assistance to satisfy the Article 6(1) requirements. Chapter 7 demonstrated the limited guidance in the Article 6(1) case law on what amounts to 'effective' legal assistance, and so Article 6(3)(c) cases were used by analogy. The Chapter contended that if the circumstances are such that legal assistance is deemed a requirement in civil proceedings, then the standards of effectiveness should be the same as in criminal proceedings.[1620] Z has argued that due to the relationship between him and the special advocate, which is one that does not give rise to a relationship of trust and confidence or professional accountability; and, the restriction on communication after the closed material had been served on the special advocate, he had been unable to give effective instructions and therefore felt he had no option but to withdraw his claim. Chapter 7 illustrated that the relationship of trust and confidence, and private communications between an individual and their legal assistance, to be of vital importance in the ECtHR's reasoning.[1621] The ECtHR's case law demonstrated that the lack of these qualities are sufficient to amount to an interference with Article 6.[1622] This demonstrates that there lies the possibility for Z to argue that he had not received effective legal assistance, this resulted in a hindrance on his right to have his civil rights determined before a court. If accepted by the ECtHR, this would lead to the conclusion that these limitations on the special advocates ability to assist Z effectively amounted to an interference with Article 6(1). However, it is also important to note here the difficulties that an individual may incur in pointing to the specific circumstances that lead to an interference with his Convention rights, given the innate secrecy of CMPs. Hence, that one of the key lessons to transpire from this doctoral research is that the key challenge is the application of the Article 6(1) guarantees in this context.

[1620] Chapter 7, Section 7.2.2.

[1621] Grid: Effective legal assistance, Column 3; Chapter 7, section 7.2.3.1.

[1622] Ibid.

Additionally, the right to access a court is not absolute, so the ECtHR would go on to examine whether this interference was justified.[1623] In this regard the ECtHR will examine whether the relevant provisions on the use of special advocates pursued a legitimate aim, were proportionate, and did not impair the very essence of the right.[1624] The legitimate aim would be national security, and the case law demonstrates the practice of the ECtHR appears to be to conflate the very essence test with the proportionality assessment.[1625] Therefore, the outcome of the ECtHR's proportionality assessment is likely to be determinative of whether Z's right to access a court has been violated.

Chapter 7 outlines the difficulty in discerning an established set of principles regarding the ECtHR's proportionality analysis applicable to the potential interference caused by the limitations placed on special advocates.[1626] This is due to the limited body of case law specifically regarding the effectiveness of legal assistance in accordance with the right to access guaranteed by Article 6(1). It was suggested that, on the current approach of the ECtHR towards CMPs and special advocates under complaints brought to Strasbourg under different Convention rights, that the applicability of *A*-type disclosure may be of relevance in the proportionality analysis.[1627] For example, if the ECtHR deems that the circumstances require effective legal assistance and considers that the special advocate does not meet the necessary standards on the facts of the case, this would constitute an interference.[1628] The ECtHR may consider that the domestic authorities had taken steps to minimise the unfairness by providing *A*-type disclosure so the individual could give effective instructions. In this case Z was only provided with a general overview of the reasons for his designation on the sanctions list. This is unlikely to meet the standards of specificity and proportion required by *A*-type disclosure. Therefore it is unlikely to be deemed as counter-balancing any unfairness. In addition the ECtHR may take into consideration whether alternative less restrictive measures

[1623] Grid: Effective legal assistance, Column 4; Chapter 7, section 7.3.

[1624] Grid: Effective legal assistance, Column 4; Chapter 7, section 3: *Ashingdane v United Kingdom* (1985) 7 EHRR 528.

[1625] Chapter 7, section 7.3.

[1626] Ibid.

[1627] Ibid.

[1628] Ibid.

were available. There is no evidence in Case Study C that the court considered less restrictive measures. This would reinforce Z's argument that the restrictions placed on the special advocate were disproportionate, and impaired the very essence of the right.

Consequently, it is possible that if the ECtHR deemed the circumstances as such that legal assistance was required to respect Z's effective access to court, that this could amount to a violation to Article 6(1).

9.2.4 Case studies: concluding observations

The analysis of the case studies, with the relevant Article 6(1) guarantees, illustrates that there is a lack of determinative answer as to the compatibility of Part 2 of the JSA with the Convention. This demonstrates that categorical assertions regarding CMPs and their compliance with the right to a fair trial as guaranteed by the ECHR are unsustainable. This discussion has illustrated how the context-specific approach of the ECtHR means that a slight change in the facts or the domestic court's application of the JSA can result in a different outcome. In addition, it has been demonstrated that tensions exist between the enhancing, and the deferential interpretative principles. How these tensions are resolved can also have an impact on the outcome of the case, and this can result in indeterminacy in the ECtHR's jurisprudence.

In terms of the ECtHR's general principles of interpretation the analysis demonstrates how the principle of effectiveness has the potential to enhance rights protection. This is particularly evident in relation to the ECtHR's application of the right to access a court, including requiring effective legal assistance in civil proceedings in certain circumstances. In addition, the principle is particularly strong in the application of equality of arms and the right to adversarial proceedings, underlining the need for the parties to have an equal opportunity to effectively participate in the proceedings. Moreover, the general principle of the need for maintaining public confidence in the public administration of justice can also work to ensure a higher level of protection of rights.

However, the analysis also demonstrates that, other general principles can then be applied to restrict rights protection. In this regard it is observed here that there are two main problems in applying Article 6(1) to CMPs. First, is the national security context. This generally leads the ECtHR to accord a wide margin of appreciation to the Contracting States. Second, a lot of the problems with CMPs arise due to the nature or

assessment of evidence, and this is relevant to the outcome of compatibility with the guarantees. The issue with this is that in accordance with the principle of subsidiarity and the doctrine of fourth instance, the ECtHR views it as beyond its role to scrutinise the national authorities' assessment of admissibility of evidence. This thesis contends that in the case law reviewed in this context the ECtHR's deferential standard of review is more prominent at the second stage of its assessment of whether there is a violation of the Convention. Therefore, the national security context coupled with CMPs concerning the admissibility of evidence can be problematic in establishing a successful challenge at Strasbourg. The danger is that the deferential principles will always have the last word, effectively trumping the enhancing principles which are more prominent at the ECtHR's first stage of its assessment.

This thesis contends that there is a way that has the potential to overcome this problem, and would entail a higher level of scrutiny of the shortcomings of the special advocate system. The argument advanced is that, the restrictions on their ability to carry out their role effectively should be assessed at the first stage of the ECtHR's assessment. Therefore, it is contended here that in certain circumstances it may be deemed that the special advocates' ability to carry out their functions are inhibited in such a way that this should be considered as part of the factual matrix that constitutes an interference with Article 6(1). In this manner the difficulties are viewed holistically as part of the assessment of the negative impact of CMPs on ECHR standards of fairness. Nevertheless, whilst this may lead to higher scrutiny, the case studies highlight that it is difficult to pinpoint the specific circumstances given the innate secrecy of CMPs. In this regard, the context-specific approach to interpretation of the ECHR, and the principle that the ECtHR will not rule in the abstract in relation to Article 6, prove problematic. This leads to the central hypothesis of this thesis that whilst CMPs under the JSA are potentially incompatible with Article 6(1), this will depend on the circumstances of each individual case. This is in itself inherently problematic given the innate secrecy of CMPs. In addition, this thesis contends that the provision of *A*-type disclosure is fundamental to the effectiveness of special advocates. It is submitted here that, on the basis of the importance of maintaining confidence in the public confidence in the fair administration of justice, even in civil claims for monetary compensation, the ECtHR should require *A*-type disclosure. For instance, where an individual claims serious

allegations in cases attracting a high level of public interest, irrespective of whether the individual is no longer under heavy restrictions.

9.3. Judicial decision-making and general oversight mechanisms

The biggest concern to emerge from the analysis in section 9.2., is that the key challenge is actually applying the Article 6(1) guarantees to the use of CMPs under the JSA. The issues are multi-faceted and outcomes will vary depending on the context. The context specific approach, which is generally welcomed by human rights activists, can have negative effects in the context of secrecy. It will be difficult for individuals to pinpoint a specific issue in the proceedings, because a substantial part of the proceedings are behind closed doors. This reinforces the importance of the initial decision to order the use of CMPs in any given case, for the sake of transparency and accountability. Chapter 5 illustrated the necessity for judicial control over the process to ensure the maintenance of public confidence in the judiciary, and that the use of CMPs would be confined to exceptional circumstances. The chapter delineated the steps of the decision-making process into a five stage decision-making framework, which assigned varying degrees of deference in accordance with the appropriate limits of judicial and executive power. The framework was used as a tool to analyse the sufficiency of section 6 of the JSA, the outcome of which was that the Act failed to provide a rigorous decision-making process in the initial decision to order a CMP in any given case. Chapter 5 demonstrated a worrying disregard by the courts to the importance of an individual being able to effectively challenge evidence, for the fair and effective administration of justice. The result being that the JSA operates unnecessarily in favour of the government. This is compounded by the provisions in section 8 which apply following a section 6 declaration. These provisions take national security as the starting point, and make no provision for the consideration of the competing interests of justice. The effect being, that once the use of a CMP is triggered, the court has insufficient control over the proceedings and management of evidence. This erodes the protection of the fair trial guarantees and does little to increase public confidence in the administration of justice.

These flaws in the legislation increase the importance of effective oversight of the extent of the use of CMPs under the JSA. Thus, in terms of accountability and transparency, section 12 of the Act should be a welcome safeguard. Section 12 provides

that the government must publicly report on the use of CMPs annually and present this report to parliament.[1629] To date three reports have been published. Initially, the reports could be criticised for lacking in detail. For example, the first report did not reveal names or dates. This approach would make it difficult to keep track and access the judgments delivered. However, the reports do reveal certain trends. The reports show that the applications for declarations of the use of a CMP in proceedings has increased since the first year of reporting. In total, over the course of the three reporting periods there have been twenty-eight applications made and these have all been by either a Secretary of State or the Police Service for Northern Ireland. So far, there have been no applications made by a non-state party who would be excluded from the CMP. It appears from the reports that a section 6 declaration has not been made in respect of every application. However, this can be difficult to state definitively because the application and the declaration do not always occur in the same reporting period. In addition, the names of the claimants were not mentioned in the first report which makes it difficult to track the judgments and match up the declaration with the original application. Interestingly, the reports reveal that to date there has been no revocation of a section 6 declaration. In addition to the annual reports, section 13 of the JSA provided for an independent review of Part 2 of the JSA after five years. This is an important oversight mechanism, and it remains to be seen as to the outcome of this independent review.

9.4. Concluding remarks

One of the motivations to carry out this piece of doctoral research was the broader issue of the proliferation of exceptional mechanisms, such as CMPs. Part 2 of the JSA significantly extended their availability to all civil proceedings, however the 'creep of "secret justice"' had already been developing prior to the introduction of the legislation. This thesis has demonstrated that even prior to enactment of the JSA the use of CMPs had expanded in the manner of both cross-border, and cross-policy policy transfer. Whilst the benefits of policy transfer are acknowledged, the dangers of policy transfer without a nuanced analysis have been highlighted. These dangers emphasise the need to engage in the rigorous analysis of CMPs under Part 2 of the JSA taken by this thesis.

[1629] Chapter 3, section 3.2.7.

There are three key mitigating tools that exist in the scheme of CMPs, and are applicable depending on the context. These are a changed judicial role, special advocates, and *A*-type disclosure. The cross-context policy transfer within the UK has proven problematic with regard to retaining these tools in line with the expansion of the availability of CMPs. For example, in SIAC and other specialist tribunals, the changed judicial role can act as a tool to mitigate the perceived unfairness of a CMP. In SIAC in particular the composition and nature of the role of the judges brings with it specialism, and inquisitorialism. With regard to *A*-type disclosure this thesis has demonstrated that its application is context dependent. Consequently, it is not deemed a requirement in every case involving a CMP. This can mean that the role of the special advocate as a mitigation tool is increasingly important in the contexts where the other two tools do not apply. This is more likely to be the case where CMPs are used in ordinary judicial processes.

The ECtHR's judgement in *Chahal*, and the UK government's interpretation of this decision, illustrate the dangers of the lack of a rigorous analysis before a policy is transplanted across borders. The establishment of SIAC which provided the platform for the first use of CMPs in the UK, omitted some key safeguards present in the Canadian system that the government appeared to believe they were 'borrowing'. For example, under the Canadian model, the primary role of the security-cleared counsel was to assist the SIRC, albeit their role included challenging the government's case and cross-examining witnesses. Hence, incidentally representing the interests of the excluded individual. However, the role of the special advocate in the UK was to represent the interests of the individual excluded from the CMP. Accordingly, the relationship between the special advocate and the individual has been categorised as 'representative but not responsible'.[1630] The implications of this have been outlined as twofold. Firstly, it raises questions of professional ethics. Secondly, questions are raised regarding the effectiveness of the system in terms of the ability of special advocates to carry out their function of representing the individual's interests.[1631] In addition, one of the predominant criticisms of the special advocate system in the UK is the prohibition on

[1630] Chapter 2. section 2.7.2.

[1631] Cian Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 KLJ 19, 30; JUSTICE, *Secret Evidence* (2009) 206.

communication.[1632] In Canada at the time such communication was not prohibited, this was an important point that was overlooked in *Chahal*, and subsequently by the UK government.[1633]

There is also the recognised trend of cross border policy transfer from the UK, in the national security and counter-terrorism context.[1634] The use of CMPs and special advocates are no exception to this and have been of abiding interest in several other jurisdictions. Interestingly, the UK model was subsequently adopted by Canada in the review of 'security certificates' in the Federal Court of Canada. The Supreme Court of Canada held in *Charkaoui v Canada (Citizenship and Immigration)*,[1635] that the procedure at the time (which did not provide for the appointment of special advocates), under the Immigration and Refugee Protection Act 2001 (IRPA) violated section 7 of the Canadian Charter of Rights and Freedoms. The Supreme Court considered SIAC and the UK model of the special advocate, and found that it would be an improvement on the IRPA.[1636] The Canadian parliament responded to *Charkaoui* by adopting the UK-style model of special advocates including the prohibition on communication. In a more recent case the Supreme Court of Canada concluded that those provisions of the IRPA in relation to the role of special advocates met the requirements of a fair process protected by section 7 of the Canadian Charter of Rights and Freedoms.[1637] In addition to Canada, the UK special advocate model has been of interest in other jurisdictions. These include: Australia;[1638] New Zealand;[1639] the USA;[1640] and, in the European Court

[1632] Chapter 2, section 2.7.3.

[1633] David Jenkins, 'There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology' [2011] *Columbia Human Rights Law Review* 279, 321.

[1634] See chapter 1, footnote 21.

[1635] [2007] 1 SCR 9.

[1636] Ibid, at 397 – 400.

[1637] *Canada (Citizenship and Immigration) v Harkat* [2014] SCC 37. See also, Department of Justice, *Special Advocates Program Evaluation: Final Report* (2015).

[1638] E.g. Sir Roger Gyles, C*ontrol Order Safeguards Part 2* (Canberra, 2016).

[1639] New Zealand Law Commission, *The Crown in Court: A Review of the Crown Proceedings Act and national security information in proceedings* (NZLC R135, Wellington, 2015).

[1640] Stephen I. Vladeck, 'The FISA Court and Article III' 72 *Washington & Lee Law Review* 1161 (2015).

of Justice.[1641] A comparative study is beyond the scope of this thesis, however this will form the basis of future research activities. The purpose of the reference to other jurisdictions here is to illustrate the potential for cross border policy transfer of Part 2 of the JSA, supporting the contention of this thesis of the need to subject it to a rigorous analysis within the framework of universalised norms, such as the ECHR. However, this is not meant to overlook the advantage of policy transfer, and it would be interesting to gain a sense of whether other approaches can be gathered from these other systems.

The cross-context and cross-border policy transfer, is of relevance to informing the choice of this particular study and the wider lessons that it seeks to demonstrate. In addition policy transfer is indicative of the normalisation of CMPs. Although they were once regarded as an exceptional measure, CMPs are now one of the predominant mechanisms for dealing with secret evidence. This thesis goes further than the existing literature which cautions against normalisation of exceptional mechanisms and focuses on the next step. It is argued here that normalisation has occurred in this context and that this can have a longer lasting impact on diminishing rights protection.

This thesis pre-empts the borrowing of Part 2 of the JSA by other jurisdictions, and acknowledges the unsatisfactory results that this can produce which are already evident in the examples provided of policy transfer to date. Consequently, the rigorous analysis of the legislative framework for Part 2 of the JSA taken by this thesis is fundamentally important before such policy transfer occurs. This analysis has been undertaken within the framework of the ECtHR's Article 6(1) jurisprudence. This is important because the extension of the availability of CMPs to all civil proceedings requires its compatibility with the civil limb of Article 6. In addition, the ECtHR's judgment in *Chahal* illustrates the potential for it to act as a vessel for policy transfer with an outcome which omits safeguards and poses the risk of providing a lower level of rights protection. Therefore, it is important to highlight the potential human rights concerns that could amount to a violation with the Convention.

This thesis has demonstrated that CMPs are potentially incompatible with Article 6(1). It has sought to provide a structured framework by which to make this assessment

[1641] See Draft Rules of Procedure of the General Court (7795/14, 17 March 2014) and Rules of Procedure of the General Court 2015 (L 105, 23 April 2015) Article 109 and Practice Rules for the implementation of the rules of procedure of the General Court (L 152/1, 18 June 2015).

which could act as an aid to interpretation of the relevant Article 6(1) guarantees in this context. The approach is intended to be pragmatic which corresponds with the ECtHR's context specific approach to interpretation. This is in recognition that not every line of argument will be relevant in each case and this is dependent on the circumstances. However, this thesis has demonstrated that the key challenge is applying the Article 6 guarantees in the first-place due to the secrecy inherent in CMPs and the ECtHR's approach to interpretation. Consequently, the initial decision-making procedure to use these restrictive measures in the first place, and general oversight mechanisms are of vital importance.

The nuanced analysis of the ECtHR's Article 6(1) jurisprudence, with reference to national security and sensitive issues, has also illustrated the tensions that exist between the ECtHR's general principles of interpretation in this context. These tensions and how they are reconciled can have a significant impact on the outcome of the case, and it is argued here that this results in layers of indeterminacy in the ECtHR's jurisprudence. At present the ECtHR is making a choice between the principles. This is not, however, being done explicitly. It is embedded in the structure of the ECtHR's reasoning. For example, the principles that generally enhance the level of rights protection are predominately used by the ECtHR at the first stage in its assessment of whether the circumstances give rise to an interference with Article 6(1). This includes the principle of effectiveness, and the ECtHR's emphasis on the importance of maintaining confidence in the fair administration of justice. Whereas, the ECtHR's deferential interpretative principles are more predominant at the second stage of its assessment as to whether interferences can be justified. This poses particular difficulties in the context of CMPs because of the tendency to use the deferential principles in the context of national security and the admissibility of evidence. The effect is that the deferential principles are always likely to trump the principles that enhance the level of rights protection.

It is argued here that one way to reconcile these tensions is to present the shortcomings of the special advocate system in a different manner than exists currently. The current approach is to present the special advocate as a positive mechanism which can offset the potential negative effect of the use of a CMP to an individual. The consequence of this presentation of the system, is that it is reflected in the ECtHR's approach in its assessment of the compatibility of CMPs. The result is that special advocates are

examined in a proportionality analysis at the second stage of the ECtHR's assessment. It is not disputed that special advocates provide an important mitigating tool in relation to the perceived unfairness of a CMP. Neither is it suggested here that the system of CMPs would be improved if special advocates were not provided. However, the argument is that the overall effect on the proceedings still falls short of the acceptable standard of fairness that should be sought to be achieved. It is this overall effect that should be the focus of an analysis of the system, and rights protection. Consequently, this thesis has advanced an alternative holistic approach to the assessment of the shortcomings of the special advocate system.

Chapters 7 and 8 demonstrated that the limitations that special advocates' face could inhibit their ability to carry out their functions effectively as to amount to an interference with Article 6(1). Therefore, the shortcomings of the special advocate system are assessed alongside the impact of the use of a CMP at the first stage of the ECtHR's assessment of compatibility. This thesis has contended that if the role of special advocates was considered at the first stage of the ECtHR's assessment as to whether there is an interference with Article 6(1), this would entail a more rigorous assessment of the limitations that they face in carrying out their functions. Moreover, if the special advocate is considered at the first stage in the assessment then ECtHR has to examine the operation of CMPs more closely in order to ascertain whether there are more adequate safeguards sufficient to counterbalance the unfairness. This is likely to entail scrutiny of the decision-making procedure taken to order the use of CMPs in any given case. In this regard, the ECtHR is more likely to utilise the principle of effectiveness and the emphasis on the need to maintain confidence in the administration of justice. This thesis argues that this approach permeates the principles that enhance the level of rights protection in the entire process of the ECtHR's reasoning. For example, the principle of effectiveness should not be confined to the first stage of assessment, and the margin of appreciation should not always have the last word. This holistic approach fits within the ECtHR's own general principles.

Without reconciling the tensions between the principles the ECtHR's present mechanistic approach will always result in the conclusions reached in the case studies in Section 9.2. This in turn leads to further normalisation of such restrictive measures. The consequence of this is that there is the potential for the ECtHR's approach to debase rather than enhance rights protection.

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