

## JUSTICE AND SECURITY IN THE UNITED KINGDOM

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*This article outlines the ways in which the United Kingdom manages civil litigation concerning sensitive national security material. These are: (i) the common law of public interest immunity; (ii) the use of a closed material procedure and special advocates; and (iii) the secret hearings of the Investigatory Powers Tribunal. With these existing alternatives in mind the article analyses the background to, the reasons for, and the controversies associated with the Justice and Security Act 2013, enacted in the wake of the UK Supreme Court's 2011 ruling in Al Rawi v Security Service.*

**Keywords:** national security, civil litigation, secrecy, closed material procedure

### 1. INTRODUCTION

How can litigation concerning national security secrets be conducted fairly? All countries committed to the rule of law must wrestle with this question, to which there is no easy answer. States need to keep secrets. Not all activity with regard to national security needs to be kept secret, but some of it does. From time to time the operations and decisions of national security agencies will be challenged in court, whether directly or otherwise. How can such cases be managed fairly, with due regard for the fundamental principles of open justice and of natural justice, if much of the evidence relevant to the proceedings is required to be kept secret? These are not new questions, but in recent years they have come to prominence, not just in the United Kingdom (on which this article focuses) but also in the United States,<sup>1</sup> in the European Court of Human Rights<sup>2</sup> and in the European Court of Justice,<sup>3</sup> as well as elsewhere.

In April 2013, following 18 months of protracted and sometimes heated debate, the United Kingdom Parliament passed the Justice and Security Act, which significantly amends the way in which certain national security cases may be tried in the UK. The legislation concerns only civil litigation – nothing is said in the Act about criminal trials – and this article, too, focuses only on civil litigation and not on criminal trials. The article tells the story of the Justice and Security Act 2013: of where it came from, of why the United Kingdom government decided that it was needed, and of its strengths and likely limitations as a means of conducting national

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<sup>1</sup> The US ‘state secrets’ doctrine has been interpreted in recent years as a strong bar to numerous national security claims that probably would have been litigated further in the UK and European courts than was permitted in the US: see, eg, *United States v El-Masri* 479 F.3d 296 (4th Cir 2007) and *Mohamed v Jeppesen Dataplan* 614 F.3d 1070 (9th Cir 2010).

<sup>2</sup> See *A v United Kingdom* (2009) 49 EHRR 29.

<sup>3</sup> See Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union* [2008] ECR I-6351.

security litigation.<sup>4</sup> The Justice and Security Act is highly controversial in the UK, especially among lawyers and human rights groups.

At one level this is a rather parochial story of lawmaking in the UK, but to view the matter simply in that light would be a mistake. The story of the Justice and Security Act may turn out to have substantial international resonance. The United Kingdom has long been a net exporter of national security and counter-terrorism law.<sup>5</sup> Interest in the Justice and Security Act is acute not only in the UK but in numerous countries around the world, which include countries in the Commonwealth and in Europe, as well as in Israel. If the legislation can be shown to work effectively, it seems inevitable that it will be copied.

The measures contained in the Justice and Security Act are far from the only tools available to courts and tribunals in the United Kingdom to manage national security litigation. In order to understand both the controversy and the novelty of the Act it must be seen in the light of the UK's pre-existing rules in this area. There are three sets of such rules: (i) the common law rules of public interest immunity (formerly known as Crown privilege); (ii) the statutory innovation of 'closed material procedure' and special advocates; and (iii) the unique rules governing the Investigatory Powers Tribunal, a body whose procedures were generally overlooked in the parliamentary and political battles over the Justice and Security Act. Each of these sets of rules will now be sketched briefly, before turning to the case law which gave rise to the Justice and Security Act, and to our examination of the instrument itself.

## 2. PUBLIC INTEREST IMMUNITY

The common law has long grappled with the tension that lies at the heart of the Justice and Security Act and has developed a sophisticated framework for handling disputes between the competing public interests of openness, on the one hand, and secrecy, on the other. This is the work performed by public interest immunity (PII), a common law doctrine of the law of evidence developed over a fifty-year period of case law. Under the law of PII, a public authority (normally either a government minister or the police) may certify to the court that it would be contrary to the public interest for otherwise relevant evidence to be disclosed in legal proceedings. The first modern authority is *Duncan v Cammell Laird*, a case decided at the height of the Second World War.<sup>6</sup> When a submarine flooded and sank in tests, killing 99 servicemen on board, the next of kin of those who died sued the manufacturers, arguing that the vessel had been designed negligently. The Admiralty intervened, certifying that the submarine's

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<sup>4</sup> Justice and Security Act 2013. The Act addresses three matters: (i) it reforms the United Kingdom Parliament's oversight of intelligence and security; (ii) it allows for 'closed material procedure' to be more widely used in civil litigation in the UK; and (iii) it ousts the courts' *Norwich Pharmacal* jurisdiction (*Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (House of Lords)) in national security and other sensitive cases. This article deals only with the second of these three reforms (with regard to the others, see further the references below at n 76).

<sup>5</sup> 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) 374.

<sup>6</sup> *Duncan v Cammell Laird* [1942] AC 624.

plans and specifications could not be disclosed on grounds of (what we would now call) national security.<sup>7</sup> The House of Lords ruled that the courts had no jurisdiction to go behind such a ministerial certificate. Material the disclosure of which is formally certified by a minister to be injurious to the public interest may not be disclosed, their Lordships ruled. This ruling did not stop the action in negligence from proceeding; when that action later reached the House of Lords their Lordships ruled that no negligence could be proved.<sup>8</sup>

The ruling that the courts could not go behind a ministerial certificate and determine for themselves whether material should be disclosed did not survive for long. It was overruled as a matter of Scots law in 1956,<sup>9</sup> with English law following suit in *Conway v Rimmer* in 1968.<sup>10</sup> *Conway v Rimmer*, however, was hardly a matter of national security: it was an employment dispute between a probationary police officer and his former superintendent. Nonetheless the House of Lords in that case laid down the essentials as to how the courts should assess claims that evidence relevant to civil proceedings should be withheld from disclosure on public interest grounds. The correct approach, ruled their Lordships in *Conway v Rimmer*, is that the judge should inspect the evidence in question privately, and should decide whether on balance the harm to the public interest in its disclosure outweighs the harm to the public interest in its non-disclosure. The fair administration of justice ordinarily requires relevant material to be disclosed to all the parties – such is elementary to the principles of natural justice – and it is in the public interest (as well as in the interests of the parties) that this should occur. When it does not – as, for example, when the material in question needs to remain secret – damage is done to the public interest. It is this damage which the judge is to weigh against the damage to the public interest that would be caused by the disclosure of material that should remain secret. This balancing exercise is often referred to as the ‘Wiley balance’, after the *Wiley* case which was decided in 1995 (see below),<sup>11</sup> but it stems from Lord Reid’s opinion in the House of Lords in *Conway v Rimmer*.

While *Conway v Rimmer* was a reforming decision in the sense that the minister would no longer have the last word, in other respects UK law remained deeply conservative, even after 1968. Their Lordships confirmed, for example, that ministers and other public authorities could properly claim PII on the basis either of the *contents* of the documents or because the documents fell into a *class* of material that ought not be disclosed. Thus, the decision upheld the rule that ministers may claim PII even if revealing the content of the documents in question would of itself cause no harm to the public interest. Lord Reid stated, for example, that:<sup>12</sup>

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<sup>7</sup> ‘National security’ is a phrase that gained currency in the UK only from the Cold War period. In the 1940s lawyers spoke instead about ‘defence of the realm’ and material the disclosure of which would be ‘injurious to the public interest’: see Charles Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford University Press 1993).

<sup>8</sup> *Woods v Duncan* [1946] AC 401.

<sup>9</sup> *Glasgow Corporation v Central Land Board* 1956 SC (HL) 1.

<sup>10</sup> *Conway v Rimmer* [1968] AC 910.

<sup>11</sup> *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1995] AC 274 .

<sup>12</sup> *Conway v Rimmer* (n 10) 952.

there are certain classes of documents which ought not to be revealed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest ... To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is.

It was only in 1980 that the balancing approach to PII was extended to Cabinet papers.<sup>13</sup> It was only in 1996 that the government announced that it would no longer make 'class' claims to PII and that thenceforward its claims to PII would always be based on the damage to the public interest that could be caused by disclosure of the particular content of the documents in question.<sup>14</sup>

The case law on PII was reviewed by the House of Lords in *R v Chief Constable of the West Midlands Police, ex parte Wiley*.<sup>15</sup> As that case explains, the modern law is as follows. PII has a series of stages. First, it must be considered whether the material is *relevant* to the legal proceedings (only relevant material is liable to be disclosed by one party to another in civil litigation). Second, the public authority must consider whether disclosure would entail a *real risk of serious harm* to an important public interest (such as national security). If, applying the 'real risk of serious harm' test, the material is assessed to attract PII, the third stage is for the public authority to decide whether, in its view, the public interest in non-disclosure is outweighed by the public interest in disclosure. The public authority must consider and balance the relevant competing public interests; if the view is taken that the overall public interest favours non-disclosure, the public authority will make a certificate to that effect to the court. The court is the ultimate decision maker, its assessment being the final stage of the process. As part of its assessment the court will consider whether alternatives to full disclosure, whereby the risk of harm to the public interest might be lessened,<sup>16</sup> are available and, if so, whether they would be sufficient to meet the needs of justice.

All this is now well established as a matter of doctrine. What is much less well known is how widely PII is actually used in practice. When cases come to prominence it is usually because something has gone badly wrong with the PII process.<sup>17</sup> The government appears to maintain no central record of the use by ministers of PII: we thus have no ready means of understanding whether its use is routine, occasional or exceptional.

<sup>13</sup> *Burmah Oil v Bank of England* [1980] AC 1090; see also *Air Canada v Secretary of State for Trade* [1983] 2 AC 394.

<sup>14</sup> See Adam Tomkins, *The Constitution after Scott* (Oxford University Press 1998) 197–99.

<sup>15</sup> *Wiley* (n 11).

<sup>16</sup> For example, disclosure subject to redactions or disclosure into a closed 'confidentiality ring'. There appears to be disagreement at the moment over whether disclosure may lawfully be made into a 'confidentiality ring': in *R (Serdar Mohammed) v Secretary of State for Defence* [2012] EWHC 3454 (Admin) it was held that this could be done; in *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin), by contrast, it was ruled that it could not.

<sup>17</sup> As in *R (Al Sweady) v Secretary of State for Defence* [2009] EWHC 1687 (Admin) and [2009] EWHC 2387 (Admin).

### 3. CLOSED MATERIAL PROCEDURE AND SPECIAL ADVOCATES

Special advocates and closed material are much newer arrivals in the United Kingdom, although they are now used in a variety of legal proceedings. Their first use in the UK was in the Special Immigration Appeals Commission (SIAC), a body established by statute in 1997. SIAC hears appeals against decisions on immigration, deportation and deprivation of citizenship where those decisions are taken in the interests of national security. Special advocates and closed material were used also in control orders cases under the Prevention of Terrorism Act 2005, in cases under the Terrorism Prevention and Investigation Measures Act 2011 (TPIMs cases),<sup>18</sup> and in terrorist asset-freezing and other financial restrictions proceedings.<sup>19</sup> The Joint Committee on Human Rights (a committee of the United Kingdom Parliament) reported in 2010 that there were at that time a total of 21 different contexts in which special advocates may be used in the UK and that they had, in fact, been used in 14 of these.<sup>20</sup> The core change made by the Justice and Security Act 2013 is to extend the availability of closed material procedure (CMP) and special advocates generally to civil litigation in the UK.

CMP operates as follows. The government, advised by the Security and Secret Intelligence Services,<sup>21</sup> will divide its evidence and supporting material in a case into ‘open’ and ‘closed’ bundles. Material which the government considers to be sensitive for reasons of national security is ‘closed material’.<sup>22</sup> Open material will be served on the other parties as normal. Closed material will not be served on the other parties, but will be served only on a ‘special advocate’ and, where appropriate, shown also to the court. A special advocate is a lawyer with security clearance who is appointed from a list maintained by the Attorney General to act on behalf of a party in closed proceedings.<sup>23</sup> Once appointed, the special advocate will have two main functions. The first is to test the government’s claim that the closed material really needs to be closed: thus, special advocates will seek to have as much of the closed material as possible disclosed as open evidence. The second function is to do what they can to protect the interests of the party

<sup>18</sup> Control orders were coercive (but non-criminal) measures imposed by the Secretary of State on an individual who was reasonably suspected of involvement in terrorism-related activity. They were seriously invasive of civil liberties and were highly controversial, and were replaced as from 2011 by Terrorism Prevention and Investigation Measures (TPIMs). TPIMs are broadly similar to control orders, although there are some differences of detail.

<sup>19</sup> Under the Counter-Terrorism Act 2008 and the Terrorist Asset-Freezing etc Act 2010.

<sup>20</sup> Joint Committee on Human Rights, 16th Report of 2009–10, House of Lords (HL) 86, House of Commons (HC) 111, para 58. An excellent and detailed account of the position down to 2009 is provided in Justice, ‘Secret Evidence’, June 2009, <http://www.justice.org.uk/data/files/resources/33/Secret-Evidence-10-June-2009.pdf>.

<sup>21</sup> Namely, the Security Service (MI5), the Secret Intelligence Service (MI6) and Government Communications Headquarters (GCHQ). See, respectively, the Security Service Act 1989 and the Intelligence Services Act 1994.

<sup>22</sup> Justice and Security Act 2013, s 6(11): closed material is that whose disclosure ‘would be damaging to the interests of national security’. In control orders or TPIMs cases, by contrast, closed material is that whose disclosure ‘would be contrary to the public interest’ (eg, TPIMs Act 2011, Sch 4, para 4(c)). National security is only one of several public interests that may be cited as justification for closed material in control orders and TPIMs cases; others include international relations and the prevention and detection of crime. Thus, the definition of closed material is narrower under the Justice and Security Act than it is under the control orders and TPIMs legislation.

<sup>23</sup> At the time of writing there are 54 special advocates on the list.

on whose behalf they act. Where a court or tribunal hears a case partly under closed material procedure it will deliver both an ‘open judgment’ and a ‘closed judgment’. The latter will be disclosed only to the government and to the special advocate. Neither the non-government party (or parties) nor the public have access to closed judgments. Indeed, we do not even know how many such judgments there are.

The exercise of the special advocate’s functions is extremely difficult in practice. Martin Chamberlain, an experienced special advocate, published an instructive analysis of the issues in the *Civil Justice Quarterly* in 2009.<sup>24</sup> He identified three problems which particularly hamper the ability of special advocates to perform their functions effectively. His arguments were supported by the Joint Committee on Human Rights, which took evidence in 2010 from three further special advocates.<sup>25</sup> The problems are as follows. First, even though the relevant procedural rules now allow it, special advocates have no ability in practice to adduce evidence to rebut allegations made in the closed material. Second, special advocates struggle to find ways of mounting effective challenges to government objections to disclosure of material. From time to time a web search may reveal that some closed material is already in the public domain but, other than through making such a discovery, it is difficult for special advocates to find ways in which a court will be persuaded that material which the government says must remain closed should properly be disclosed. Third, special advocates are hampered by the rules which severely restrict communications between the special advocate and the party he or she ‘represents’ once the closed material has been served.

Despite these deficiencies in its operation, the system has been held by the courts to be capable of satisfying the requirements of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR or the Convention).<sup>26</sup> Under the leading authorities of *A and Others v United Kingdom*<sup>27</sup> and *Secretary of State for the Home Department v AF (No 3)*,<sup>28</sup> however, this is subject to the condition that parties to legal proceedings are given ‘sufficient information about the allegations’ against them to enable them to give ‘effective instructions in relation to those allegations’.<sup>29</sup> As Lord Phillips expressed it in *AF (No 3)*, ‘provided that this requirement is satisfied there can be a fair trial notwithstanding that the [party concerned] is not provided with the detail or the sources of the evidence forming the basis of the allegations’.<sup>30</sup>

There are two key differences between PII and CMP. The first is that under closed material procedure, as it operates in SIAC and control orders/TPIMs proceedings, there is no balancing

<sup>24</sup> Martin Chamberlain, ‘Special Advocates and Procedural Fairness in Closed Proceedings’ (2009) 28 *Civil Justice Quarterly* 314 and ‘Update on Procedural Fairness in Closed Proceedings’ (2009) 28 *Civil Justice Quarterly* 448. See also Tim Otty, ‘The Slow Creep of Complacency and the Soul of Justice’ [2012] *European Human Rights Law Review* 267, 269–70.

<sup>25</sup> Joint Committee on Human Rights, 9th Report of 2009–10, HL 64, HC 395.

<sup>26</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR).

<sup>27</sup> *A v UK* (n 2).

<sup>28</sup> *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 (*AF (No 3)*)

<sup>29</sup> *A v UK* (n 2) [220].

<sup>30</sup> *AF (No 3)* (n 28) [59]. See further on this requirement *Home Office v Tariq* [2011] UKSC 35 [2012] 1 AC 452.

exercise – that is to say, neither the government nor the court weighs the public interest in disclosure against the public interest in non-disclosure. Rather, the government decides what evidence should remain closed and serves that material only on the special advocate. Once evidence is classed as being sensitive, there is no weighing of the reasons as to why it should be withheld against the reasons as to why, in the interests of justice, it should be disclosed: it is automatically withheld. It will remain closed subject only to the special advocate's ability to persuade the court otherwise. In contrast, the rule in the law of PII is that, as Lord Templeman expressed it in *Wiley*, 'a claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice'.<sup>31</sup> This rule does not apply to closed material.

The second difference is that material which is subject to PII is inadmissible. No-one may rely on it, including the court. Closed material, by contrast, is admissible and may be relied on not only by the government but also by the court (who will deal with issues arising on the closed material in a closed judgment).

It is worth noting why we have closed material procedure and special advocates in the UK. These devices were introduced in Britain in the context of immigration law: only thereafter was their availability extended to certain aspects of counter-terrorism law. Their introduction in the immigration context was the direct result of the decision of the European Court of Human Rights in *Chahal v United Kingdom*, a case which the UK lost in Strasbourg.<sup>32</sup> The UK government wished to deport Mr Chahal to India for national security reasons. As the law stood at the time there was no right of appeal against a deportation order when the order was made for reasons of national security. Rather, there was a right to have the order reviewed by an advisory panel. The person concerned could make oral or written representations to the advisory panel and could call witnesses on his or her behalf, but no legal representation was permitted; the Home Secretary (a government minister) decided how much information against the person could be communicated to him; the panel's advice to the Home Secretary remained confidential, and the Home Secretary was not required to follow the advice of the panel. In *Chahal v UK* the European Court of Human Rights found that these procedures breached Articles 5(4) and 13 of the ECHR. Article 5(4) provides that anyone who is detained<sup>33</sup> is entitled to have the lawfulness of his detention 'decided speedily by a court'. Article 13 provides for a right to an effective remedy. Here, Article 5(4) was violated because the advisory panel was held not to be a court, despite the fact that in Chahal's case the panel was chaired by an appeal court judge and included among its other members a former president of the Immigration Appeal Tribunal.

A number of human rights non-governmental organisations (NGOs) intervened in Chahal's case, including Amnesty International and Liberty. They pointed out that in Canada deportation decisions in national security cases are subject to quasi-judicial oversight using a procedure of

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<sup>31</sup> *Wiley* (n 11) 280.

<sup>32</sup> *Chahal v United Kingdom* (1996) 23 EHRR 413.

<sup>33</sup> Mr Chahal was detained pending his deportation; his detention was held to be compatible with ECHR, art 5(1)(f).



‘closed material’ with the aid of a ‘special advocate’. The European Court of Human Rights summarised the Canadian position in a single paragraph of its judgment in *Chahal*.<sup>34</sup> While the Court did not expressly approve the procedure, it described the Canadian position as ‘a more effective form’ of control,<sup>35</sup> and the hint was taken in the United Kingdom that were the advisory panel to be replaced with a quasi-judicial oversight regime such as that found in Canada, this was likely to be a Convention-compatible solution; hence the creation in the UK of the Special Immigration Appeals Commission, with its use of closed material procedure and special advocates. We have these devices in the UK because they were suggested by the European Court of Human Rights; and they were suggested to that Court by a number of human rights NGOs who had intervened in *Chahal*.<sup>36</sup>

#### 4. SECRET JUSTICE AND THE INVESTIGATORY POWERS TRIBUNAL

There is one last procedure to examine before we turn to the Justice and Security Act. The Investigatory Powers Tribunal (IPT) was established under the Regulation of Investigatory Powers Act 2000 (RIPA), section 65. RIPA permits public authorities such as the Security and Secret Intelligence Services in certain circumstances to apply for warrants to intercept communications and to employ other techniques of intrusive surveillance. The IPT exists to hear claims that such techniques have been used illegally or improperly. RIPA provides that the IPT is the only appropriate forum in relation to such proceedings. The IPT has jurisdiction to investigate any complaint that a person’s communications have been intercepted and, where interception has occurred, to examine the authority for such interception. There is no appeal from a decision of the IPT ‘except to such extent as the Secretary of State may by order otherwise provide’. No such order has been made. The IPT is chaired by a senior judge; its other members include judges, practitioners and academics.

As regards disclosure of information, the IPT’s Rules<sup>37</sup> provide in rule 6:

The Tribunal shall carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.

<sup>34</sup> *Chahal* (n 32) [144].

<sup>35</sup> *ibid* [131].

<sup>36</sup> In a powerful critique David Jenkins has strongly criticised the poor comparative technique of the European Court of Human Rights in *Chahal*. To the extent that the Court recommended this model to the UK, it did so ‘without adequate justification, background context, or cautions as to its future use’: David Jenkins, ‘There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology’ (2010–11) 42 *Columbia Human Rights Law Review* 279, 281. In the same article Jenkins later states (*ibid* 289) that the Court ‘only superficially understood’ the Canadian system and that it ‘mischaracterised’ it, overlooking ‘persistent difficulties regarding procedural fairness’.

<sup>37</sup> In accordance with statute (RIPA, s 69), the rules are made by the Secretary of State: see Investigatory Powers Tribunal Rules 2000, SI 2000/2665.



Under rule 6(2), the Tribunal may not generally disclose to the complainant or to any other person either (a) the fact that the Tribunal has held, or proposes to hold, an oral hearing; or (b) any information or document disclosed or provided to the Tribunal in the course of that hearing, or the identity of any witness at that hearing (exceptions are made in the event that the person concerned consents to the Tribunal disclosing the matter to the complainant). Rule 9(2) provides that '[t]he Tribunal shall be under no duty to hold oral hearings, but they may do so in accordance with this rule (and not otherwise)'. Under this rule, if an oral hearing is held, the Tribunal may hear each party to the proceedings separately. In other words, the complainant may be wholly excluded from hearing any part of the government's case. Finally, rule 9(6) provides that '[t]he Tribunal's proceedings, including any oral hearings, shall be conducted in private'.<sup>38</sup>

This is a model, therefore, not merely of closed evidence, but which enables altogether secret justice. It is designed to safeguard as paramount the consideration that the government will neither confirm nor deny whether interception of communications or intrusive surveillance has taken place.

In *Kennedy v United Kingdom*<sup>39</sup> the applicant complained to the IPT that his communications were being improperly intercepted.<sup>40</sup> In Strasbourg, much of the argument focused on the right to privacy and on the question of whether the alleged interception of his communications violated Mr Kennedy's rights under Article 8 ECHR (the Court ruled that there was no violation). However, consideration was also given in the Court's judgment to the matter of whether the IPT's extraordinary procedures were compatible with the right to a fair trial under Article 6 ECHR. This right applies to the 'determination' of 'civil rights and obligations'. Without formally ruling on whether a decision to place someone under intrusive surveillance amounted to a determination of his or her civil rights, the European Court of Human Rights ruled that the IPT's procedural rules were compatible with Article 6.

The Court reiterated that 'according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent', but acknowledged also that 'there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security [or] the need to keep secret certain police methods of investigation'. In the Court's judgment, there will not be a fair trial 'unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities'.<sup>41</sup> The Court went on to state that 'the entitlement to disclosure of relevant evidence is not an absolute right. The interests of national security or the need to keep secret methods of investigation of crime must be weighed against the general right to adversarial proceedings'. The Court noted that, in proceedings before the IPT, documents submitted, as well as

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<sup>38</sup> As an exception to this, hearings that are purely on points of law may be conducted in public. Rulings that are purely on points of law may similarly be in public.

<sup>39</sup> *Kennedy v United Kingdom* (2010) 52 EHRR 4.

<sup>40</sup> *ibid*; the rather disturbing factual background to the case is given at paras 5–20.

<sup>41</sup> *ibid* para 184.

details of any witnesses, are likely to be ‘highly sensitive’, particularly when viewed in light of the government’s ‘neither confirm nor deny’ policy. The Court agreed with the UK government that, in these circumstances, ‘it was not possible to disclose redacted documents or to appoint special advocates as these measures would not have achieved the aim of preserving the secrecy of whether any interception had taken place’;<sup>42</sup> similarly, the limitations on oral and public hearings. The obligation to hold a hearing is not absolute, ruled the Court: the circumstances that may justify dispensing with an oral hearing come down to the nature of the issues to be decided. The Court noted that rule 9(2) permits the IPT to hold an oral hearing where it considers that such a hearing would assist.<sup>43</sup> For these reasons, the Court ruled that the restrictions on the procedure before the IPT did not violate Mr Kennedy’s right to a fair trial.

Throughout its reasoning on the Article 6 issue the Court placed considerable weight on the fact that the IPT has the jurisdiction to hear any complaint made to it about unlawful interception or surveillance. There are no standing requirements and there is no threshold burden of proof that the complainant must satisfy before the IPT will investigate a complaint. The Court was also conscious, of course, of the fact that the case before it arose out of a complaint as to unlawful surveillance. In this particular context, it is perhaps understandable that the Court should accept the paramourcy of the ‘neither confirm nor deny’ principle. Secret surveillance would lose much of its potency if the state had to confirm whether or not it has taken place. However, the jurisdiction of the IPT is not limited to complaints relating to interception and surveillance; it also has jurisdiction to hear any human rights claim brought against a member of the Security and Secret Intelligence Service (RIPA, section 65). Moreover, this is an exclusive jurisdiction as section 65 provides that the IPT is the ‘only appropriate forum’ to hear such cases.

In *R (A) v Security Service*<sup>44</sup> a former member of the Security Service wished to publish a book about his work with MI5. The Director of the Security Service refused his consent to the publication of parts of the book. The author of the book sought judicial review of this decision in the High Court, arguing among other matters that the Director’s decision was a disproportionate interference with his right to freedom of expression under Article 10 ECHR. The Security Service contended that the IPT had exclusive jurisdiction to hear the complaint, and the UK Supreme Court ruled unanimously that this contention was correct in law. In a separate case in 2010 it emerged that an undercover police officer, while collating intelligence on a group of political activists, had entered into sexual relations with a number of women in the group. The women sued the police, alleging that they were deceived into entering into intimate sexual relations. The claimants pleaded that a number of their Convention rights had been violated by this action, and also sued in the common law torts of deceit, misfeasance in public office, assault and negligence. As a preliminary matter it was contended that section 65 of RIPA conferred on the IPT exclusive jurisdiction to hear the complaints in the action that were based on Convention

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<sup>42</sup> *ibid* para 187.

<sup>43</sup> *ibid* para 188.

<sup>44</sup> *R (A) v Security Service* [2009] UKSC 12, [2010] 2 AC 1.

rights. The court ruled that the IPT does have such jurisdiction.<sup>45</sup> By contrast, it does not have jurisdiction to hear the common law claims in the law of tort. Clearly this is a procedural nightmare, but the pressing question in our context is whether the extraordinary procedures used by the IPT are apt for determining claims such as those in either of the two cases outlined here. Those procedures are designed to safeguard the paramountcy of the ‘neither confirm nor deny’ principle in the context of claims that surveillance has been undertaken unlawfully. However, there is surely no reason why this principle should be paramount in the context of a dispute about whether a former spy’s memoirs have been excessively censored or, indeed, in a case where the issue is the lawfulness of entering into sexual relations under false pretences. It seems highly unlikely that *Kennedy v UK* will remain the last word on these matters for long.<sup>46</sup>

## 5. TOWARDS THE JUSTICE AND SECURITY BILL – THE *AL RAWI* CASE

These, then, are the UK’s three current ways of managing civil litigation concerning sensitive national security material: the common law of PII, the statutory innovation of CMP, and the extraordinary procedures of the IPT. With these in mind we can now move to the reasons why the government considered that further legislation in this area was necessary. The key is the *Al Rawi* case,<sup>47</sup> a damages action in the law of tort. The case was brought by six claimants who had been detained (inter alia) at Guantanamo Bay. They sought damages in the English courts from the Security Service, the Secret Intelligence Service, the Attorney General, the Foreign and Commonwealth Office and the Home Office on the basis that each of these departments or agencies of the UK government had contributed towards the claimants’ detention, rendition and alleged mistreatment. The claims were brought under the following heads: false imprisonment, trespass to the person, conspiracy to injure, torture, negligence, misfeasance in public office and breach of the Human Rights Act 1998.

The government sought to have the trial held under the emergent principles of closed material procedure. This was the first time that the use of CMP had been proposed in a civil claim for damages: as we saw above, while CMP has been used in the UK in certain forms of proceedings (in SIAC, in control orders and TPIMs cases, and in terrorist asset-freezing cases), it was not otherwise generally available and certainly it had never before been adopted in an action for damages in the law of tort. The *Al Rawi* claimants resisted the government’s proposal and argued that the ordinary principles of PII should apply instead.

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<sup>45</sup> *AKJ and Others v Metropolitan Police Commissioner* [2013] EWHC 32 (QB).

<sup>46</sup> Several complaints have been made to the IPT (including by Liberty) in light of the disclosures in 2013 emanating from Edward Snowden that GCHQ and the US National Security Agency have engaged in much more widespread surveillance than was previously thought. Similar applications have also been lodged at the European Court of Human Rights, on which see the documents available here: <https://www.privacynotprism.org.uk/news/2013/10/03/gchq-to-face-european-court-over-mass-surveillance>.

<sup>47</sup> *Al Rawi v Security Service* [2009] EWHC 2959 (QB) (High Court); *Al Rawi v Security Service* [2010] EWCA Civ 482, [2010] 3 WLR 1069 (Court of Appeal); *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 (Supreme Court).

At first instance Silber J ruled in the High Court that there was no legal authority that barred the government's proposed course of action. The claimants appealed to the Court of Appeal, which unanimously overturned the first instance ruling. Whereas Silber J approached the matter as one of precedent, asking himself whether prior legal authority ruled out the possibility that a civil trial be conducted according to CMP, the Court of Appeal approached the matter as one of principle, asking itself whether as a matter of common law the courts should be able to order that a trial be conducted according to this procedure. The Court of Appeal judgment was delivered by Lord Neuberger who, at the time, was the Master of the Rolls (he is now the President of the UK Supreme Court). The judgment was in strong terms, setting out 'firmly and unambiguously' that the course of action proposed by the government was simply not open to the court absent clear parliamentary authorisation.<sup>48</sup> The primary reason given for this conclusion was that by acceding to the government's argument, 'while purportedly developing the common law' the court 'would in fact be undermining one of its most fundamental principles'.<sup>49</sup> Lord Neuberger explained as follows:<sup>50</sup>

Under the common law, a trial is conducted on the basis that each party and his lawyer sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard.

Further, continued the Court of Appeal, 'another fundamental principle of our law' is that the judge must make public the reasons for his decision. As Lord Phillips MR expressed it in a case in 2002, 'justice will not be done if it is not apparent to the parties why one has won and the other has lost'.<sup>51</sup>

Additionally, Lord Neuberger said that 'a further fundamental common law principle is that trials should be conducted in public, and that judgment should be given in public'.<sup>52</sup> This is the principle of open justice, the companion principle to that of natural justice, and long since celebrated in leading common law judgments.<sup>53</sup> From these principles are derived two rules. Again, in Lord Neuberger's words:<sup>54</sup>

First, a civil claim should be conducted on the basis that a party is entitled to know ... the essentials of its opponent's case in advance, so that the trial can be fairly conducted ... Secondly, a party in civil litigation should be informed of the relevant documents in the control of his opponent, through the [process of] disclosure.

<sup>48</sup> *Al Rawi* [2010] *ibid* [11].

<sup>49</sup> *ibid* [12].

<sup>50</sup> *ibid* [14].

<sup>51</sup> *ibid* [16], quoting *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409.

<sup>52</sup> *Al Rawi* [2010] (n 47) [17].

<sup>53</sup> *Scott v Scott* [1913] AC 417 and *A-G v Leveller Magazine* [1979] AC 440.

<sup>54</sup> *Al Rawi* [2010] (n 47) [18].

The Court of Appeal acknowledged that these various principles and rules are subject to exceptions. Public interest immunity is, of course, a common law exception to the ordinary rules of disclosure. But, as was pointed out above, a critical difference between PII and closed material procedure is that the effect of a successful claim to PII is that the evidence in question is excluded entirely from the litigation: no party may rely on it, and neither may the court. Under CMP, by contrast, closed material remains part of the litigation, but the government shares it only with the judge and with the special advocate: the other party or parties to the case may not see it and, other than through the special advocate, may not challenge it. While the common law will admit of some exceptions to the fundamental principles set out above, the Court of Appeal ruled in *Al Rawi* that to adopt a CMP in a civil action for damages was not so much an exception to principle as an emasculation of it. As Lord Neuberger put it:<sup>55</sup>

The principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it.

The government appealed against the Court of Appeal's ruling to the Supreme Court. Before the case was argued in the Supreme Court, however, the substantive tort action in *Al Rawi* was settled. When the Conservative/Liberal Democrat coalition took office after the 2010 general election the new Prime Minister, David Cameron, announced that he would seek to settle the *Al Rawi* litigation because he did not want so much of the intelligence services' resources to be taken up fighting legal battles.<sup>56</sup> A settlement was announced in the House of Commons in November 2010;<sup>57</sup> its terms are confidential but it has since emerged that the total sum paid by the government to the six claimants was £20 million plus legal expenses.<sup>58</sup> Despite the settlement of the substantive action, the Supreme Court decided that it would continue to hear and to rule upon the preliminary question on which the High Court and Court of Appeal had ruled because it raised such 'an important point of principle'.<sup>59</sup>

*Al Rawi* was argued before the Supreme Court in January 2011. The Supreme Court's judgment was handed down six months later in July. Whereas the judgment of the Court of Appeal was expressed as 'firmly and unambiguously' as possible, that of the Supreme Court is convoluted. Nine justices heard the appeal. Lord Rodger died before judgment was given in the case. The remaining eight were agreed on precious little. Closest to the Court of Appeal were Lords Dyson, Hope and Kerr: their position will be considered first. Then come Lord Mance, Lady Hale and Lord Clarke who, again, may be considered as a group. Finally come Lord Brown and Lord Phillips, each of whom must be taken on his own. Formally, the government's appeal from the Court of Appeal was dismissed, but beyond that it is extremely difficult to marshal a

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<sup>55</sup> *ibid* [30].

<sup>56</sup> HC Deb, 6 July 2010, vol 513, col 175.

<sup>57</sup> HC Deb, 16 November 2010, vol 518, col 752.

<sup>58</sup> HC Deb, 19 October 2011, vol 533, col 905.

<sup>59</sup> *Al Rawi* [2011] (n 47) [7] (Lord Dyson).

majority of the justices behind any proposition of law. The judgments of Lords Dyson and Clarke are the longest: these are the main judgments, to which all the others are, in a sense, supplementary.

Lords Dyson, Hope and Kerr approached the matter from the starting point of basic principle, as the Court of Appeal had done. Lord Dyson set out his understanding of the ‘fundamental’ features of a common law trial, including the principles of open and natural justice. Strikingly, he observed that ‘unlike the law relating to PII, a closed material procedure involves a departure from both’ principles.<sup>60</sup> Later in his judgment Lord Dyson stated that ‘a closed procedure is the very antithesis’ of PII and that they are ‘fundamentally different from each other’.<sup>61</sup> While he acknowledged that the use of special advocates in CMP ‘mitigates’ the problems ‘to some extent’, Lord Dyson noted that they have their limitations: ‘in many cases’, he said, ‘the special advocate will be hampered by not being able to take instructions’. Further, the judge hearing the case will not always be able to decide whether the special advocate has been hampered in this way.<sup>62</sup> Lord Dyson’s conclusion was that the government had not shown that it was necessary for the court to be able to order that a trial proceed under CMP and that, absent such clear necessity and absent legislative authority, it was a step that the courts should decline to take. Lords Hope and Kerr gave short supporting judgments, Lord Kerr adding the following remarks:<sup>63</sup>

[The government’s argument] proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive – for what, the [government] imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties. 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.

Now we come to the second position: that adopted by Lord Clarke and, with one modification, Lord Mance (with whom Lady Hale agreed). In order to understand the position of these justices it must be recalled that the substantive dispute in *Al Rawi* had been settled by the time of the Supreme Court’s judgment – there was therefore no prospect of this case actually being litigated, whether under a closed material procedure or not. The terms of the Court of Appeal’s decision in the case must also be borne in mind. The Court of Appeal had ruled that it could *never* be appropriate for a court to order that a civil trial be conducted under a closed material procedure, at least not without the consent of the parties.<sup>64</sup> Such a break with common law tradition could be

<sup>60</sup> *ibid* [14].

<sup>61</sup> *ibid* [41].

<sup>62</sup> *ibid* [36].

<sup>63</sup> *ibid* [93].

<sup>64</sup> See *Al Rawi* [2010] (n 47) [69]–[70]; see also on the same point *Al Rawi* [2011] (n 47) [69] (Lord Dyson).

authorised only by Act of Parliament. Lord Clarke disagreed that it could never be right for the courts to do this: he saw circumstances where it might be appropriate. These circumstances are important, not least because they went on to form a core part of the government's justification for introducing the Justice and Security Bill.

In *Al Rawi* six former inmates at Guantanamo Bay were suing five different departments and agencies of the United Kingdom government on a variety of common law and human rights grounds for complicity in their detention, rendition and mistreatment. Under the ordinary rules of disclosure the government must disclose to the claimants all relevant documents and other material in its possession. Clearly, a vast amount of this material will attract PII: there will be a great deal in the material that speaks directly, for example, about the ways in which the US and UK intelligence services cooperate. There will be details of operations, sources and methods, as well as a host of other background material. Much of the information in the government's possession could be highly sensitive in terms not only of national security but also of international relations. Even now, more than a decade after 9/11, much secrecy remains about the full extent of the CIA's rendition programme, even if more details are slowly creeping into the public domain.

Applying the tests for PII summarised above, government lawyers would have to sift through hundreds of thousands of pages of material to work out what could be disclosed to the claimants and what claims to PII would have to be made. That is a logistical problem for government to solve (and may be one of the reasons why Mr Cameron was keen to settle the litigation).<sup>65</sup> Lord Clarke was more interested in another problem. What if so much of the material that the government would need to produce in order to defend itself was subject to PII that the government could not effectively defend itself at all? The result of a successful PII certificate, it should be recalled, is that the evidence covered by the certificate cannot be produced or relied on by any party to legal proceedings. The government might be wholly innocent of complicity in wrongdoing but, at the same time, might be unable to prove its innocence, given the sensitivity of the material in question. What then?

As the law stands, the government would have only two options: it could either concede the claim and settle the litigation, or it could apply to the court for the case to be struck out as untriable. Lord Clarke suggested that, if such a case arose, the court ought to be able to fashion a third option: namely, that the trial should proceed according to some form of closed material procedure. Lord Mance agreed, although for him a judge should be permitted to attempt to fashion such a third option only after the whole of the PII process in the case had been exhausted, and only with the consent of the parties.<sup>66</sup> For Lord Clarke, the judge should be permitted to adopt this approach as soon as it became clear to him that the case would be untriable using PII – in

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<sup>65</sup> In *Al Rawi* itself, the government claimed that it had 250,000 relevant documents in its possession and that PII may have to be claimed for as many as 140,000 of these. It was estimated that the PII process in the case would take upwards of three years to complete: see *Al Rawi* [2011] (n 47) [135] (Lord Clarke).

<sup>66</sup> *ibid* para 120. Cases before *Al Rawi* had been litigated under a CMP with the consent of the parties (eg *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin)) but the High Court ruled after *Al Rawi* that, owing to the Supreme Court's decision in that case, this was no longer permissible: see *AHK and Others v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin).



some cases this may become apparent before the PII process has been fully completed.<sup>67</sup> For both Lord Clarke and Lord Mance, a court should be able to order that a civil action proceed under a CMP only if it was strictly necessary to do so. The test for necessity is that the trial could not proceed in any other way and that the only alternative to the trial proceeding under a CMP is that it would have to be struck out entirely.<sup>68</sup>

At this point, we must ask, does such a case exist? Is there such a thing as a civil action that cannot be tried under the law of PII? We will never know whether the substantive action in *Al Rawi* could have been heard using PII because it was settled out of court before the PII process had been completed. Remarkably, perhaps, the law reports appear to contain only one case which has been struck out on this ground, and even that case was almost certainly wrongly decided. The case is *Carnduff v Rock*. Carnduff was a registered police informer. He sued the West Midlands police force in the law of contract, claiming payment for information which, he alleged, he had passed to the police and which had resulted in the arrest and prosecution of a suspected drugs trafficker. By a two-to-one majority the Court of Appeal struck out the claim because it ‘cannot be litigated consistently with the public interest’.<sup>69</sup> One of the Lords Justices in the majority explained as follows:<sup>70</sup>

If a fair trial of the issues in the case would necessarily involve the disclosure by the authorities of information or material which is sensitive or confidential and the disclosure of which is not in the public interest, and if that in turn means that it would be contrary to the public interest that the trial should take place, then the case should not be allowed to proceed . . . In the instant case it is in my judgment inevitable on the face of the statement of claim that a fair trial of the issues there raised will necessarily involve the disclosure of information and material by the police, the disclosure of which is not in the public interest.

Waller LJ dissented on the ground that the issue of whether there was a legally binding contract between the parties should be tried as a preliminary matter.

The great problem with *Carnduff v Rock* is that none of the leading case law on PII was cited by the court. The decision of the Court of Appeal in this case cuts substantially across the well-established process by which claims to PII are assessed and determined. For example, there was no exploration of whether documents could have been disclosed subject to redactions, of whether documents could have been disclosed into a confidentiality ring, or of whether a special advocate could have been appointed to act on Carnduff’s behalf in PII hearings. It is therefore an open question whether the approach proposed in *Al Rawi* by Lords Clarke and Mance is a solution to a real problem, or only to one which has never in fact arisen.<sup>71</sup>

<sup>67</sup> *Al Rawi* [2011] (n 47) [159]–[62] and [175].

<sup>68</sup> Lord Mance said in *Tariq* (n 30) [40] that neither possibility – ie having to settle an unmeritorious claim or having a claim struck out as untriable – was one which the law ‘should readily contemplate’. In the same case Lord Brown went further. He said that the submission that the government never has to disclose sensitive material because it can simply pay up ‘I find not merely unpersuasive but wholly preposterous’ (ibid [84]).

<sup>69</sup> *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786 [33] (Laws LJ).

<sup>70</sup> ibid [49]–[50] (Jonathan Parker J).

<sup>71</sup> Lord Mance stated in *Al Rawi* [2011] (n 47) [108] that, as he understood it, ‘no member of the Supreme Court doubts the approach in *Carnduff* as a possibility . . . [A] successful claim to PII can make an issue untriable’ (emphasis added).

We can deal with the final two judgments in *Al Rawi* very briefly. Lord Phillips stated that he found the divergent arguments in each of Lord Dyson's and Lord Clarke's judgments to be 'compelling', but elected not to choose between them on the ground that the matter had become 'academic'.<sup>72</sup> He would have dismissed the appeal on the narrow ground that the Court of Appeal was right to resist making a declaration on CMP in the broad terms that had been invited by the parties. Lord Brown agreed that the appeal should be dismissed, but gave as his reason an argument that was not shared by any of his colleagues. Lord Brown stated that claims such as *Al Rawi*'s, 'targeted as they are principally against the intelligence services, are quite simply untriable by any remotely conventional open court process'. For Lord Brown, 'far too little would be gained, and far too much lost' by the proposal to allow such claims to proceed under a CMP. Some 'altogether more radical solution' is required: either that such claims are determined by a body such as the Investigatory Powers Tribunal, 'which does not pretend to be deciding ... claims on a remotely conventional basis'; or that claims of this nature cannot but be struck out, on the basis that, as with *Carnduff v Rock*, they cannot 'be justly tried at all'.<sup>73</sup>

## 6. THE JUSTICE AND SECURITY GREEN PAPER

When the Prime Minister announced in the House of Commons that his government would seek a mediated settlement with the *Al Rawi* claimants, he informed the House that the government intended in due course to publish a Green Paper (government consultation document) containing proposals for 'how intelligence is treated' in a range of judicial proceedings.<sup>74</sup> Publication of the Green Paper was delayed until after the Supreme Court handed down its judgment in *Al Rawi*. In the event, a Justice and Security Green Paper was published in October 2011.<sup>75</sup> This triggered a three-month public consultation exercise. The Green Paper contained proposals on a broad range of matters, including the parliamentary and other non-judicial mechanisms for holding the UK's security and secret intelligence agencies to account.<sup>76</sup> On issues relating to PII and closed material procedure, the core proposal in the Green Paper – which has now been enacted in the Justice and Security Act 2013 – was that CMP should be made generally available in civil proceedings.

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<sup>72</sup> *Al Rawi* [2011] (n 47) [189].

<sup>73</sup> *ibid* [86].

<sup>74</sup> HC Deb, 6 July 2010, vol 513, col 177.

<sup>75</sup> Cm 8194, October 2011.

<sup>76</sup> On Parliament's Intelligence and Security Committee, see the Intelligence Services Act 1994 and the Justice and Security Act 2013, ss 1–4; on the Intelligence Services Commissioner, see RIPA and the Justice and Security Act 2013, s 5. The Green Paper also contained proposals that the highly controversial use made in the *Binyam Mohamed* (n 118) litigation of the court's *Norwich Pharmacal* (n 4) jurisdiction should be reversed. This is an important but highly complex matter, which there is no space to discuss here. For a full account of the *Binyam Mohamed* case, see Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64 *Current Legal Problems* 215; for analysis of the provisions in the Justice and Security Bill on *Binyam Mohamed* and *Norwich Pharmacal*, see the House of Lords Constitution Committee, 4th Report of 2012–13, HL 31; and see now the Justice and Security Act 2013, ss 17–18. See also *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118.

The government explained its reasons for making this proposal in the following terms. Its justification was that, in contrast to PII, closed material procedure maximises the amount of sensitive material that can be considered by a court while, at the same time, protecting it from harmful disclosure. The government argued that ‘it is fairer in terms of outcome to seek to include relevant material rather than to exclude it from consideration altogether’ (as occurs when PII is used) and that ‘the public interest is best served by enabling as many such cases as possible to be determined by the courts’.<sup>77</sup> Nonetheless, acknowledging that the use of CMP requires a departure from the principle of open justice, the Green Paper accepted that it should be available only exceptionally – that is, where it is ‘absolutely necessary to enable the case to proceed’.<sup>78</sup>

Moving to the detail, the Green Paper proposed that closed material procedure would operate in civil cases in the following way. First, the Secretary of State would decide if a case involves certain ‘sensitive material’, disclosure of which could damage the public interest. Second, the Secretary of State’s decision that a case does involve such sensitive material would be amenable to judicial review. Third, if the Secretary of State’s decision is upheld, the case – or the relevant parts of the case – would be tried under a CMP using a special advocate.<sup>79</sup> ‘Sensitive material’, in the Green Paper, was given a broad definition: it was to include any material or information which, if publicly disclosed, would be likely to result in harm to the public interest. All secret intelligence would necessarily be ‘sensitive’ for this purpose and other categories of material might also fall within the definition, such as diplomatic correspondence.<sup>80</sup> The Green Paper also suggested that CMP be made available for certain inquests; it proposed modest reforms to the training and resources available to special advocates; and it floated the idea that the *AF (No 3)* ‘gisting’ requirement<sup>81</sup> be enshrined in (and limited by) statute.<sup>82</sup> However, it expressly rejected the idea, suggested by Lord Brown in *Al Rawi*, that any solution lay in extending the jurisdiction of the Investigatory Powers Tribunal or in creating a new tribunal modelled on the IPT’s procedures.<sup>83</sup>

The Justice and Security Green Paper triggered a public consultation exercise which attracted 84 published responses and a further six which remained unpublished, but which are summarised on the government’s web pages.<sup>84</sup> The government has published a useful summary of the consultation responses.<sup>85</sup> In addition, Parliament’s Joint Committee on Human Rights (JCHR) took evidence and published a report on the Green Paper.<sup>86</sup> The majority of the responses to the

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<sup>77</sup> Cm 8194 (n 75) [2.2].

<sup>78</sup> *ibid* [2.5].

<sup>79</sup> *ibid* [2.7].

<sup>80</sup> *ibid* 71.

<sup>81</sup> nn 28–30 and accompanying text.

<sup>82</sup> *ibid* [2.10]–[2.46].

<sup>83</sup> *ibid* [2.53]–[2.71].

<sup>84</sup> The responses are available at <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>.

<sup>85</sup> Cm 8364, May 2012.

<sup>86</sup> Joint Committee on Human Rights, 24th Report of 2010–12, HL 286, HC 1777 (April 2012) (JCHR 24th Report).

consultation exercise raised four main sets of concerns about the Green Paper's proposals as to CMPs: (i) they had not been shown to be necessary; (ii) their scope was drawn too widely; (iii) it should be for the court and not for the Secretary of State to trigger a CMP in any particular case; and (iv) even with the use of special advocates CMP remained fundamentally unfair. In a notable development, 57 special advocates put their names to a collective submission in which aspects of the Green Paper were subjected to powerful criticism. The special advocates wrote that 'CMPs are inherently unfair; they do not work effectively, nor do they deliver real procedural fairness'.<sup>87</sup> They argued that the proposal in the Green Paper to extend CMPs to civil actions was based on 'the unsound premise' that CMPs are fair and effective in the contexts in which they are already deployed.<sup>88</sup> Citing with approval Lord Kerr's dictum from *Al Rawi*,<sup>89</sup> the special advocates noted that the Green Paper failed even to acknowledge, never mind to answer, Lord Kerr's concerns.<sup>90</sup> Others, it should be pointed out, have suggested that the special advocates significantly underplayed their own effectiveness in their submission on the Green Paper. Ouseley J said in the High Court in 2012, for example, that 'I do not think, and I am not alone in this among the judges who hear these types of cases, that the views of the special advocates ... are a true reflection of the effectiveness they bring'.<sup>91</sup>

Numerous of the consultation responses complained that the government had not shown that it was necessary to extend the availability of CMP to civil actions generally. NGOs such as the Bingham Centre for the Rule of Law, Liberty and Justice, for example, each agreed that *Carnduff v Rock* was an unsafe precedent, yet no other specific example save for *Al Rawi* itself was presented by the government as justification for the need to roll out CMPs beyond the limited contexts in which they were already available. In its report on the Green Paper the JCHR was highly critical of this. In the Green Paper the government had claimed that there were 27 cases currently before the courts in the United Kingdom in which sensitive material was central, but few details were given as to what these 27 cases were and no evidence was offered as to why, precisely, they could not be successfully litigated without resort to CMP. Under pressure from the JCHR, from the special advocates and from a host of human rights and other NGOs, the government allowed the Independent Reviewer of Terrorism Legislation, David Anderson QC, to see the case files in seven of these 27 cases.<sup>92</sup> Having spent a day being taken through the files, Mr Anderson informed the JCHR that he had been persuaded that 'there is a small but indeterminate

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<sup>87</sup> Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates*, 16 December 2011, para 15 (Special Advocates).

<sup>88</sup> *ibid* para 17.

<sup>89</sup> n 63 and accompanying text.

<sup>90</sup> Special Advocates (n 87) para 25.

<sup>91</sup> *AHK* [2012] (n 66) [78].

<sup>92</sup> The Independent Reviewer of Terrorism Legislation is appointed under statute to review and periodically to report on a range of the UK's counter-terrorism legislation. David Anderson QC replaced Lord Carlile as the Independent Reviewer as from 2011: see 'History', *Independent Reviewer of Terrorism Legislation*, <https://terrorismlegislationreviewer.independent.gov.uk>. It is worth noting that the case files seen by Mr Anderson were selected by the government; that only three of them were claims for civil damages; and that at the material time Mr Anderson had not acted in any CMP cases. For these reasons the JCHR invited the government to show the same material to a small group of experienced special advocates, but the government declined to do so.

category of national-security related claims ... in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist'.<sup>93</sup> Nonetheless the JCHR was not convinced. The Committee recommended that, instead of extending the availability of CMP, legislation should instead be introduced to put the law of public interest immunity onto a statutory footing, with the opportunity being taken to explain in the legislation how PII should apply in national security cases.<sup>94</sup>

## 7. THE JUSTICE AND SECURITY ACT 2013

The government introduced its Justice and Security Bill into Parliament in May 2012. The Bill was introduced into the House of Lords. Much amended by the Lords, it then moved to the Commons in November 2012, where it was further amended. The Bill completed its parliamentary passage in March 2013 and came into force in June 2013.<sup>95</sup> As introduced, the Bill would have provided for CMP to be used in civil proceedings *on the application of the Secretary of State*. The court would have been *required* to grant such an application where the proceedings in question would otherwise have required any party to disclose material the disclosure of which would be damaging to national security. As introduced, the Bill would not have required any PII process to have been completed before an application could be made that proceedings should go into a closed process.

A number of these features were amended during the Bill's passage through the House of Lords. As amended by the Lords, CMP could be used in civil proceedings *on the application of any party* to those proceedings or on the court's own motion. The court would have a *discretion* as to whether to grant an application that proceedings go into a closed process. In exercising that discretion, the court would have been required to consider (a) whether the degree of harm to national security caused by any disclosure of material outweighed the public interest in the fair and open administration of justice, and (b) whether a fair determination of the proceedings was possible by any other means. In considering the latter point the court would have been required to consider whether a claim to PII could have been made instead of an application that the proceedings go into a closed process.

The Lords' amendments had three objectives. First, they sought an equality of arms that was missing from the original Bill. Under the Bill as introduced, only the Secretary of State could apply for civil proceedings to be heard under CMP: no other party to litigation could have made such an application. Yet, there may be cases where it suits another party – and does not suit the Secretary of State – for a case to be heard under CMP. Second, the amendments sought to build into the CMP process the *Wiley* balancing exercise that is such a core component of the

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<sup>93</sup> See JCHR 24th Report (n 86) para 73.

<sup>94</sup> *ibid* para 122.

<sup>95</sup> For all the documents relating to the Bill, including its various printed versions, as well as amendment papers, select committee reports, government responses to committee reports, and debates on the Bill, see <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/the-justice-and-security-bill> and <http://services.parliament.uk/bills/2012-13/justiceandsecurity.html>.

modern law of PII. Third, they sought to ensure that conducting a trial under CMP is genuinely a measure of last resort.

Not all of these amendments survived in the House of Commons. To take each in turn, the government was initially unhappy about the move to allow any party to the proceedings to apply to the court claiming that the case should adopt closed material procedure. The government reasoned that only ministers could claim PII<sup>96</sup> and that it should therefore follow that only ministers ought to be able to decide when a case should adopt CMP. However, when it was pointed out to them that other parties may have legitimate reasons for wanting a case to be heard under CMP, the government dropped its objection to this amendment, and it now stands.<sup>97</sup> The Lords' amendment that it should be for the court (and not for the Secretary of State) to decide whether a case should adopt a closed process was also accepted by the government. This amendment, too, may be found in the legislation as enacted.<sup>98</sup>

The Lords' amendment to insert into the process a *Wiley* balance was resisted by the government, and did not survive in the Commons. However, during the course of the Bill's passage through the Commons an alternative to the *Wiley* balance was put in place. The Lords' *Wiley* amendment would have meant that the court could not declare that particular proceedings could adopt CMP unless it considered that 'the degree of harm to the interests of national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice'.<sup>99</sup> In place of this provision, the Commons moved that the court may declare that proceedings may adopt CMP only if two conditions are met. The first is that a party to the proceedings would be required to disclose material that is sensitive for reasons of national security. The second condition – which is the important one for present purposes – is that the court must be satisfied that 'it is in the interests of the fair and effective administration of justice' that such a declaration be made.<sup>100</sup> This provision – section 6(5) of the Act – is in many ways the lynchpin of the entire system of CMP as enacted, and we will return to it in a moment.

First, we must consider the fate of the last of the Lords' amendments summarised above. Their Lordships passed an amendment which would have meant that a court could declare that proceedings may adopt CMP only if the court considered that 'a fair determination of the proceedings is not possible by any other means'.<sup>101</sup> This 'last resort' amendment was also resisted by the government and was removed from the Bill by the House of Commons.

Section 6(5) of the Act, however, may be seen not only as the government's alternative to the Lords' *Wiley* amendment, but also as its answer to the Lords' 'last resort' amendment. Under

<sup>96</sup> This is not strictly true: the police may claim PII (as in *Conway* (n 10) and *Wiley* (n 11), for example) and so, exceptionally, may other organisations working in the public interest, such as the National Society for the Prevention of Cruelty to Children: see *D v NSPCC* [1978] AC 171. Nonetheless, it is clear that ordinary litigants may not claim PII – and this was the government's point.

<sup>97</sup> Justice and Security Act 2013, s 6(2).

<sup>98</sup> *ibid* s 6(1).

<sup>99</sup> Justice and Security Bill, as amended by the House of Lords, cl 6(2)(c).

<sup>100</sup> Justice and Security Act 2013, s 6(5).

<sup>101</sup> Justice and Security Bill (n 99), cl 6(2)(d).

section 6(5) no court will be able to declare that a case – or that part of a case – should be tried under a closed material procedure unless the court considers that it is in the interests of the fair and effective administration of justice to do so. Given everything that was said in the Court of Appeal and in the Supreme Court in *Al Rawi* about the fundamental importance of the principles of open justice and natural justice, and given the judicial acceptance in that case that special advocates are likely to be ‘hampered’ and may mitigate the problems inherent in the CMP system only ‘to some extent’,<sup>102</sup> it is unlikely that courts will find the section 6(5) condition to be satisfied unless they are of the view that there really is no alternative in a particular case to ordering that CMP should be adopted. Section 6(5) is buttressed by section 7(2) of the Act. Under this provision, a court that has made a declaration that proceedings may adopt CMP must keep the declaration under review and ‘may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice’.

In other words, even though the Lords’ ‘last resort’ amendment did not survive, the effect of the Act ought nonetheless to be that no trial will be permitted to adopt CMP unless the court is satisfied that there are no alternative means by which the litigation can proceed. This was the view taken by the High Court in the first case to be decided under the Act. In *CF and Mohamed v Foreign and Commonwealth Office*<sup>103</sup> the claimants sought damages under the Human Rights Act 1998 and in the law of tort in respect of their treatment en route from Somalia (where they were arrested and detained) to the United Kingdom (where they were made subject to counter-terrorism measures). The court declared that, as regards one element of the trial, a CMP application under section 6(1) of the Act may be made. In so ruling, the Court made it plain that in its view this was an action that, like *Carnduff v Rock*, would otherwise be untriable.<sup>104</sup> The court emphasised that the interests of the claimants would be protected in the closed hearings not only by the special advocates, but also ‘by the vigilance and care of the court itself’.<sup>105</sup>

The courts have three means at their disposal to encourage them to interpret the legislation so that a CMP may be ordered only when it is clear that the action would be otherwise untriable. The first is the rule in *Simms*, sometimes known as the ‘principle of legality’.<sup>106</sup> In *Simms* Lord Hoffmann said the following:<sup>107</sup>

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words ... In the absence of express language or necessary implication to the contrary,

<sup>102</sup> *Al Rawi* [2011] (n 47) [36] (Lord Dyson).

<sup>103</sup> *CF and Mohamed v Foreign and Commonwealth Office* [2013] EWHC 3402 (QB).

<sup>104</sup> *ibid* [43].

<sup>105</sup> *ibid* [19].

<sup>106</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

<sup>107</sup> *ibid* 131.



the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

The fundamental common law principles of open and natural justice are among the ‘basic rights of the individual’. Applying the rule in *Simms*, section 6(5) of the Justice and Security Act must be taken to operate ‘subject to’ those rights.

The second is the Human Rights Act 1998. Under that Act the right to a fair trial as enshrined in Article 6 ECHR is a ‘Convention right’. Under section 3 of the Human Rights Act, primary legislation ‘must’, so far as is possible, be ‘read and given effect in a way which is compatible with Convention rights’. (Where such a reading is impossible, the court may declare that the legislation in question is incompatible with Convention rights: see section 4 of the Human Rights Act.) Thus, section 6(5) of the Justice and Security Act must, so far as is possible, be ‘read and given effect’ in a manner that is compatible with the right to a fair trial.

The third is the judgment of the UK Supreme Court in *Bank Mellat v HM Treasury (No 1)*.<sup>108</sup> This decision, which was handed down one week before the Justice and Security Act came into force, marked the first occasion on which the UK’s highest court examined a closed judgment of a lower court. The case concerned the lawfulness of a Financial Restrictions Order which the United Kingdom government had imposed on the activities within the UK of an Iranian bank. A majority of the Supreme Court ruled that the Order was disproportionate, that it had been unfairly applied and that it was for these reasons unlawful.<sup>109</sup> In seeking to resist this conclusion, counsel for the Treasury had sought to persuade the Supreme Court to consider two matters that the judge at first instance had dealt with in his closed judgment in the case.<sup>110</sup> The Supreme Court ruled (by six to three) that it had the power to consider a closed judgment and (by five to four) that the power should be exercised in this instance. After looking at the closed judgment, however, the justices were unanimously of the view that there had in fact been no need for them to do so.<sup>111</sup> The judgment of the majority was delivered by Lord Neuberger, the President of the Court. He described *Al Rawi* as having established matters of ‘fundamental’ common law principle<sup>112</sup> and as having ‘uncompromisingly’ set its face against introducing CMP.<sup>113</sup> He went on to say that ‘any judge ... must regard the prospect of a closed material procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern’.<sup>114</sup> He concluded that an appellate court should be asked to conduct a closed hearing only if it is ‘strictly necessary for fairly determining the appeal’, that ‘the initiation of a closed material

<sup>108</sup> *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38.

<sup>109</sup> *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.

<sup>110</sup> There were both a closed judgment and an open judgment at first instance.

<sup>111</sup> The court was sharply critical of the way in which the government had sought to persuade it to look at the closed judgment, with Lord Hope stating that it was ‘a misuse of the procedure’ and that the experience ‘should serve as a warning that the State will need to be much more forthcoming if an invitation to this court to look at closed material were to be repeated in the future’: *Bank Mellat (No 1)* (n 108) [100].

<sup>112</sup> *ibid* [36].

<sup>113</sup> *ibid* [49].

<sup>114</sup> *ibid* [51].

procedure ... should be avoided if at all possible', and that 'the court itself is under a duty to avoid a closed material procedure if that can be achieved'.<sup>115</sup>

There is no doubt that section 6 of the Justice and Security Act now permits that which was ruled impermissible by the appeal courts in *Al Rawi*. Closed material procedure *may* now be adopted in civil trials and in claims for judicial review. However, there should equally be no doubt that the use of CMP in any case heard under the Act will be effectively conditioned by the common law and Convention rights of the parties. The result ought to be that CMP will be available in a civil trial only if that is the only means by which the litigation can proceed at all.

## 8. CONCLUSIONS

The Act as passed by Parliament is much improved on the original Bill and, even more so, on the proposals contained in the Green Paper.<sup>116</sup> One of the principal concerns expressed about the Green Paper was the scope of the proposal, as it then stood, to allow CMP to be used in civil litigation. The Act makes it clear (in contrast to the Green Paper) that the extension of the procedure into civil litigation for which it provides is strictly limited to the national security context. It is also strictly limited to litigation: there is no provision in the Act that enables CMP to be used in an inquest (as had been floated in the Green Paper). Also welcome in the Act are the provision in section 12 that the Secretary of State must report annually to Parliament the number of cases in which closed material procedure is used under the Act, and the provision in section 13 that the use of the procedure under the Act must be independently reviewed after five years. Each of these was a late government amendment made to the Bill in the House of Commons in order to meet the concerns of the Bill's critics.

Throughout its parliamentary passage the Justice and Security Bill was contested and controversial. National security litigation has gained unprecedented prominence in the United Kingdom in the last decade. This is true not only in the counter-terrorism field, where coercive measures which the state wishes to impose on suspected terrorists must be scrutinised in court, but also as regards litigation about the conduct of the UK's armed forces in Afghanistan and Iraq,<sup>117</sup> and as regards litigation concerning the extent to which the UK's security and secret intelligence agencies have been involved in US-led programmes of extraordinary rendition, illegal kidnapping, unlawful detention, torture and other cruel, inhuman or degrading treatment of detainees.<sup>118</sup> A number of these matters have come into the public domain as a direct result of litigation. The

<sup>115</sup> *ibid* [70].

<sup>116</sup> Once the Bill had been passed by the House of Commons it returned to the Lords for the Upper House to consider the Commons' amendments. An attempt was made to reinstate the Lords' earlier *Wiley* balance and last resort amendments, but this was defeated (see HL Deb, 26 March 2013, vol 744, cols 1017–57). A number of Peers who had voted in favour of the Lords' amendments in 2012 considered that the government had done enough to meet their concerns: see the speech of the former Lord Chief Justice, Lord Woolf (cols 1043–45).

<sup>117</sup> See *Evans* (n 66) and *Al Sweady* (n 17).

<sup>118</sup> See *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 and, of course, *Al Rawi* itself (n 47).

fear of many of those who were most concerned about the justice and security legislation was that the law was being changed in order to make it more difficult for campaigners to use litigation in the United Kingdom as a means of exposing wrongs committed in the name of national security and as a means of holding office holders to account for their actions.<sup>119</sup> The extension of closed material procedure, they reasoned, would allow the state to withhold a greater proportion of evidence and would lead to an increase in secrecy.

It would indeed be a travesty if this is the result of the Justice and Security Act, but, as we saw above, to increase secrecy has not been the government's stated intention. Rather, the concern has been to increase the chances of national security litigation being fought to a conclusion, rather than being settled out of court or struck out as effectively untriable. It will be for the courts now to ensure that the Justice and Security Act achieves what the government said it wanted to achieve. If the Act is used accordingly, and if its key provisions (notably section 6(5)) are interpreted in the manner argued for in this article, then there is every chance that this legislation might well succeed in that next-to-impossible task of achieving both justice and security at one and the same time.

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<sup>119</sup> See Anthony Peto QC and Andrew Tyrie MP, *Neither Just nor Secure: The Justice and Security Bill* (Centre for Policy Studies 2013).