Closed Material Procedures at 25: Evaluating the 'Normalisation' of Closed Hearings in UK Judicial Proceedings

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Abstract— Written 25 years after the advent of the Closed Material Procedures in the UK legal system, the present article seeks to ascertain the present *status quo* as concerns the degree of 'normalisation' of closed procedures as a judicial response to resolving fairness-security dilemmas. In its first part, the article charts the development of the judicial approach to CMPs related to national security post-dating the enactment of the JSA 2013 in (i) the context of the JSA 2013 itself and (ii) at common law. In the second part, the discussion moves to examining the question of the employment of common law-based CMPs beyond the national security context. The analysis of the case-law concludes by suggesting that the absence of cautionary language comparable to that found in pre-2013 judgments in lower-instance and

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appellate decisions from the 2013-2023 period shows signs of a degree of 'normalisation' of CMPs within the judicial system. The third part of the discussion offers a possible explanation for this phenomenon, arguing that closed hearings present the courts with means to reduce the scope of areas of governmental activity laying beyond the reach of law – at a cost to the rights of the excluded party. The Annex discusses the 2023 UKPC decision in *Ramoon,* containing a number of important implications for the main body of argument.

Introduction

On 16 August 1990, Mr Karamjit Singh Chahal was served with a notice of intention to deport by the Home Secretary. The events which followed had a profound impact – the 1997 European Court of Human Rights' ('ECtHR') decision in *Chahal v. United Kingdom*[1] resulted in the 'exceptional'[2] introduction of closed material procedures ('CMP') to proceedings before the Special Immigration Appeals Commission ('SIAC'). As is well known, the introduction of CMPs into the UK legal system attracted significant criticism, judicial[3] and academic[4] alike, on grounds of their 'inherent unfairness',[5] with emphasis on the recourse to closed hearings being a last-resort, exceptional solution.[6] Nevertheless, despite this proclaimed exceptionality, '[h]aving gained a foothold in the legal system, the procedure has spread progressively, initially to other specialist tribunals, and then to the

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[1] *Chahal v United Kingdom* (1997) 23 EHRR 413.
[2] *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39 [140] (Lord Reed).
[3] See e.g. *Secretary of State for the Home Department v MB* [2007] UKHL 46; *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; *Al Rawi and Others v Security Service and Others* [2011] UKSC 34; *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65.
[4] Amongst many others, see M Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) Civil Justice Quarterly 314; J Ip, '*Al Rawi*, *Tariq* and the Future of Closed Material Procedures and Special Advocates' (2012) 75 MLR 606; R Goss, 'To the Serious Detriment of the Public': Secret Evidence and Closed Material Procedures.' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014).
[5] Special Advocates' Memorandum on the Justice and Security Bill Submitted to the Joint Committee on Human Rights (14 June 2012) <https://ukhumanrightsblog.com/wp-content/uploads/2012/06/js-bill-sa-response-final-final.pdf> accessed 8 May 2023, [3].
[6] *Bank Mellat* (n 2) [145] (Lord Dyson MR).

courts'.[7] The present article aims to provide an updated evaluation of the closed procedures' expansion within the UK judicial system. In doing so, the discussion does not seek to evaluate whether such expansion is a *desirable* development: its primary object is that of *identifying* and *explaining* the extent of this phenomenon.

In a 2015 article on the ECtHR's approach to CMPs,[8] Nanopolous referred to the process of judicial 'normalisation' of the mechanism, in which closed procedures no longer could be 'characterised as an exceptional process' but rather 'as the predominant mechanism for dealing with allegedly sensitive security information'.[9] Borrowing this definition of 'normalisation', the following discussion will argue that there are indeed signs that the UK judicial approach has evolved to consider recourse to CMPs the dominant mechanism for addressing governmental claims to secrecy.[10] By way of introduction, the first part of the argument will present a short overview of closed procedures' pre-2013 development. The second part of the discussion will examine the main-post-2013 developments in the courts' approach to CMPs in the national security context under the Justice and Security Act 2013 ('JSA 2013'), and their inherent procedural jurisdiction. Examining the decision in *Haralambous,*[11] the third part will draw attention to the signs that CMPs are increasingly deployed to address concerns

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[7] *Bank Mellat* (n 2) [140] (Lord Reed).
[8] E Nanopolous, 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 78(6) MLR 913.
[9] ibid., 913.
[10] ibid, 913.
[11] R *(Haralambous) v Crown Court at St Albans* [2018] UKSC 1.

unrelated to questions of national security, concluding that there are indeed signs of 'normalisation' of closed procedures in the court rhetoric. In its final section, the argument will draw to a close by suggesting a possible explanation for this phenomenon: namely, the availability of closed procedures serving to increase the courts' institutional competence to review cases in traditionally non-justiciable areas, of which national security is the archetypal example.

1. Closed material procedures before 2013

Historically, claims involving questions of national security brought before UK courts faced pronounced difficulty, with questions of disclosure of government-held information resolved chiefly through the Public Interest Immunity ('PII') procedure. Under the PII process, a body holding confidential information petitions the relevant minister to issue a 'PII certificate', certifying that the interest in confidentiality outweighs the interest in public administration of justice. If issued, the certificate is subject to review by the courts.[12] However, if a PII certificate is upheld, the relevant information is wholly excluded from the court's consideration – which can be fatal to the claim's triability.

Chahal concerned a related problem. Mr Chahal could not challenge the Home Secretary's decision that his continued presence in the United Kingdom was 'unconducive … to the

[12] *Conway v Rimmer* [1968] AC 910; the test applied is the '*Wiley* test' from *R. v Chief Constable of the West Midlands Police Ex p. Wiley* [1995] 1 AC 274.

international fight against terrorism',[13] as the relevant (classified) evidence was not made available to the court.[14] Holding that the proceedings failed the requirements of Art. 5 and Art. 13 of the European Convention on Human Rights, the ECtHR nevertheless recognised that 'the use of confidential material may be unavoidable where national security is at stake' and referred to a 'more effective form of judicial control' present in Canada.[15] The British government took notice of the ECtHR's suggestions and incorporated a more restrictive[16] version of the Canadian procedure in s 8(3) of the Special Immigration Appeals Commission Act 1997, introducing closed procedures to the UK system. Function-wise, CMPs were intended to be the 'very antithesis'[17] of PII procedures: whereas following a PII certification, the claim either proceeds without the evidence or is struck out, CMPs facilitate the disclosure of sensitive evidence to a limited number of parties. Most controversially, the non-state party is *not* one of them. When a CMP is adopted, a special advocate – a security-cleared barrister – is appointed to represent the excluded party, taking instructions from them and their 'open'

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[13] *Chahal* (n 1), [25].
[14] ibid, [130].
[15] ibid, [131].
[16] In Canada, SAs have more opportunities for contact with the excluded party: for example, applications for communication involving the substance of the closed material do not necessarily require the consent of the party holding the confidential information (usually the Government). In this way, the present Canadian approach has potentially fewer consequences for the protection of the exluded party's right to a fair trial. Special Advocates' Response to the Justice and Security Green Paper Consultation, (16 December 2011) <https://adam1cor.files. wordpress.com/2012/01/js-green-paper-sas-response-16-12-11-copy.pdf>, accessed 17th April 2023, 12.
[17] *Al Rawi* (n 3) [41] (Lord Dyson).

representative. Upon the disclosure of the closed evidence, the special advocate can no longer contact the party or their representative without the court's permission: the contents of the 'closed' *in camera* hearings and 'closed' judgments are known only to the special advocate, the opposing governmental counsel and the court itself.

The difficulty posed by CMPs is thus obvious. Even in its more formal iterations, the fundamental principle of the rule of law calls for judicial proceedings to be open and fair.[18] Common law systems utilise the adversarial format of proceedings as means of ensuring fairness. Furnishing the parties with notice of the respective arguments raised is a crucial element of maintaining equality of arms between the adversaries – and thereby an 'essential requirement of natural justice' at common law.[19] The ability to effectively confront one's opponents is a 'core of due process in adjudicative proceedings' and 'a pre-condition for the exercise of more particular process rights'.[20] Such awareness of the case against one's arguments is inherently absent in the 'fatally flawed'[21] closed procedures carrying 'inescapable' fairness costs to the excluded party, who is at a 'great disadvantage' in the proceedings.[22] As implemented in the UK,

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[18] See e.g. J Raz, *The Authority of Law: Essays on Law and Morality* (Claredon Press, 1979), 217

[19] *Ridge* v. *Baldwin* [1964] AC 40, 113.

[20] P Craig, 'Perspectives on Process: common law, statutory and political' [2010] PL 275, 286.

[21] D Cole and S I Vladeck, 'Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and 'Cleared Counsel' in the United States, the United Kingdom, and Canada' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014), 177.

[22] ibid, 175

the ECtHR's well-meaning suggestion of means intended to make proceedings in which an 'irremediable clash between security interests and human rights'[23] occurred *less* unfair by allowing the claim to proceed[24] thus struck at the very core of the mechanism safeguarding procedural fairness.

It is therefore hardly surprising that despite their quick proliferation across various statutory regimes,[25] closed procedures have initially received a rather frosty[26] judicial reception: in a particularly strong-worded opinion in *Roberts*, Lord Steyn considered that 'taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing' and 'involves a phantom hearing only'.[27] On the level of doctrine, the ECtHR itself found it necessary to clarify its stance, indicating that the use of special advocates will only be compatible with Art.5(4) ECHR when the excluded party is provided with sufficient information to meaningfully instruct the special advocate,[28] leading to the

[23] Nanopolous (n 8) 918.
[24] T Hickman and A Tomkins, 'National Security Law and the Creep of Secrecy: A Transatlantic Tale' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement*, (Hart Publishing, 2014), 157.
[25] Following the SIACA 1997, CMPs formed part of the regimes introduced in the Anti-Terrorism, Crime and Security Act 2001, Prevention of Terrorism Act 2005 (replaced by the Terrorism Prevention and Investigation Measures Act 2011) and Counter-Terrorism Act 2008.
[26] (n 4).
[27] R *(Roberts)* v. *Parole Board* [2005] UKHL 45 [35].
[28] *A. and Others v United Kingdom* [2009] ECHR 301,[220].

introduction of the *AF* 'gisting' requirement.[29] *AF* also maintained the *R v Davis*[30] rejection of the possibility of excluding the accused from *any* part of criminal proceedings. Further, Lord Phillips' judgment in *AF* is a masterly discussion of the possible *policy* arguments against the resort to closed proceedings, referring to both the dignitarian importance of not subjecting an individual to sanctions which the individual *de facto* cannot challenge,[31] and the impacts on the public confidence in the justice system resulting from justice not being seen to be done even if it is done.[32] The high-water mark of judicial unwillingness to engage with CMPs occurred in *Al Rawi,* where in 'perhaps the most extensive and authoritative statement of the objection in principle',[33] the Supreme Court expressly rejected the possibility of adopting closed procedures in the exercise of its common law procedural jurisdiction, holding that:

> '[T]he right to be confronted by one's accusers is such a fundamental element of the common law right to a fair

[29] 'Gisting' entails providing the excluded party with the 'gist' of the case against them sufficient to enable them to instruct the SA where, as in *AF,* the entirety of the Government's case is made in closed material.

[30] *R v Davis* [2008] AC 1128.

[31] *AF* (n 3) [63] (Lord Phillips).

[32] ibid. Lord Phillips' worry about the impact of CMPs on public confidence in the justice system has proven justified: see O Bowcott, 'What are secret courts and what do they mean for UK justice?' *The Guardian,* 14 June 2013, <https://www.theguardian.com/law/2013/jun/14/what-are-secret-courts>, accessed 20 March 2023.

[33] *CF v Security Service* [2014] 1 W.L.R. 1699 [20] (Irwin J).

> trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that.'[34]

The *Al Rawi* rejection of non-statutory CMPs was rather short-lived. Two years after *Al Rawi,* a bare majority of the Supreme Court in *Bank Mellat* 'crossed the Rubicon'[35] and adopted a closed material procedure in absence of a Parliamentary authorisation, with Lord Neuberger holding that although the stand taken in *Al Rawi* 'remains unquestioned', it did not mean that 'there could be no circumstances' in which a closed procedure could be 'reasonably' introduced.[36] Further, in response to *Al Rawi*, the Parliament enacted the Justice and Security Act 2013 ('JSA 2013; JSA'), Part II of which struck the final blow to Lord Brown's *Al Rawi* urging that claims involving highly sensitive security issues should be either struck out as untriable or determined by some body 'which does not pretend to be deciding such claims on a remotely conventional basis'.[37]

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[34] *AF* (n 3) [35] (Lord Dyson).
[35] *Bank Mellat* (n 2) [88] (Lord Hope).
[36] *Bank Mellat* (n 2) [50] (Lord Neuberger).
[37] *AF* (n 3) [86] (Lord Brown).

2. Assessing the post-2013 expansion of the scope of CMP availability

A. National security

I. The framework and practical impacts of JSA 2013

JSA s 6(1) allows courts[38] to make a declaration permitting applications for a closed material procedure. To make a declaration, the court must consider that (i) but for the declaration, a party to the proceedings would be required to disclose material the disclosure of which would be damaging to the interests of national security (s 6(4), read together with s 6(11)) and (ii) that 'it is in the interests of the fair and effective administration of justice' (s 6(5)). If granted, the declaration is subject to statutory duty of review and the court's discretion to revoke the declaration should its continuation no longer be in the interests of fair and effective administration of justice (s 7(2)). The range of proceedings to which the JSA applies is defined broadly: s 6(1), read together with s 6(11), indicates that a s 6 declaration can be made in 'any proceedings (other than proceedings in a criminal cause or matter)'. Although the stated rationale behind the Act was that of enabling the government to defend itself against allegations touching upon questions of national security

[38] Specifically the High Court, the Court of Appeal, the Court of Session and the Supreme Court.

without resort to 'expensive out of-court settlements',[39] the potential reach of the JSA potentially stretches far beyond that context, introducing CMPs into *any* civil proceedings where national security concerns arise.

As relates to the JSA's practical impacts, assistance can be drawn from the long-overdue[40] review of the Act's operation carried out by Sir Duncan Ouseley, published in December 2022.[41] According to the Government's annual reports, there have been 54 applications for a s 6 declaration in the five-year review period,[42] with the numbers falling back towards the end of the review period. Although not all applications have been

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[39] See Ministry of Justice, *Justice and Security Green Paper* (Cm 8194, 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79293/green-paper_1.pdf> accessed May 8 2023, para 1.18 for the Government's specific concern the lack of a civil proceedings framework for damages claims brought by ex-Guantanamo detainees resulting in 'expensive out of-court settlements'.

[40] The review was due in 2018. However, a reviewer was only appointed in 2021, and the Review itself was published in December 2022, over 4 years after the statutory deadline.

[41] Ministry of Justice, *Independent report on the operation of closed material procedure under the Justice and Security Act 2013 presented to Parliament pursuant to section 13(5) of the Justice and Security Act 2013* (MOJ November 2022) ('Ouseley Report') < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_ data/file/1120738/closed-material-procedure-operation-report-webpdf.pdf>, accessed 15 December 2022.

[42] The review examined the period between 2013 to 2018; Ouseley Report (n 41), 39-40.

granted,[43] refusals are relatively rare.[44] At least some of those cases could not have been tried without a closed procedure;[45] the outcome in at least one would have been different under a PII procedure.[46] As regards the Government's stated aim of reducing the number of settlements, it is interesting to note that out of 36 civil damages cases in which a s 6 declaration was made within the review period, *all but one* were settled on a confidential basis (although some without an admission of liability).[47] This 'much greater than anticipated'[48] number of settlements occurring once the closed proceedings have finished[49] but *before* any disclosure[50]

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[43] Requests for a s 6 declaration were denied e.g. in *Margaret Keeley and 31 other Plaintiffs v Chief Constable of NI* [2021] NIQB 81 and *Roddy Logan v PSNI* [2017] NIQB 70.

[44] As reasons for granting CMP applications are not usually given in the open judgments, presumably on the grounds of being substantiated by the closed material, few conclusions can be drawn from these high acceptance rates: they can be ascribed to *either* an overly lax judicial approach to the government's attempts to impose unnecessary secrecy or desirable governmental restraint in requesting s.6 declarations (the Ouseley Report prefers the latter interpretation: Ouseley Report (n 41), 64). The question whether such non-disclosure of the grounds of the courts' decision is justifiable lies beyond the scope of the present discussion insofar it goes directly to the question of the fairness of CMPs as a whole.

[45] The Ouseley Report refers to, amongst others, *CF* (n 28)*, Belhaj v Straw* [2017] EWHC 1861 (QB) ("*Straw*") and *K, A, and B* [2019] EWHC 1757 (Admin): Ouseley Report (n 41), 110.

[46] Ouseley Report (n 41), 111.

[47] ibid, 59

[48] ibid, 113.

[49] Or even began, as the 1.3bn claim in *Bank Mellat* (n 2) was settled before trial: J Croft, A England and S Provan, 'UK settles £1.3bn lawsuit with Iran's Bank Mellat after 10 years' Financial Times, 18 June 2018, <https://www.ft.com/ content/ 58c4ae5c-91b0-11e9-b7ea-60e35ef678d2> accessed 23 Dec 2022.

[50] Ouseley Report (n 41), 113.

suggests that despite the availability of CMPs, the government may nevertheless prefer to avoid disclosure altogether by settling the claims – and that the enactment of the JSA 2013 may not have been strictly necessary.

II. The scope of JSA 2013: *CF v Security Service* and *R (Belhaj) v DPP*

Nevertheless, the importance of the JSA 2013 to the present discussion lies not in the assessment of the policy behind its enactment, but in the approach to its provisions adopted by the courts. In this regard, the key object of interest is the width given to the two pre-conditions of the grant of a s 6 declaration and the ambit of 'civil proceedings' under s 6(1).

As concerns the s 6(4) and s 6(5) preconditions, the first point of note is that although the s 6(4)(a) 'sensitive material' condition is clarified by s 6(11), stating that 'sensitive material' is material the 'disclosure of which would be damaging to national security', whether this criterion is fulfilled tends to be examined in closed proceedings.[51] As Graham notes, open judgments thus usually simply confirm or deny that the information falls into the qualifying category,[52] precluding the ascertainment of the strictness with which the criterion is applied. Second, as seen in

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[51] E.g.in *CF* (n 33), Irwin J's judgment explicitly states (at [40]) that the reasons for finding the material in question to be 'sensitive' stated in the open judgment are 'amplified' in the closer judgment by fuller references to the material relied on.

[52] L Graham, 'Statutory secret trials: the judicial approach to closed material procedures under the Justice and Security Act 2013' 2019 CJQ 38(2), 195.

CF v Security Service, the s 6(5) condition calling for CMPs to only be used where it is 'fair and effective' to do so seems to add little to the 'sensitivity' condition.

In *CF,* the first case discussing the JSA following the Act's coming into force,[53] Irwin J rejected the claimants' submission that a PII process should be concluded before the JSA can apply as 'running directly counter' to the Act's scheme.[54] Irwin J was also 'not persuaded'[55] that a less unfair alternative was available, considering that 'experience [of CMPs] suggests that … a just result can be achieved',[56] particularly where the claimants 'set the agenda for the case'.[57] As noted by Graham,[58] this more permissive approach to the question of fairness of CMPs stands in contrast to *AF* and *Al Rawi* – decisions somewhat unconvincingly put to the side in *CF* as 'made in consideration of the common law'[59] and not the JSA, despite the criticisms of CMPs' impacts on fairness being applicable to both contexts.[60] Further, by emphasising the parliamentary endorsement of the balance struck by the Act,[61] *CF* seemingly suggests that within the JSA, something *more* than the unfairness inherent in CMPs is required to fail the s 6(5) condition.[62] As argued by Graham, some

[53] The JSA 2013 came into force on 25 June 2013; the hearings in *CF* were held in late July, with the judgment handed down on November 7 2013; *CF* (n 33) [11]-[12] (Irwin J).
[54] ibid [25]; [35].
[55] ibid [51].
[56] ibid [52].
[57] ibid [53].
[58] Graham (n 52), 207.
[59] *CF v Security Service* at [27].
[60] Graham, (n 52) 207.
[61] *CF v Security Service* at [31]-[35].
[62] Ouseley Report (n 41), 20.

passages in *CF* may even be understood as suggesting that within the JSA, resort to CMPs will be s 6(5) 'fair' *whenever* a national security issue arises. [63] In employing language painting CMPs as a fair means of delivering justice, *CF* can thus can be considered an early example of the JSA's contribution to the 'normalisation' of closed procedures.[64]

As regards to the Act's scope, a matter conditioned by the s 6(1) notion of 'relevant civil proceedings', the key decision is the Supreme Court judgment in R *(Belhaj) v DPP*.[65] *Belhaj* concerned a challenge brought by Mr Belhaj to the DPP's refusal to prosecute Mr Allen, allegedly complicit in Mr Belhaj's torture in Libya. The question before the Court was whether a claim for judicial review from which a prosecution could result constituted 'proceedings in a criminal cause or matter' – to which, as made clear by s 6(11), the JSA does not apply. The majority (Lord Sumption, Lord Mance, and Lady Hale) held that judicial review was not an inherently civil proceeding,[66] and in reality, Mr Belhaj was attempting to require the DPP to prosecute Mr Allen. For this reason, his challenge constituted 'criminal proceedings' and the JSA did not apply.[67] Following *Belhaj*, the JSA thus applies to some, but not all judicial review proceedings, depending on whether their subject-matter is a 'criminal' matter. In light of the particular importance of equality of arms and open justice in

[63] Graham, (n 52) 209.
[64] Nanopolous (n 8) 921.
[65] *Belhaj and Boudchar v. Director of Public Prosecutions* [2018] UKSC 33.
[66] Lord Sumption in *Belhaj* (n 65) [17].
[67] ibid [20].

criminal-adjacent contexts,[68] the decision to not expand the JSA into the (notably broadly-defined) criminal realm seems correct. However, taken against the wider context of enhanced judicial protection typically afforded to fundamental rights,[69] the reasoning of the majority in *Belhaj* is surprisingly restrained.

Firstly, similarly to *CF,* both the majority and the minority judgments accept that JSA 2013 is to be taken as representing the democratically-legitimised balance between natural justice and national security, from which the courts should not deviate. Lord Lloyd-Jones' dissenting judgment considered that JSA 'leaves *no scope* for … the principle of legality'[70] (emphasis added) which could call for a restrictive interpretation – seemingly indicating that the JSA's specificity removes the possibility of a *Simms*-type narrow interpretation. In contrast, Lord Sumption expressly approved of Richards LJ's *Sarkandi*[71] remark that there is '*no reason*' to give JSA 2013 a narrow construction,[72] approaching the question on 'ordinary principles of construction'.[73] The language used by the majority can thus be understood to 'normalise' CMPs more than that of the minority judgment - although a fundamental right is potentially engaged, at

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[68] Reflected both in the wording of Art.6(2-3) of the European Convention on Human Rights and decisions such as *AF* (n 3) and *R v Davis* (n 30).
[69] See e.g. *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC and *R v Ministry of Defence, ex p. Smith* [1996] QB 517.
[70] *Belhaj* (n 65) [42] (Lord Lloyd-Jones).
[71] R *(Sarkandi) v Secretary of State for Foreign and Commonwealth Affairs* [2016] 3 All ER 837.
[72] *Belhaj* (n 65) [14] (Lord Sumption.
[73] ibid.

least in the context of JSA 2013, there is *no reason* to adopt a narrow construction.

Secondly, the majority invoked the *Barras* principle[74] to hold that the meaning of 'criminal cause or matter' should be interpreted consistently across statutory contexts. As indicated by Lord Lloyd-Jones in his dissent, this approach assumes that the rationale for the exclusion of criminal proceedings from the JSA is 'readily applicable or transposable' to other types of challenges.[75] Lord Lloyd-Jones' disagreement with this assumption and insistence that the meaning of a 'criminal cause or matter' may be interpreted differently depending on its statutory context[76] betrays a deeper interpretative difference. The majority located the rationale behind the JSA's civil/criminal differentiation in the consideration that whereas in criminal proceedings:

> 'the state can as a last resort avoid disclosure by withdrawing the prosecution … in civil claims, where the government is a defendant, there is no possibility of withdrawal'[77]

and therefore the absence of CMPs would either complicate the government's defence or render the case un-triable.[78] In contrast, Lord Lloyd-Jones considered that the exclusion of criminal proceedings was intended as a safeguard *for the excluded party*. In

[74] *Barras v Aberdeen Sea Trawling & Fishing Co. Ltd* [1933] AC 402.
[75] *Belhaj* (n 65) [56] (Lord Lloyd-Jones).
[76] ibid at [51].
[77] *Belhaj* (n 65) [22] (Lord Sumption).
[78] *Belhaj* (n 65) [28] (Lord Mance).

Belhaj, the court was determining the legality of the conduct of the decision-maker, who was not excluded from the proceedings: therefore, the safeguarding rationale was not cross-applicable,[79] and a CMP was permissible.

Despite the refusal to permit the closed procedure, the majority approach thus *does* 'normalise' CMPs. The emphasis on interpreting the JSA consistently with other statutes – which *do not* concern closed procedures - does not treat the JSA 2013's statutory context as 'exceptional', but seeks to absorb CMPs into the wider interpretative frame.[80] The majority's reasoning carries the implicit suggestion that as a 'defendant', the government is to be treated as an individual would, an equivalency that seems questionable in light of the informational asymmetry between the state and the individual. Notably, the Supreme Court's 2020 decision in *Re McGuiness*[81] seems more cognisant of the need to confine security-related decisions to their own context, with the leading judgment of Lord Mance (who also sat in *Belhaj*) advising caution in relying on *Belhaj* to determine the meaning of 'criminal cause or matter' in other frameworks.[82] In *Belhaj*, a failure to appreciate this distinction led the court to *reduce* the degree of scrutiny of governmental decision-making. As argued by Laird,[83] whether such a result was intended by the Parliament must surely be open to doubt.

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[79] *Belhaj* (n 65) [57] (Lord Lloyd-Jones).
[80] K Laird, 'Judicial review: Belhaj v DPP Supreme Court: Baroness Hale P, Lords Mance, Wilson, Sumption and Lloyd-Jones SCJJ: 4 July 2018; [2018] UKSC 33' Crim. LR. 2018 (12) 1012, 1015.
[81] *Re McGuiness* [2020] UKSC 6.
[82] *Re McGuiness* (n 81) at [24] (Lord Mance).
[83] Laird (n 80), 1015.

III. Family proceedings and national security-based CMPs

A potential weakness of using the JSA 2013 cases as evidence of 'normalisation' of CMPs lies in JSA being a specific legislative response to the *Al Rawi* refusal to extend the availability of public interest-related CMPs at common law – a consideration to which, as seen above, the courts are particularly attentive to. However, that explanation is not cross-applicable to contexts where no similar statutory schemes exist. For this reason, the following section will examine the evolution of judicial approach to the CMPs in a context far removed from the control orders-adjacent regulatory regimes: namely, family law proceedings.

Family proceedings are of particular interest in assessing the 'normalisation' of CMPs, as although the use of closed procedures in the family law context is 'very rare indeed',[84] wardship proceedings are one of the 'obvious'[85] contexts in which the use of closed procedures (including procedures employing special advocates)[86] *is* 'normalised'.[87] However, in stark contrast from the JSA 2013-*Al-Rawi* employment of CMPs to protect the state interest in secrecy, the main rationale for reliance on closed

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[84] D Burrows, *Privilege, privacy and confidentiality in family proceedings,* (Bloomsbury Professional, 2019), 289

[85] *Al Rawi* (n 3) [63] (Lord Dyson).

[86] Blackbourn, 'Closed material procedures in the radicalisation cases' 2020 CFLQ 32 (4), 14. Blackbourn refers to *Re T (Wardship): Impact of Police Intelligence* [2009] EWHC 2440 (Fam) and *Chief Constable and another v YK and others* [2010] EWHC 2438 (Fam).

[87] ibid.

procedures in family proceedings is the protection of the interests of *the child*:[88] 'where the interests of the child are served, so are the interests of justice'.[89] For this reason, family law CMPs provide an instructive point of comparison, highlighting the key difference between the 'controversial' and 'obvious' uses of CMPs - namely, that of *whose* interest is protected.

Given the distinct rationales for resort to CMPs in national security-related and family proceedings and the *Al Rawi* rejection of common law-based CMPs protecting *state* interests, one would perhaps expect the courts to keep the categories separate. Nevertheless, as seen in *Re XY and Z,*[90] there are signs of cross-contamination. Although *Re XY and Z* was a wardship case, during the course of the proceedings, a question arose of disclosing one of the mother's statements to the CPS and Security Service for prosecution purposes. While discussing the arrangements for the *future* variation of such a permission to disclose, MacDonald J referred to the possibility of employing 'some species of closed procedure involving … special advocates'[91] to determine the application, recognising that

> '[T]here *may* remain an argument to be had as to whether the use of some species of closed procedure in the Family Court is permissible absent express statutory provision for the same, or in family proceedings in the High Court pursuant to the Justice and Security Act 2013 absent any

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[88] Burrows (n 84), 294.
[89] *Al Rawi* (n 3) [63] (Lord Dyson).
[90] *Re XY and Z (Disclosure to the Security Service)* [2016] EWHC 2400 (Fam).
[91] ibid [91].

> rules of procedure governing the same having been promulgated'.[92] (emphasis original).

The main source of difficulty for MacDonald J seems to have rested in identifying the legal basis of the CMP.[93] This concern is well-founded. As noted in the Ouseley Report, as family proceedings are a type of civil proceedings, post-JSA 2013 the precise ground of the Family Court's ability to order a closed material procedure is unclear.[94] Blackbourn suggests that as s 6(11) JSA 2013 does not expressly name the Family Court and there is no provision for closed material procedures in Family Procedure Rules,[95] s 6 applications cannot be filed in family proceedings.[96] On the other hand, High Court (before which certain types of family proceedings can also be brought) *is* included in the JSA,[97] and a s 6 declaration has been sought and approved in family proceedings at least once, in the 2016 proceedings in *Re H*.[98]

The use of JSA 2013 in *Re H* seems anomalous, in that although there is no reason in principle why a scheme similar to the JSA should not operate where security concerns arise in children's proceedings,[99] it is exceedingly unlikely that the

[92] ibid [95].
[93] ibid [89].
[94] Ouseley Report (n 34), 39.
[95] ibid.
[96] Blackbourn, (n 86), 12.
[97] Special Advocates' Submission to JSA Review pursuant to section 13 (8 June 2021), <https://ukhumanrightsblog.com/wp-content/uploads/2021/06/THE-OUSELEY-REVIEW-SAs-Submission-FINAL.pdf> accessed 8 May 2023, 39.
[98] Special Advocates' submission to Ouseley Report (n 98), 39.
[99] Burrows (n 84), p.295.

Parliament addressed its mind to family proceedings while enacting the JSA itself. The inclusion of the High Court, but not the Family Court, would give rise to an unexplained difference between the procedure available in the same set of proceedings. The conclusion that such a distinction was not intended is strengthened by the absence of any provision for procedural rules - as noted in the Ouseley Report, if the JSA *is* to be applicable to family proceedings,[100] the failure to promulgate adjustments to Family Procedure Rules would constitute a long-standing breach of statutory duty.[101] Further, the impact of *Re H* is difficult to assess: the judgment is wholly confidential, little is known about the procedure adopted by the parties,[102] and the proceedings were eventually settled.[103]

Nevertheless, the question of the application of the JSA to family proceedings goes to the heart of the present discussion, as the object of the JSA is the protection of *national security*. As highlighted by Blackbourn, although undoubtedly relevant insofar as the decision to prosecute the mother is concerned, 'it is difficult to see how the best interests of the child might be a factor in a decision to grant onwards disclosure' of the information.[104] MacDonald J's own reasoning was that although 'it is plainly in the interest of children generally that suspected terrorist activity is investigated',[105] further onwards disclosure may adversely impact the child due to the information entering

[100] A matter on which Ouseley J expressed no view: Ouseley Report (n 41), 48.
[101] Ouseley Report (n 34), 49.
[102] ibid, 46.
[103] Special Advocates' submission to Ouseley Report (n 98), Annex, 4.
[104] Blackbourn, (n 86), 18-19.
[105] *XY* (n 90) [62].

the wider public domain.[106] Nevertheless, it is suggested that this consideration notwithstanding, MacDonald J's judgment implicitly adopts *the general public interest* as part of the rationale for the adoption of a CMP. This is so as the use of a CMP was framed in terms of the need to protect information about *the Secret Service's* activities *from the parties* – if the court's concern about onwards disclosure pertained *solely* to the disclosure into the public domain, there would be no need to exclude the parties.[107] The interchangeable treatment of the JSA and the Family Court's inherent jurisdiction in *Re XY and Z* as bases for the closed procedure also points to national security being the relevant interest. The (prospective) use of a CMP in *Re XY and Z* thus risks circumventing *Al Rawi* by the back-door - although *Re XY and Z* is a wardship case, the rationale for relying on a CMP was not strictly connected to the wardship aspect of the proceedings. Nevertheless, despite the uncertain legal basis, the Court was ready to employ this 'existing, well established procedure'[108] to deal with allegedly sensitive security information: the very essence of 'normalisation' as defined by Nanopolous.

B. Beyond national security?

As visible in *XY and Z,* the category of *what* can amount to 'sensitive information' is relatively open-ended. As described by Lord Neuberger in *Bank Mellat*, a CMP protects 'the production of material which is *so confidential and sensitive* that it requires the court not only to sit in private, but to sit in a closed hearing' (own

[106] ibid [65].
[107] ibid [90] –[91].
[108] ibid [91].

emphasis). Following this line of thought, so long as the sensitivity of the information is the primary concern, there is no reason CMPs should be relevant *only* in the context of national security. As will be discussed in the following section, the courts are increasingly cognisant of the arbitrariness of this restriction – and, as seen in the example of the Supreme Court decision in *Haralambous,* increasingly willing to overcome it.

The central object of *Haralambous* were the magistrates' powers to (i) issue search warrants and seize property under s 8 of the Police and Criminal Evidence Act 1984 ('PACE') and (ii) order the retention of unlawfully seized evidence under s 59 of the Criminal Justice and Police Act 2001 ('CJPA') in *ex parte* proceedings. Two closed s 8 orders were made in respect of addresses allegedly occupied by Mr Haralambous, who sought disclosure of the evidence upon which the orders were based.[109] Following a refusal to order full disclosure, Mr Haralambous brought judicial review proceedings challenging the decision of the Magistrates' Court, at which point the problem arose: whereas s 8 PACE authorised magistrates' courts to consider evidence not disclosable to the subject of the warrant, the same authorisation was not extended to either the Crown Court (for the purposes of s 59 CJPA) or the High Court (to which an application for judicial review could be made). The JSA 2013 could not apply, as the proceedings were criminal in nature and, crucially for the present purposes, disclosure would not be damaging to the interests of national security.[110] The aspect of the public interest in keeping sensitive information confidential at play was the prevention of crime and disorder. The question was thus whether, given that

[109] *Haralambous* (n 11) [6]-[9] (Lord Mance).
[110] ibid [11].

the statute permitted the *creation* of closed material, courts other than the Magistrates' Court were entitled to adopt a closed procedure permitting Mr Haralamous to challenge it.[111]

In the unanimous judgment delivered by Lord Mance, the Court considered that despite the lack of statutory authorisation, such courts were indeed able to review the lawfulness of the decision to grant a warrant. In doing so, it seemingly overruled[112] the earlier High Court decision in *Competition and Markets Authority v Concordia International RX (UK) Ltd*,[113] in which Marcus Smith J held that *Al Rawi* precluded the adoption of a closed procedure in reviewing search warrants issued under s 28 of the Competition Act 1998, which largely parallels s 8 PACE. Lord Mance held that the statutory schemes of PACE and CJPA must have been intended to be coherent, and hence the Parliament must be taken to have contemplated that the Crown Court would be able to operate a closed procedure when assessing a s 59 application.[114] Importantly, this conclusion was drawn in reliance on *Bank Mellat*, which Lord Mance considered to present an 'analogy' to the PACE-CJPA interaction and to be 'compar[able] with' the question of judicial review in High Court.[115] Indeed, *Bank Mellat* loomed large in *Haralambous*, with Lord Mance considering that

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[111] M Chamberlain, 'National Security, Closed Material Procedures, and Fair Trial' in Andrew Higgins (ed.) *The Civil Procedure Rules at 20* (OUP 2020), 85.
[112] ibid [24].
[113] [2017] EWHC 2911 (Ch).
[114] *Harambulous* (n 11) [41] (Lord Mance).
[115] ibid [42], [54].

> 'many of the considerations which were of weight in *Bank Mellat* on an appeal from lower courts conducting closed material procedures are also of weight in relation to judicial review of lower courts conducting such procedures.'[116]

The similarity was taken to lie in the consideration that 'it would be self-evidently unsatisfactory, and productive potentially of injustice and absurdity'[117] if the High Court considered the matter on a different basis from the lower courts. *Al Rawi* was distinguished on the basis of the Court in that case 'not directing its attention to this very special situation'; *per* Lord Mance, had done so, it would see a 'a similarity between this situation and the two exceptions which it did identify'.[118]

However, as argued by Lock, the reasoning employed to reach that conclusion is 'conspicuously underdeveloped',[119] in that 'the Court gives little consideration to the public interest in settling clear limits to the CMP regime'.[120] Although in a sense *Haralambous* is simply another case resulting from drafting oversights in specifying the courts permitted to adopt CMPs, in a stark contrast to cases from the *Al-Rawi* and *Bank Mellat* era, the factors *against* extension are not addressed in detail,[121] and the desirability of the use of CMPs in circumstances where otherwise the claim would be struck out is taken as a given in light of the

[116] ibid [57].
[117] ibid.
[118] ibid [59].
[119] D Lock, 'A New Chapter in the Normalisation of Closed Material Procedures' (2020) 83(1) MLR 202, 203.
[120] ibid 203.
[121] ibid 211.

need to 'maintain the coherence' of the statutory scheme. This was so even though the facts of *Haralambous* concerned intrusive police investigation which could ultimately culminate in a criminal charge, and the closed procedure adopted within the courts' inherent jurisdiction does not possess procedural protections equivalent to those present in the JSA.[122] Lock's accusation that *Haralambous* results in the creation of 'a non-statutory CMP regime within a less urgent, non-national security context', signalling a new direction for the Supreme Court by displaying a 'more openly supportive' attitude to CMPs[123] seems fairly well-justified: gone is the language of 'phantom hearings', substituted by references to the alternatives to closed hearings risking 'depriving judicial review of any real teeth'.[124]

Further, *Haralambous* is unlikely to constitute the last word in the expansion of closed procedures *beyond* the national security context. Irwin J's pre-*Haralambous* discussion of the relationship between PII certificates and CMPs in *CF* usefully highlights that national security concerns are usually *tied* to concerns about other aspects of the public interest, with the procedural differences risking prospective clashes:

> 'in restricting the ambit of the JSA 2013 to material affecting national security, excluding material where PII may be sought on other

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[122] C Montgomery, 'Case Comment: R (Haralambous) v Crown Court at St Albans [2018] UKSC' UKSC Blog 02 February 2018, <http://ukscblog.com/case-comment-r-haralambous-v-crown-court-at-st-albans-2018-uksc-1/>, accessed 22 Dec 2022.
[123] Lock (n 119), 213.
[124] *Haralambous* (n 11) [52] (Lord Mance).

> grounds, Parliament has created problematic anomalies … if a declaration [for material under a PII to be excluded on non-security grounds, such as damage to international relations] is followed by permission for a CMP, material which would have been excluded under a PII application on the (usually) more serious and pressing ground of potential damage to national security will be seen and assessed by the court; material excluded on the ground of potential damage to international relations cannot be considered either in the open proceedings or within the CMP'.[125]

This concern is well-founded. As noted by Chamberlain, although the JSA applies to a wide range of proceedings, the *information* in respect of which it authorises the adoption of CMPs is rather narrow - most statutory CMP regimes define the criterion of sensitive information more broadly, as including the conduct of international relations and the prevention of crime and disorder.[126] Should a case arise in which the material favouring the individuals pertained to (for example) *both* international relations and national security, the court seemingly would have to choose between excluding it under the PII or admitting it in evidence under a non-statutory CMP.[127] Prior to the March 2023 decision in *Ramoon,*[128] discussed in more detail in the Appendix,

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[125] *CF* (n 28), [56].
[126] Chamberlain (n 111), 83
[127] *CF* (n 28) [58].
[128] *Justin Ramoon v Governor of the Cayman Islands* [2023] UKPC 9.

the probability of the courts refusing an invitation to adopt a closed procedure in such a case was not at all certain.

3. Closed Proceedings, but Proceedings Nonetheless?

CMPs unequestionably constitute a departure from the principles of natural justice forming the bedrock of English administrative law. Nevertheless, 25 years after their introduction to UK courtrooms and 10 years after the passing of the JSA 2013, there are clear signs of 'normalisation' of CMPs as a solution to security-fairness dilemmas, with indications of transposition into other areas of public interest concerns. The last section of this article proposes a possible explanation for this phenomenon, arguing that CMPs play into a wider tendency[129] of the courts to assert their jurisdiction in traditionally off-limits areas.

To set the stage for this argument, the discussion must return to the comparison drawn between family law and the public interest uses of CMPs. As outlined by Lord Devlin in *Re K* (*Infants*),[130] a family non-disclosure case, the judge usually sits as an arbiter between two parties, and relies on the parties for information. For this reason, the right to effective challenge is of paramount importance, as it ensures the information will be

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[129] On the topic of the changes in the courts' approach to the protection of national security, see the excellent discussion of Woods, McNamara and Townend, 'Executive Accountability and National Security' 2021 MLR 84(3), 553

[130] *Re K* (*Infants*) [1965] AC 201, 240G-241A (Lord Devlin).

tested. However, in some cases, the judge is *not* sitting 'purely, or even primarily, as an arbiter, but is charged with the paramount duty of protecting the interests of *one outside the conflict'* – and a rule 'designed for just *arbitrament* cannot in all circumstances prevail' (emphasis added). In *Re K* itself, the interest of the parties locked in conflict was thus trumped for the need to protect the child. In contrast to children, however, in disclosure challenges, the state plays a dual role. It is both 'the one outside the conflict' – the ultimate guarantor of recognised forms of social co-existence, including the legal system itself - and a party *to* the conflict, as it is state actions that impinge on individual rights. The court thus faces a dilemma. As an arbiter, it should insist on only examining tested evidence; as part of the state's machinery tasked with upholding the social order, it must protect the state's continued existence, including by refusing to order disclosure of potentially damaging information.

Historically, this dilemma was resolved by prioritising the state's role as the facilitator of societal co-existence. Exercising their competency as masters of own procedure,[131] the courts deemed the traditionally most sensitive areas - issues of national security, defence, diplomacy and prevention of crime and disorder – non-justiciable,[132] leaving issues arising therein for political decision.[133] Further, governmental claims to secrecy were readily acceded-to under the doctrine of Crown privilege - writing

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[131] *Roberts* (n 27) [44] (Woolf CJ).
[132] See e.g. the judgment of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[133] S Weill, Reducing the Security Gap through National Courts: Targeted Killings as a Case Study, Journal of Conflict and Security Law 21(1) 49, 52

in 1965, Williams lamented the tendency of the English judiciary to 'look favourably upon arguments based on public interest' and adopt a 'self-denying ordinance' even when not forced to do so by express provision.[134] With the advent of a more rights-led approach in the late 20th century, the status quo shifted: the courts began to expand the law's reach over state action.[135] Decisisions such as *CCSU*[136] rendered the scope of non-justiciability doctrines and extra-legal governmental decision-making ever narower.[137] Nevertheless, the dilemma remained: although the individual could now challenge the government in a wide range of circumstances, the wider public interest still had to be accounted for, leaving the applicant to face pronounced evidential hurdles. As seen in *Carnduff v Rock,*[138] the reliance on the PII regime may lead to evidence being so one-sided the case cannot be tried at all,[139] leading to the claim being struck out. Further, even if a partial disclosure was made, the claimant would still face the task of rebutting the *Rossminster*[140] presumption of decisions being made in a lawful manner - an eminently difficult task in light

[134] D Williams, *Not in the Public Interest: The Problem of Security in Democracy* (Hutchinson, 1965), 187, 194.
[135] H P Lee, P Hanks, and V Morabito, *In the Name of National Security: The Legal Dimensions* (LBC, 1995), 11.
[136] *CCSU* (n 132).
[137] D Dyzenhaus and M Hunt, 'Deference, Security, and Human Rights' in B Goold and L Lazarus (eds.) *Security and Human Rights* (Hart 2007), 133.
[138] [2001] WLR 1786
[139] Chamberlain (n 111), 86.
[140] *R v Inland Revenue Commissioners and others, ex parte Rossminster Ltd* (CA) [1980] AC 952.

of the *AHK*[141] refusal to assume that *no* other evidence than that disclosed exists.

It is suggested that against this background, the advent of CMPs may have presented the courts with a perceived opportunity to redress the unfairness of this strike-out dilemma: at the cost of subjecting the excluded party to the 'Kafkaesque situation' of not knowing the case against them,[142] CMPs allow judicial scrutiny of government action *without* creating a threat to the public interest. At a cost to the proceedings' adversarial nature, reliance on CMPs promises to 'save' the justiciability of cases touching upon public interest issues - as Chamberlain notes, *AHK, Haralambous,* and R. *(on the application of Campaign Against Arms Trade) v Secretary of State for International Trade* [143] would automatically fail had the CMP not been available.[144] The weight paid to allowing claims to proceed is visible in Lord Mance's *Haralambous* remarks[145] about the 'unattractive result' of *Rossminster* 'depriving judicial review of any real teeth' in comparison with closed procedures. Similar concerns are also evident in Popplewell J's Divisional Court judgment in *Straw*,[146] holding that the effect of the JSA is 'that the executive … can be held to account by judicial process', and Irwin J's decision in *CF,* who indicated that 'a court which remained in ignorance of [the closed material] would operate in the dark'.[147] Most recently, in

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[141] *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin).
[142] *Roberts* (n 27) [95] (Lord Steyn).
[143] [2017] EWHC 1754 (Admin).
[144] Chamberlain, (n 111) 86-7.
[145] *Haralambous* (n 11) [52] (Lord Mance).
[146] *Straw* (n 45)[60].
[147] *CF* (n 33) [43] (Irwin J).

the Ouseley Report, Ouseley J commented that the availability of CMPs '*at least* permit[s] judicial evaluation of the material',[148] and the JSA

> 'substitutes *something closer … to normal litigation* for the random outcomes of strike out, or inevitable failure or success because the defendants were disabled from evidencing their defence.[149] (emphasis added)

CMPs are thus the polar opposite of the traditional objects of judicial hostility, far-ranging ouster clauses of the type recently seen in *Privacy International,* expanding rather than reducing scope of review.[150] The ultimate question, which the present article does not seek to answer, is thus whether this provision of judicial review with metaphorical 'teeth' does not come at too steep a price in terms of the excluded party's rights – and the corruption of the nature of judicial process itself.

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[148] Ouseley Report, (n 41), 9

[149] Ouseley Report, (n 41), 112.

[150] R *(Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

Conclusion

As noted by Woods, McNamara and Townend, the reason why closed procedures require 'extraordinary degrees of trust in the executive and judicial branches' is the secrecy which shrouds their use.[151] The preceding discussion has argued that the concerns about procedures introduced in exceptional circumstances becoming 'routine'[152] have been proved at least partly correct. Although in the grand scheme of things, CMPs have not been extended to a significantly wider range of proceedings than those authorised by statute, the open judgments on the use of closed procedures in the post-JSA era show a rhetorical shift from outright hostility to signs of acceptance, evidenced by the employment of a less cautionary tone and a rather run-of-the-mill interpretative approach. It is not claimed that this conclusion is necessarily ground-breaking: the risk of a progressive 'normalisation' of closed procedures is a 'well-worn tale',[153] which the present discussion only attempted to prove on the facts. Nevertheless, as argued in the last section, a possible explanation for the 'normalisation' lies in the manner in which, by distorting the adversarial balance of the proceedings, closed procedures 'normalise' review of governmental action, promising to reduce the number of areas beyond the reach of law.

[151] Woods, McNamara and Townend (n 129), 569.
[152] *Al Rawi* (n 3) [69] (Lord Dyson).
[153] Lock, (n 119), 210.

Appendix

On March 3rd 2023, after the substance of the preceding discussion had been finalised, the Judicial Committee of the Privy Council handed down an important decision in *Ramoon*.[154] The following note seeks to distil the key implications of the decision for the argument developed in the previous sections.

A. The facts of *Ramoon*

There is no statutory basis for CMPs in the Cayman Islands.[155] Nevertheless, the appellant in *Ramoon,* allegedly a '"senior and influential member" of a criminal gang',[156] applied for the adoption of a common law-based CMP in judicial proceedings concerning the Governor's decision to order his transfer to a higher-security prison in the United Kingdom.[157] The Court of Appeal of the Cayman Islands granted the application, holding that 'alternatives to a CMP were unsatisfactory' and that 'the rights of the appellant … could only be justly and fairly vindicated by an effective judicial review … which *is not possible* without a CMP' (emphasis added), for which reason the Grand Court of the Cayman Islands was found to possess jurisdiction to grant a CMP.[158] This judgment was appealed to the Judicial Committee of the Privy Council.

[154] *Ramoon* (n 128).
[155] ibid [34].
[156] ibid [13].
[157] ibid [23].
[158] ibid [29].

B. The Decision

The advice of the Board, delivered by Lord Lloyd-Jones, marks a significant change from the more 'normalising' language adopted by UKSC in *Harambulous* and *Belhaj*. The change in focus is immediately evident from the account of the authorities in *Ramoon*, referring to *Al Rawi* arguments against the possibility of adoption of 'common law' CMPs at some length[159] and highlighting the 'real misgivings' and 'grave reservations' expressed by the majority in *Bank Mellat* regarding the adoption of a CMP.[160] At [48], the decision makes clear that *Harambulous* is to be considered as 'closely analogous' to *Bank Mellat,* with both judgments constituting a 'limited encroachment on the principle stated in *Al Rawi* depend[ent] on Parliament having expressly established a statutory scheme whereby lower courts are authorised to follow a CMP', with 'neither case support[ing] any greater inroad' into the *Al Rawi* principle.

Most importantly for the present purposes, the counsel for the appellant expressly attempted to rely on the 'unfairness of strike-outs' argument discussed in the main body of the article, in reliance on (amongst others) Ouseley J's *dicta* in *AHK.*[161] This attempt did not find much favour with the Board. It was firstly indicated that the CMP-strike-out dichotomy did not accurately

[159] ibid [35] – [42].
[160] ibid [44].
[161] ibid [50].

represent the options available to the lower courts[162] - the proceedings would not be struck out in absence of a CMP, and true *Carnduff*-type cases are 'likely to be exceptional and rare'.[163] Secondly and more fundamentally, it was made clear that 'in the Board's view the course followed by the Court of Appeal … *was not open to it'* (own emphasis). Even if, as an UKSC decision, *Al Rawi* was not binding on the UKPC, it nevertheless 'possesses the authority of a decision of a Supreme Court comprising eight justices' and 'the Board finds the reasoning of Lord Dyson *compelling*' (emphasis added). The invention of a CMP for the Cayman Islands would not be incremental development: it would be 'a major change involving an inroad into fundamental common law rights' and therefore a decision for the legislature.

C. Turning the tide of normalisation?

The appeal was allowed on the CMP issue, with the Board's discussion concluding with the succinct observation that

> 'the Court of Appeal here overlooked the essential reasoning of *Al Rawi* that a CMP, unlike the law relating to PII, necessarily involves a departure from the principles of open justice and natural justice, principles which are fundamental to the right to a fair trial.'[164]

There are two points of note. First, the approach to CMPs adopted by the Cayman Islands Court of Appeal constituted a

[162] ibid [51].
[163] ibid [55].
[164] ibid [52].

prime example of 'normalisation' discussed in the main body of the article: CMPs increased the effectiveness of judicial review, and therefore were to be adopted. Second, the UKPC empathically disagreed with this conclusion. The emphasis on the importance of the protection of the claimant's right to a fair trial clearly underpinning the analysis in *Ramoon* is a notable change of rhetoric from the Court's previous decisions. *Al Rawi* and the warnings against CMP expansion contained therein have seemingly regained their previous prominence. Lord Lloyd-Jones, dissenting in *Belhaj*, is now the voice of the Board. In light of the importance of the interests at stake, decisions on the expansion of the availability of CMPs are for the legislature – and, given *Ramoon* entertaining the possibility of the 'strike-out unfairness' risk being relevant in 'exceptional' circumstances, the apex court itself. Closed proceedings are *not* to be treated as a readily-available tool for resolving the security-fairness tension, a strategy seemingly adopted by the Cayman Islands Court of Appeal. The cost to the procedural rights of the excluded party, innate in the procedure itself, precludes such a casual approach: the damage inflicted to the principles of natural justice is *not* to be overlooked.

It remains to be seen whether Lord Lloyd-Jones' lead in reasserting the primacy of careful, rights-focused language in regards to CMPs is followed in future decisions. For now, however, *Ramoon* constitutes an important (if non-binding) appellate warning to lower courts overeager to rely on CMPs: the slow creep of complacency is to be resisted.[165]

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[165] *AF* [84] (Lord Hope).