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The Use of Secret Evidence in Judicial Proceedings: A Comparative Survey

Research Paper prepared for the Joint Committee on Human Rights

October 2011

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In addition, the research co-ordinators would like to acknowledge the assistance of and thank the following individuals:

- Professor Timothy Endicott, Dean of the Oxford Law Faculty, for his support of the project, and John Cartwright, Acting Dean of the Law Faculty;
- Executive Members of the Oxford Pro Bono Publico Committee, Professor Sandra Fredman, Dr Tarunabh Khaitan, Dr Jane Donoghue, Dr Jeff King, Laura Hilly, Lawrence Hill-Cawthorne and Dhvani Mehta, for their support and assistance with the project.

EXECUTIVE SUMMARY

Secret evidence, or evidence that is relied upon by the court without disclosure to one of the parties, has been used with increasing frequency in the United Kingdom over the past decade. In January 2010 the Rt Hon David Hanson MP indicated that there were at least 21 different contexts in which the Government was ‘aware’ that special advocates and secret evidence have been ‘or may be used’. Less prevalent, however, are thorough understandings of how this practice impacts upon fundamental human rights. Equally troubling, is that the full extent of this practice still remains unclear. The rapid rise of the use of secret evidence over recent years is not only a concern in itself. It is also being used in different procedures which risks a fragmented and ad-hoc approach. The Government Green Paper on Justice and Security,¹ published on 19 October 2011, focuses on the use and deployment of sensitive material in judicial proceedings. This Research Paper is intended to assist the Joint Committee on Human Rights (JCHR) in its scrutiny of this Green Paper.

The Government says that in developing the proposals in the Green Paper it has surveyed a range of international practice and given full and careful consideration to the experience and approaches of other Governments to addressing the challenge of handling sensitive material in judicial proceedings, with a view to learning from that experience.² This Research Paper aims to provide a more detailed comparative perspective on how secret evidence is treated across various jurisdictions, to enable the JCHR to survey the different ways in which such evidence is used, and the human rights implications that arise from these uses. The paper compares the position in the United Kingdom with the European Convention on Human Rights, Canada, the United States of America and, to a lesser extent, Australia.

Each comparative jurisdiction navigates a variety of legal instruments to direct and dictate the application of secret evidence. Section 1 of the report examines these in some depth. For ease of reference, a table listing the most important guiding norms and rules is provided below.

¹ *Justice and Security*, Cm 8194 (October 2011).

² Appendix J of the Green Paper (Use of sensitive information in judicial proceedings: international comparisons).

Table 1: Norms and Rules on Secret Evidence

Jurisdiction	Instrument	Page
European Court of Human Rights	<ul style="list-style-type: none"> • Article 2 (right to life) • Article 5 (right to liberty and security of person) • Article 6 (the right to fair trial and right of access to a court) • Article 8 (the right to respect for private and family life) 	2
United States	<ul style="list-style-type: none"> • Fifth Amendment of the US Constitution (provisions concerning prosecution) • Sixth Amendment of the US Constitution (right to a speedy trial; witnesses) • Fourteenth Amendment of the US Constitution (due process and citizens rights) 	6
Canada	<ul style="list-style-type: none"> • Section 7 of the Canadian Charter of Rights and Freedoms (right to life, liberty, and security of person except in accordance with principles of fundamental justice) • Section 11(d) of the Canadian Charter (presumption of innocence until proven guilty) • Canada Evidence Act • Immigration and Refugee Protection Act • Canadian Security Intelligence Service Act 	7
Australia	<ul style="list-style-type: none"> • No national human rights instrument, but dictated by the right to procedural fairness • National Security Information Legislation Amendment Act 2005 (NSIA) • NSIA Section 31(8) and 31(7) (requiring judge or magistrate to give ‘greatest weight’ to interests of national security when deciding to disclose information) 	9

Though secret evidence may well have myriad applications, most commonly its use has occurred in six categories, national security, civil proceedings, aliens and immigration, public inquiries, security vetting, and covert surveillance. Jurisdictions differ greatly in their approach to each category, and details on these differences are enumerated in the Report. Here, however, we provide a very brief and general overview:

National Security Measures, Criminal Prosecution, and Quasi-Criminal Proceedings

The national security context provides one of the most permissive environments for the use of secret evidence, but not one without limitations. This qualified but unsettled approach reveals ambiguities over whether secret procedures could ever be fair. However, each jurisdiction does seek to balance security concerns with procedural justice to some degree.

In the UK, this takes the shape of the ‘sufficient information’ requirement: where an individual is not given sufficient information to challenge allegations against him, difficulties with secret evidence will arise. The ECtHR similarly looks to ‘counterbalancing’ as a way of guaranteeing fair process and adversarial proceedings. While both jurisdictions accept that the Special Advocate plays a role, the individual in question must still have sufficient information about the allegations he faces in order to effectively instruct his advocate. Canada gives great deference to its judges in ensuring a fair process. This, however, does not foreclose a chance of subsequent disclosure:

where the severity of consequences following state action are high, such as deprivation of life or liberty, information beyond mere summaries may be revealed to a detainee. The United States finds a fair procedure requirement to be satisfied through summaries of classified or withheld information, or a statement admitting relevant facts. Here too the court is tasked with assessing the proper balance. Finally, the Australian context looks to its established common law right to procedural fairness, in lieu of having any other applicable human rights instruments, to dictate whether secret evidence is appropriate. However, this right has been explicitly superseded by national security considerations, with the courts given less leeway to balance the right to a fair trial against competing interests.

General Civil Proceedings

Each jurisdiction expresses concern over whether the use of secret evidence in general civil proceedings could comport with common law principles. The UK Supreme Court has already articulated its desire not to extend exceptions into common law guarantees without compelling reason, particularly with regard to whether a closed procedure can be compatible with natural justice. Canada has extended the use of secret evidence into civil proceedings, but only pursuant to a test assessing the material's relevance, whether it would be injurious to enumerated state interests, and the public interest in disclosure or non-disclosure. The United States similarly looks to courts to balance the interests in using secret evidence in civil proceedings, with little consensus over what should guide these assessments.

Entry, Stay, Deportation and Exclusion of Aliens or Resident Aliens

Because the ECtHR has found that Article 6 is not applicable to issues regarding the entry, stay, and deportation of aliens, these issues have been resolved at common law. As such, the use of secret evidence in this context has not been found to be unfair. However, where a court cannot access the secret material, as in a case under the ECtHR, a breach of rights may be found. Canadian courts have also found the use of secret evidence to violate their Charter, particularly so where the individual has not been informed of the case to be met and given an opportunity to respond. The American context also looks to courts to strike the balance between competing interests, with caution against erroneous deportation. In Australia, the balance weighs heavily in favour of security considerations over procedural fairness in the immigration context.

Public Inquiries

Only the Canadians have experience with secret evidence in public inquiries, and their experience reveals a host of complexities in doing so. The same difficulties present in the criminal, quasi-criminal, and civil contexts translate here. Moreover, national security confidentiality is over-claimed through this process, which leads to the pursuit of inquiry information through court rulings.

Security Clearance and Vetting

Here, perhaps the greatest deference towards government is shown in the jurisdictions examined. Generally, the highly sensitive nature of the security vetting process excuses the use of secret evidence, especially because its disclosure would undermine the entire process. The ECtHR grants significant authority to the bodies that supervise such clearance, and uphold security clearances even when challenged on the grounds of secret evidence. Occasionally, Article 6 may be available to civil servants to challenge these findings. Similarly, Canada entrusts bodies with ensuring procedural fairness through notice of reasons for denial and opportunities to respond. So long as these conditions are met, secret evidence usage here is permissible. The UK has recognized that an individual is entitled to a summary of the material used to assess them, but this right is not absolute. No such right exists in the United States, and applicable precedent is extremely narrowly tailored so as not to provide a rule.

Covert Surveillance

Each examined jurisdiction uses covert surveillance, with few limitations. Though the ECtHR does now hold that Article 6 is applicable to covert surveillance, it simultaneously has found that the UK uses secret evidence procedures compatibly with the requirements of a right to fair trial. Covert surveillance is justified in that context, for the effective operation of intelligence services. The United States enjoys similarly broad license to use covert surveillance, with the Foreign Intelligence Surveillance Court and other renewed PATRIOT Act measures expanding the use of such measures. By contrast, the Supreme Court of Canada has not shied away from scrutiny of covert surveillance, going so far as to order disclosure where a violation of the Charter was found.

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1. INTRODUCTION

A. Overview of Research Paper

This Research Paper is intended to assist the Joint Committee on Human Rights (JCHR) in its scrutiny of the Government Green Paper on Justice and Security, published on 19 October 2011.³ The Government says that in developing the proposals in the Green Paper it has surveyed a range of international practice and given full and careful consideration to the experience and approaches of other Governments to addressing the challenge of handling sensitive material in judicial proceedings, with a view to learning from that experience.⁴ This Research Paper aims to provide a more detailed comparative perspective on how secret evidence is treated across various jurisdictions, to enable the JCHR to survey the different ways in which such evidence is used, and the human rights implications that arise from these uses.

Over the past decade, the use of secret evidence in UK courts has risen dramatically. ‘Secret evidence’ refers to evidence that is introduced by one party, and which is relied upon by the court, but which is not disclosed to the other party.⁵ Various procedures, such as the use of special advocates and closed hearings, have been developed in this context. Now widespread in the UK, these procedures have been adopted across a range of different legal proceedings, but the precise extent of these practices remains unclear. In January 2010 the Rt Hon David Hanson MP indicated that there were at least 21 different contexts in which the Government was ‘aware’ that special advocates have been ‘or may be used’.⁶ While it is difficult to ascertain the precise extent of the use of secret evidence, Appendix A contains a graph based on a Westlaw search of a range of key terms and key legislation. This gives some indication of the frequency with which secret evidence has been used since 1999. The rapid rise of the use of secret evidence over recent years is not only a concern in itself. It is also being used in different procedures which risks a fragmented and ad-hoc approach, suggesting there is a need for a holistic and comparative framework.

The use of secret evidence presents challenges to the UK’s long-standing human rights obligations. In particular, secret evidence raises difficulties in terms of the right to a fair hearing, including both the right to be heard and the right of confrontation. These requirements of a fair trial are fundamental parts of the adversarial system of justice. While today their protection lies in the provisions of the European Convention on Human

³ *Justice and Security*, Cm 8194 (October 2011).

⁴ Appendix J of the Green Paper (Use of sensitive information in judicial proceedings: international comparisons).

⁵ Eric Metcalfe, *Secret Evidence* (JUSTICE 2009) 9.

⁶ Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (Ninth Report of Session 2009-2010) written evidence 50-51.

Rights (ECHR), their pedigree is in fact much older and has long been recognized as fundamental by the common law.⁷

The focus of the paper is predominantly on case law that has developed on the use of secret evidence in comparative jurisdictions, namely the European Court of Human Rights (ECtHR), the United States and Canada. Where relevant examples from Australia have also been included, although with less depth (partly due to the absence of a federal Bill of Rights in Australia). The Introduction contains a brief overview of the relevant legal framework in the comparative jurisdictions under consideration. The details of how each jurisdiction has approached the use of secret evidence are then examined in relation to seven different contexts:

- National Security Measures, Criminal Prosecution, and Quasi-Criminal Proceedings
- General Civil Proceedings
- Entry, Stay, Deportation and Exclusion of Aliens or Resident Aliens
- Public Inquiries
- Security Clearance and Vetting
- Covert Surveillance

B. Relevant Legal Framework in Comparative Jurisdictions

(i) European Convention on Human Rights

The main provisions of the ECHR that are relevant to secret evidence are Article 6 (the right to fair trial and the right of access to a court) and Article 8 (the right to respect for private and family life). Complaints of breach of Article 8 are often brought in conjunction with Article 13 (the Right to an Effective Remedy). In general terms, Article 6 permits less secrecy than Article 8 because Article 6 is an absolute right, meaning that national security does not amount to a general justification for reducing its protections. By contrast, Article 8 is a ‘qualified right’, which explicitly permits national security to be balanced against the right to respect for private and family life. Nevertheless, a number of ECtHR decisions have used Article 8 to impugn the use of secret material.⁸ Article 5 of the ECHR (the right to liberty and security) is also relevant on the basis that the ECtHR considers that this article incorporates many of the protections of Article 6. There are also procedural expectations of transparency and openness which are inherent to the investigative duty under Article 2 of the Convention (the right to life).⁹

Article 6 and Article 8 concerns will arise in a variety of situations. However, particular care needs to be taken when considering older judgments of the ECtHR relating to civil servants, as previously the ECtHR tended to consider disputes concerning civil servants

⁷ *Al Rawi v Security Service* [2011] UKSC 34, [2011] 3 WLR 388.

⁸ *Leander v Sweden* (1987) 9 EHRR 433; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214; *Gaskin v United Kingdom* (1989) 12 EHRR 36, see further sub-section (b) below.

⁹ *Jordan v UK* (App no 24746/94).

as falling outside the scope of Article 6.¹⁰ Two recent Grand Chamber judgments in Pellegrin¹¹ and Eskelinen¹² have changed the position so that it is now much easier for a civil servant to complain of a breach of Article 6. Similarly, care should be taken with regard to decisions relating to the entry, stay, and deportation of aliens. This is because the ECtHR in Maaouia¹³ ruled that such decisions fall outside Article 6. As such, judgments of the ECtHR in these cases will provide no guidance as to the interpretation of Article 6 in other contexts.

In times of ‘public emergency threatening the life of the nation,’ a state may derogate from certain articles including Articles 5, 6, 8 and 13 if the conditions set out in Article 15 of the ECHR are met.

(a) Article 6 - the Right to Fair Trial

Under Article 6 of the ECHR, national security may justify the use of secret evidence in circumstances, such as (1) where a state restricts the right of access to a court in the interests of national security, and (2) where the individual fair trial protections of Article 6 are modified for reasons of national security. The tests in relation to each are different.

In *Golder v UK*, the ECtHR confirmed that Article 6 includes an implied ‘right of access’ to a court.¹⁴ At the time, prison rules forbade contact between a prisoner and a legal advisor unless this was authorised by a prison governor. Golder, a prisoner, had been denied permission to consult a solicitor by his prison governor. The ECtHR held that in addition to the substantive protections guaranteed by Article 6, there was also an implied right of access to a court. Golder’s prison governor had effectively prevented Golder from consulting a solicitor (and from launching an intended civil action for libel), and the ECtHR held that this amounted to a breach of Article 6.

However, as the ECtHR recognised in *Golder*¹⁵ and *Ashingdane*,¹⁶ this right of access to a court is not absolute. National security may be used to justify restrictions on the right. In order to be compatible with Article 6, restrictions must not impair the very essence of the right,¹⁷ they must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹⁸

¹⁰ See for example *X v Portugal* (1983) 26 DR 262 (armed forces); *X v Portugal* (1983) 32 DR 258 (judges); *X v Italy* (1980) 21 DR 208 (school teachers); *X v Belgium* (1969) 32 CD 61 (employees of public corporations); and *X v United Kingdom* (1980) 21 DR 168 (police officers).

¹¹ *Pellegrin v France* (2001) 31 EHRR 651.

¹² *Eskelinen v Finland* (2007) 45 EHRR 43.

¹³ *Maaouia v France* (2001) 33 EHRR 42.

¹⁴ *Golder v UK* (1975) 1 EHRR 524 [34].

¹⁵ *ibid* [38].

¹⁶ *Ashingdane v UK* (1985) 7 EHRR 528 [57].

¹⁷ *Golder* (n 14) [38]; *Winterwerp v the Netherlands*, Series A no 33 [60], [75]; *Ashingdane* (n 16) [57].

¹⁸ *Ashingdane* (n 16) [57], *Tinnelly and McElduff v UK* (1999) 27 EHRR 249 [72].

In *Tinnelly* the ECtHR considered the extent to which restrictions on the right of access to court may be justified in the context of the security situation in Northern Ireland.¹⁹ The applicants alleged unlawful discrimination on the grounds of religion and political opinion arising out of failures to win contracts to work on public demolition and construction projects. The Secretary of State for Northern Ireland subsequently issued conclusive certificates that the acts were ‘done for the purpose of safeguarding national security or of protecting public safety or public order.’ The certificates had the effect of terminating the discrimination claims in each case. The ECtHR held that the issuing of conclusive certificates in these circumstances amounted to a disproportionate restriction on the right of access to a court as there would be no independent judicial scrutiny of the facts grounding the vetting decisions.²⁰ Similar conclusions have been reached by the ECtHR in a number of other cases.²¹

If an applicant can access a court, the substantive protections of Article 6 become applicable. These protections include the right to (1) an adversarial hearing; (2) equality of arms; (3) disclosure; (4) cross-examination; and (5) a reasoned judgment. Despite the absolute nature of the substantive rights enshrined in Article 6, some secrecy is permissible in cases that raise national security concerns, provided that strict conditions are met. It is important to note that the ECtHR applies a much stricter test when considering the permissibility of exceptions to the substantive fair trial protections of Article 6 than when considering restrictions on the right of access to a court.

In *Jasper*,²² the ECtHR set out the nature of rights under Article 6 and the circumstances where these can be attenuated on the basis of national security:

In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 ... Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities...²³

While this guidance was developed in the context of criminal proceedings, in *Kennedy*²⁴ the ECtHR suggested that the same tests apply, in principle, to civil proceedings.²⁵

¹⁹ *Tinnelly* (n 18).

²⁰ *ibid* [62], [77], [79].

²¹ *Devlin v UK* (2002) 34 EHRR 43, *Devenney v UK* (2002) 35 EHRR 24; and *Osman v UK* Application No 23452/94, Reports 1998-VIII.

²² *Jasper v United Kingdom* (2000) 30 EHRR 441.

²³ *ibid* [52].

²⁴ *Kennedy v UK* (2011) 52 EHRR 4.

²⁵ *ibid* [184].

(b) Article 8 - the Right to Respect for Private and Family Life

Though Article 8 provides less extensive protection against the use of secret material than Article 6, Article 8 may be applicable in a wider range of circumstances, such as in relation to civil servants, covert surveillance, and decisions relating to the entry, stay, and deportation of aliens. Unlike Article 6, Article 8 is a ‘qualified right.’ This means that an interference with the right can be justified for reasons including national security.

In a number of cases where reliance has, or may have been, placed on secret material, the ECtHR has held there has been an infringement of Article 8(1). Examples include *Leander*²⁶ (security vetting), *Klass*²⁷ and *Kennedy*²⁸ (secret surveillance), and *Gaskin*²⁹ (refusal to provide access to a childhood personal history file).

When considering whether an interference with Article 8(1) can be justified in accordance with Article 8(2), the ECtHR asks whether the impugned measure

- (1) is in accordance with the law;
- (2) pursues a legitimate aim (such as national security); and
- (3) is necessary in a democratic society.

In relation to the requirement of being ‘necessary in a democratic society’, the ECtHR applies a test of proportionality. On a number of occasions, the Court has recognised that the use of secret material can be compatible with Article 8(2). For example, in *Klass*,³⁰ the ECtHR accepted that measures in place to supervise the use of covert surveillance were proportionate and therefore met the requirements of Article 8(2). The Court took the view that a requirement for authorities to subsequently notify an individual that they had been subject to surveillance might jeopardise the long-term purpose that originally prompted the surveillance.³¹

The ECtHR has also confirmed that Article 8 also imposes certain procedural requirements, though these are more limited than those required to comply with Article 6. In *McMichael*,³² the applicants complained of lack of access to documents during proceedings to determine the care and custody of their child. In this context, the Court stated that while Article 8 contained no explicit procedural requirements, ‘the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8’.³³ In *Al-Nashif*,³⁴ the applicant complained of the interference with his private life when he was deported, purportedly on the grounds of national security. The ECtHR established the following principles in Article 8 cases:

²⁶ *Leander v Sweden* (1987) 9 EHRR 433.

²⁷ *Klass v Federal Republic of Germany* (1978) 2 EHRR 214.

²⁸ *ibid.*

²⁹ *Gaskin v United Kingdom* (1989) 12 EHRR 36.

³⁰ *Klass* (n 27).

³¹ *ibid* [58].

³² (1995) 20 EHRR 205.

³³ *ibid* [87].

³⁴ *Al-Nashif v Bulgaria* (2002) 36 EHRR 655.

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information ... The individual must be able to challenge the executive's assertion that national security is at stake.³⁵

(c) Article 13 - the Right to an Effective Remedy

Complaints of breaches of Article 8 are often brought in conjunction with Article 13. National security considerations will similarly affect what remedies the Court considers appropriate. In *Klass*,³⁶ where covert surveillance was found to be compatible with Article 8, the ECtHR also considered the effect of national security considerations on Article 13, concluding that:

For the purposes of the present proceedings, an ‘effective remedy’ under Article 13 must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance.³⁷

(ii) United States

In the United States, the relevant legal framework is provided by a number of sources. The ultimate source of law is the US Constitution. Legislation and actions inconsistent with the Constitution may be invalidated by, most prominently, the Supreme Court of the United States.³⁸ In addition to many other constitutionally-entrenched rights, a variety of due process and fair trial guarantees are provided in civil and criminal proceedings through provisions such as the Fifth, Sixth, and Fourteenth Amendments. The relevant parts of those provisions state:

V - Provisions concerning prosecution – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case

³⁵ *ibid* [123], [124].

³⁶ *ibid*.

³⁷ *Ibid* [69].

³⁸ See *Marbury v Madison* 5 US 1 Cranch 137 (1803).

to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

VI - Right to a speedy trial, witnesses, etc. – In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

...
XIV - Citizen rights not to be abridged -- 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws....³⁹

As discussed below, the United States also has statutory provisions governing the use of classified information,⁴⁰ and case-law addressing how courts should deal with various secret evidence scenarios.⁴¹

(iii) Canada

The Canadian Charter of Rights and Freedoms (the Charter) contains several provisions relevant to the use of secret evidence.⁴² Section 1 provides a general limitations clause, specifying that all of the rights and freedoms set out in the Charter are subject to such ‘reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. The following rights are of particular relevance in the context of secret evidence:

- Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

³⁹ The Constitution of the United States, and all Amendments, is available online at, for example: http://avalon.law.yale.edu/18th_century/usconst.asp

⁴⁰ See the discussion of the Classified Information Procedures Act (1980) (18 USC App III §§1-16) (CIPA), below.

⁴¹ See, for example, the discussion of *General Dynamics Corp v United States* 563 US __ (2011), below.

⁴² Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 [hereafter ‘the Charter’].

- Section 11(d): Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

There are also various statutory provisions relating to the use of secret evidence. The following is a brief summary of the key sections:

- Canada Evidence Act⁴³
 - Section 37(1) empowers a Minister of the Crown or other official to object to the disclosure of information on the grounds of specified public interest.
 - Section 37.3(1) provides that a judge presiding over a criminal trial (or other criminal proceedings) may make any order that he or she considers appropriate to protect the right of the accused to a fair trial (provided certain conditions are met).
 - Section 38.06 provides that a judge may authorize the disclosure of information (in circumstances, for example, where the public interest in disclosure outweighs the injury to international relations or national defence or national security).
 - Section 38.13(1) provides that the Attorney General of Canada may personally issue a certificate that prohibits the disclosure of certain information obtained from or in relation to a foreign entity for the purpose of protecting national defence or national security.
 - Section 38.14(1) provides that a person presiding at a criminal trial may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial. Section 38.14(2) provides examples of the types of orders that may be made under sub-section (1).
- Immigration and Refugee Protection Act⁴⁴
 - Section 77 provides that the Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court. The Minister shall then file with the Court the information and other evidence on which the certificate is based. Once the certificate is referred, no proceeding under the Act respecting the person who is named in the certificate – other than proceedings relating to sections 82 to 82.3, 112 and 115 – may be commenced or continued until the judge determines whether the certificate is reasonable.
 - Section 83(1) sets out the procedure that should apply in proceedings under any of sections 78 and 82 to 82.2. This includes the judge appointing a person from the list referred to in subsection 85(1) to act as a special advocate. It also includes the judge ensuring that the permanent

⁴³ RSC, 1985, c.C-5 [hereafter CEA].

⁴⁴ SC 2001, c. 27 [hereafter IRPA].

resident or foreign national is provided with a summary of information and other evidence that enables them to be ‘reasonably informed’ of the case made by the Minister, and providing the permanent resident or foreign national with an opportunity to be heard.

- Section 85.1 provides details about the role and responsibilities of special advocates.
- Canadian Security Intelligence Service Act (CSIS)⁴⁵
 - Section 12 provides that the Service shall collect, analyze and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada, and shall report this information to the Government.

(iv) Australia

(a) Human Rights

Unlike the United Kingdom, the United States and Canada, Australia does not have a national human rights instrument which protects the rights to liberty and a fair trial at the national level. Indeed, Australia is the only western democracy without a national bill of rights. It has neither constitutional entrenchment of human rights (like the United States), nor statutory protection (like the UK). Instead, Australia relies on a purely interpretative model of human rights protection. This means that Australian judges are able to rely on human rights principles when adjudicating constitutional rights or interpreting legislation, but only as far as the statutory language permits.

The Australian High Court has developed the common law to ensure that legislation is interpreted as consistently as possible with fundamental rights. Like other jurisdictions based on the English common law, Australian courts presume that statutes are to be construed in accordance with fundamental rights in the absence of an explicit parliamentary intention to the contrary. As in the UK, this is often referred to as the ‘principle of legality’.⁴⁶ Thus, in *Coco v The Queen*, a majority led by Chief Justice Mason held that ‘[t]he courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.’⁴⁷

Beyond this, there is nothing to prevent the Australian Parliament from enacting legislation which clearly infringes the rights to liberty and a fair trial. Thus in *Al-Kateb v Godwin*, the Gleeson High Court upheld legislation allowing for the indefinite detention

⁴⁵ R.S.C., 1985, c. C-23 [hereafter CSIS Act].

⁴⁶ See *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, *R v Secretary of State for the Home Department; Ex parte Simms* [2002] 2 AC 115, 131 (UK); *Al-Kateb v Godwin* (2004) 219 CLR 562 [19]; *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309 [18]-[22]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 [46]-[47].

⁴⁷ *Coco v R* (1994) 179 CLR 427 [10] (Mason CJ, Brennan, Gaudron and McHugh JJ).

of stateless persons, despite a range of human rights concerns.⁴⁸ Earlier, in *Malika Holdings*, Justice McHugh even suggested that the Australian Parliament could infringe rights without a clear intention, and that there were few rights it would choose not to infringe:

[F]ew principles or rights can claim to be so fundamental that it is unlikely that the legislature would want to change them. No doubt there are fundamental legal principles ... But nearly every session of Parliament produces laws which infringe the existing rights of individuals. Given the frequency with which legislatures now amend or abolish rights or depart from the general system of law, it is difficult to accept that it is 'in the last degree improbable' that a legislature would intend to alter rights or depart from the general system of law unless it did so 'with irresistible clearness'.⁴⁹

Most relevant in the context of secret evidence is the right to procedural fairness (also described as 'natural justice' or 'procedural fairness'). While Australia does not have national protection comparable to Article 6 of the ECHR, the High Court has held that procedural fairness is constitutionally protected. In *Plaintiff S157*, the Gleeson Court held that section 75(v) of the Australian Constitution requires government decision-makers to afford procedural fairness to those affected by their actions.⁵⁰ In practice, this means that anyone with standing to commence judicial review proceedings must be afforded an opportunity to comment on information that is 'credible, relevant and significant'.⁵¹ Most recently, the High Court (under Chief Justice French) has held that government officials must also afford procedural fairness to 'unlawful non-citizens' who arrive by boat at offshore immigration facilities.⁵²

(b) Secret Evidence

In 2004 and 2005, the Australian Parliament enacted legislation to address the problem of using classified information as evidence in civil and criminal proceedings. While previous Bills lapsed with an earlier federal election, the National Security Information (Criminal Proceedings) Act 2004 (Cth) and the National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004 (Cth) were passed in late 2004. These two pieces of legislation were later consolidated as the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSIA) by the National

⁴⁸ See *Al-Kateb v Godwin* (2004) 219 CLR 562

⁴⁹ *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 [28].

⁵⁰ See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

⁵¹ See *Kioa v West* (1985) 159 CLR 550, 638 (Brennan J); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural Affairs* (2005) 225 CLR 88, 95-96 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

⁵² See *Plaintiff M61/2010E v Commonwealth; Plaintiff M69/2010 v Commonwealth* [2010] HCA 41 (11 November 2010). The plaintiffs were Sri Lankan citizens who arrived by boat on Christmas Island, a territory off the north-west coast of Australia in the Indian Ocean, and an 'excised offshore place' for the purposes of the Australian Migration Act 1958 (Cth).

Security Information Legislation Amendment Act 2005 (Cth). The 2005 Act extended the operation of the original scheme beyond criminal trials to certain civil proceedings.

The NSIA was devised as a scheme for allowing defendants on trial for terrorism offences to be prosecuted on the basis of classified information. When introducing the 2004 legislation, Attorney-General Philip Ruddock echoed a comment by the head of the Australian Security Intelligence Organisation that '[s]ooner or later, the protection of classified and security sensitive information will be a critical issue in a terrorism trial in this country'.⁵³ He emphasised that the ordinary rules of evidence were not up to the task, explaining that '[t]he existing rules of evidence and procedure do not provide adequate protection for such information where it may be disclosed during the course of criminal proceedings'.⁵⁴

The problems with disclosing sensitive national security information in criminal proceedings were revealed to the Australian Government by the 2001 case of *Lappas & Dowling*.⁵⁵ The defendant Lappas was an employee of the Defence Intelligence Organisation. He was charged with a range of espionage offences for passing on top-secret documents that were likely to be useful to a foreign power. In the Supreme Court of the Australian Capital Territory, Justice Gray stayed proceedings on the application of the prosecutor who did not want the documents to be disclosed in court, however submitting that they could not successfully prosecute Lappas without using those documents as evidence. The NSIA seeks to avoid these kinds of 'catch-22' situations by allowing sensitive national security information to be admitted into evidence in a redacted or summary form.

The NSIA defines 'national security information' as information which is 'related to' or 'may affect' national security.⁵⁶ 'National security' is defined as Australia's defence, security, international relations or law enforcement interests.⁵⁷ 'Security' is given the same broad meaning as section 4 of the Australian Security Intelligence Organisation Act 1979 (Cth),⁵⁸ which includes protection from espionage, sabotage, and any form of 'politically motivated violence'.

When either party is likely to introduce national security information in civil or criminal proceedings, the NSIA requires that they must give written notice to the Attorney-General as soon as possible.⁵⁹ Failure to give notice is a criminal offence and will attract a maximum penalty of 2 years' imprisonment.⁶⁰ The parties must also interject during

⁵³ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2004, 130.

⁵⁴ *ibid.*

⁵⁵ *R v Lappas & Dowling* [2001] ACTSC 115. This case was referred to by Attorney-General Philip Ruddock when introducing the legislation at Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29308.

⁵⁶ See National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), s 7.

⁵⁷ *ibid* s 8.

⁵⁸ *ibid* s 9.

⁵⁹ *ibid* ss 24(1), 38D(1).

⁶⁰ *ibid* ss 42, 46.

proceedings if a witness is likely to reveal national security information when answering a question.⁶¹

In either case, the Attorney-General may then issue a certificate of non-disclosure.⁶² The Attorney-General may also issue a certificate to exclude a witness from the proceedings where his or her ‘mere presence’ is likely to disclose national security information.⁶³ After the Attorney-General issues a certificate, the court will then hold a closed hearing to determine whether or not the information will be disclosed or the witness excluded from the proceedings.⁶⁴ The judge or magistrate may exclude defendants – and even their legal representatives – from these closed hearings in order to protect the information from being disclosed.⁶⁵

A crucial provision of the NSIA is section 31(8). In tandem with section 31(7), this provision requires the judge or magistrate directing the closed hearing to give ‘greatest weight’ to the interests of national security when deciding whether or not the information will be disclosed.⁶⁶ The information may then be either excluded from the proceedings altogether, or admitted in redacted or summary form.⁶⁷ This means that applicants to Australian courts not only face the burden of having no explicit national protection for the right to a fair trial, but any right to procedural fairness that is implied through the Australian Constitution will also be given less weight than the interests of national security when the NSIA is applied. The NSIA procedure also means that convictions for criminal offences in Australia may be based on evidence that the accused has only had an opportunity to respond to in summary or redacted form.

⁶¹ *ibid* ss 25, 42.

⁶² *ibid* ss 26, 38F.

⁶³ *ibid* ss 28(1), 38H.

⁶⁴ *ibid* ss 27, 29, 38G, 38I.

⁶⁵ *ibid* ss 29(3), 38I(3).

⁶⁶ *ibid* sub-ss 37(7)(a)-(8). The equivalent provisions for civil proceedings are found in sub-ss 38L(7)-(8).

⁶⁷ *ibid* ss 31, 38L.

2. NATIONAL SECURITY MEASURES, CRIMINAL PROSECUTION AND QUASI-CRIMINAL PROCEEDINGS

A. The Position in the UK

(i) Detention of suspected terrorists and Control Orders

Early UK case law appears to endorse the use of secret evidence, so long as some protections remain. For example, in *A, X and Y and others v Secretary of State for the Home Department*, Lord Chief Justice Lord Woolf wrote:

[H]aving regard to the issues to be inquired into, the proceedings are as fair as could reasonably be achieved. ... the use of separate counsel to act on [the applicant's] behalf in relation to the closed evidence provides a substantial degree of protection. ... I am satisfied there is no contravention of [Article 6].⁶⁸

When the regime of indefinite detention was replaced with that of Control Orders, the approach of the courts was similarly permissive. In *Secretary of State for the Home Department v MB*, the House of Lords held that Control Order procedures were subject to the civil limb of Article 6.⁶⁹ The House of Lords acknowledged that the engagement of special advocates in closed material proceedings could enhance the measure of procedural justice available to the individual. The majority held that the question of whether a procedure would satisfy Article 6 was fact-specific and would depend on all the circumstances of the particular case.

In *Secretary of State for the Home Department v AF (No 3)* the Court of Appeal observed that

There is no principle that a hearing will be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence. Alternatively, if there is, the irreducible minimum can, depending on the circumstances, be met by ... very little indeed. Whether a hearing will be unfair depends upon all the circumstances, including for example the nature of the case, what steps have been taken to explain the detail of the allegations to the controlled person so that he can anticipate what the material in support might be, what steps have been taken to summarise the closed material in support without revealing names, dates or places, the nature and content of the material withheld, how effectively

⁶⁸ (2003) 2 WLR 564 [57].

⁶⁹ [2007] UKHL 46, [2008] 1 AC 440.

the special advocate is able to challenge it on behalf of the controlled person and what difference its disclosure would or might make.⁷⁰

The Supreme Court, however, departed from this approach in *AF (No 3)*,⁷¹ largely as a result of the need to comport with the ECtHR decision in *A v United Kingdom*.⁷² Some members of the Court expressed principled agreement with that decision, for example Lord Scott, who observed that:

I am in respectful agreement with the reasons given by the Grand Chamber for that conclusion but, in my opinion ... the common law, without the aid of Strasbourg jurisprudence, would have led to the same conclusion. An essential requirement of a fair hearing is that a party against whom relevant allegations are made is given the opportunity to rebut the allegations. That opportunity is absent if the party does not know what the allegations are.⁷³

Other, however, expressed considerable reluctance at their felt obligation to comply with the ECtHR decision. For example, Lord Hoffmann expressed the opinion that:

[T]he decision of the ECtHR was wrong and that it may well destroy the system of Control Orders which is a significant part of this country's defences against terrorism.⁷⁴

Despite this disagreement, their Lordships agreed that a new approach was required to comply with ECtHR jurisprudence. According to this approach:

[T]he controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.⁷⁵

An example of 'sufficient information' was provided by the ECtHR, by reference to the allegation that an individual had attended a terrorist training camp. The Court held that the controlee would have to be informed of the date and location of his alleged attendance, so that he would have an opportunity to offer an innocent explanation for his

⁷⁰ [2008] EWCA Civ 1148, [2010] 2 AC 269 [64] (Sir Antony Clarke MR and Waller LJ).

⁷¹ *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 [hereafter *AF (No 3)* HL].

⁷² (2009) 49 EHRR 29.

⁷³ *AF (No 3)* HL (n 71) [96]. See further [63] (Lord Phillips), [83] (Lord Hope), [101] (Baroness Hale)..

⁷⁴ *ibid* [70]. See further [107] (Lord Carswell), [121] (Lord Brown).

⁷⁵ *ibid* [59] (Lord Phillips).

whereabouts, or adduce evidence of an alibi.⁷⁶ Provided that this condition was satisfied, the controlee would not have to be provided with the detail or sources of that allegation, which could remain closed. Equally, if that allegation did not form the sole or decisive basis for the order, it could remain closed.

This approach is qualified to the extent that particular allegations may be incapable of separation from the evidence in support.⁷⁷ In that case, more may have to be disclosed – or else disregarded – according to the overriding principle that the controlee must be given ‘sufficient information’ to challenge the allegations against him.

(ii) Parole Board hearings

This context also reveals a similarly qualified – yet unsettled – approach to the use of secret evidence. In *Roberts v Parole Board*,⁷⁸ the appellant challenged the Parole Board’s decision to conduct a closed hearing in its consideration of whether or not to release him on licence following the expiration of his minimum term. A majority of the Supreme Court held that the Parole Board was empowered under statute to conduct a closed procedure and to appoint a Special Advocate to represent the interests of the appellant. However, their Lordships refused to express an opinion as to whether the procedure was compatible with the appellant’s rights under Article 5. Lord Woolf observed that:

[T]here can be situations where it is permissible and other situations where it is not permissible for the board ... (a) to withhold material relevant to the appellant's parole review from his legal representatives, and (b) instead, disclose the material to an SAA. ... Into which category a case falls can only be identified after examining all the circumstances and cannot be decided in advance as a matter of principle.⁷⁹

Beyond this, their Lordships were somewhat ambiguous as to whether such a procedure could ever be considered fair.⁸⁰ Only Lord Bingham and Lord Steyn were less equivocal in this respect. Lord Bingham doubted whether such a decision could ‘be held to meet the fundamental duty of procedural fairness required by Article 5(4).⁸¹ And similarly, Lord Steyn implored that:

Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.⁸²

⁷⁶ *ibid* [220].

⁷⁷ *ibid* [87] (Lord Hope).

⁷⁸ [2005] UKHL 45, [2005] 2 AC 738.

⁷⁹ *ibid* [83].

⁸⁰ *ibid* [76]-[78] (Lord Woolf CJ), [112] (Lord Rodger), [144] (Lord Carswell).

⁸¹ *ibid* [19].

⁸² *ibid* [88].

(iii) Pre-charge Detention Hearings

The Supreme Court has also failed to clarify conclusively the use of secret evidence in the context of pre-charge detention hearings. In *Ward v Police Service of Northern Ireland*,⁸³ the applicant challenged the use of secret evidence in the course of a hearing to determine whether to extend the length of his pre-charge detention under the Terrorism Act 2000. Here, the judge ordered a closed hearing to verify that the police still had questions yet to be asked of the applicant. The applicant would not receive early notice of the content of those questions.

The Supreme Court dismissed the appeal. This, however, was largely because of the specific and peculiar nature of the material presented in the course of the closed procedure, which was limited to notice of those topics that the police intended to investigate in questioning. Lord Bingham, giving the judgment of the Court, concluded that:

[T]here is no rule of law which requires the police to reveal to a suspect the questions that they wish to put to him when he is being interviewed. ... The interview must be conducted fairly. But advance notice of the topics to be covered is not a prerequisite of fairness.⁸⁴

B. Comparative Experiences

(i) European Court of Human Rights

(a) Detention of Suspected Terrorists

A v United Kingdom is the leading case ECtHR case concerning the use of secret evidence for reasons of national security.⁸⁵ The facts of the case arose out of the UK government's enactment of the Anti-Terrorism, Crime and Security Act 2001. This permitted the detention of individuals whose removal or deportation was not possible, provided the Secretary of State issued a certificate indicating his belief that the person's presence in the United Kingdom was a risk to national security and that he suspected the person of being an international terrorist. Certification was subject to an appeal to the Special Immigration Appeals Commission ('SIAC'). Several individuals detained under these provisions eventually lodged applications to the ECtHR. One complaint was made under Article 5(4), which provides that

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

⁸³ [2007] UKHL 50, [2007] 1 WLR 3013.

⁸⁴ *ibid* [22].

⁸⁵ *A v United Kingdom* (n 72).

The Court considered that in the circumstances of the case, Article 5(4) imported substantially the same guarantees as Article 6(1) in its criminal aspect.⁸⁶ These guarantees included (1) an adversarial system,⁸⁷ (2) equality of arms,⁸⁸ (3) an oral hearing in certain circumstances,⁸⁹ and (4) an opportunity to effectively challenge the evidence against him, which may require the court to hear witnesses or the detainee to be given access to documents in the case file against him.⁹⁰ The ECtHR recognised that there may be restrictions on the right to an adversarial procedure where strictly necessary in the light of a strong countervailing public interest such as national security. However, any difficulties caused by such limitations had to be sufficiently counterbalanced by procedures followed by the judicial authorities.⁹¹

The Court closely examined the procedure before SIAC. SIAC relied upon both material that could be made public (referred to as ‘open’ material) and secret material (referred to as ‘closed’ material). The applicants and their legal advisors were prevented from seeing the secret material. ‘Special Advocates’ were appointed to represent the applicants in the parts of the proceedings that they were excluded from. The public material was served on the applicants and the Special Advocates first and the Special Advocates could discuss the material with the applicants and take instructions on it generally. Thereafter, the secret material was served on the Special Advocate, and the Special Advocate was prohibited from discussing any material with the applicant, save as authorised by SIAC.

The Court held that, on the material before it, there was no basis for finding that excessive or unjustified secrecy was employed in respect of any of the applicants’ appeals or that there were not compelling reasons for the lack of disclosure in each case. It noted that where full disclosure is not possible (due to compromising national security or the safety of others), that Article 5(4) required that the difficulties this caused be counterbalanced so as to ensure an applicant could still effectively challenge the allegations:⁹²

... SIAC, which was a fully independent court ... and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, the special advocate could provide an important, additional safeguard through questioning the State’s witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure.⁹³

The ECtHR noted, however, that the special advocate could not perform this ‘counterbalancing’ role effectively ‘unless the detainee was provided with sufficient

⁸⁶ *ibid* [217].

⁸⁷ *ibid* [204].

⁸⁸ *ibid* [204].

⁸⁹ *ibid* [204].

⁹⁰ *ibid* [204].

⁹¹ *ibid* [205].

⁹² *ibid* [218].

⁹³ *ibid* [219].

information about the allegations against him to enable him to give effective instructions to the special advocate.’⁹⁴

In relation to those applicants who had not been provided with sufficient public information to effectively challenge the allegations against them, the court found a violation of Article 5(4).

(b) Criminal Cases

As set out in Part B of the Introduction, Article 6 permits exceptions to the substantive protections of that article in criminal cases if strictly necessary to preserve important public interests such as national security. However, any difficulties caused to the defence must be sufficiently counterbalanced by procedures followed by the judicial authorities.

In *Doorson*,⁹⁵ the applicant complained that his conviction for drug dealing had been based in part on the anonymous statements of witnesses, and this amounted to a breach of Article 6(3)(d) (which enshrines the right to examine witnesses). The Court identified its task as being ‘to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.’⁹⁶ The Court accepted that the need to protect witnesses from reprisals was a reason to provide them with anonymity. It considered that measures such as the presence of, and ability to ask questions by, the applicant’s counsel when the witnesses were questioned before an investigating judge were sufficient to counterbalance the handicaps imposed on the defence.⁹⁷ The Court further cautioned that even where such counterbalancing measures were in place, ‘a conviction should not be based either solely or to a decisive extent on anonymous statements.’⁹⁸ As that was not the situation, the Court found no breach of Article 6.

The relationship between national security and secrecy often arises in the context of Public Interest Immunity (PII) applications, where material that would otherwise be disclosed to the defence is withheld for public interest reasons. In *Jasper*,⁹⁹ the applicant complained of a breach of Article 6 after he was convicted of importation of illegal drugs. In the course of the trial, the prosecution had successfully applied to a judge to withhold material from the defence on the basis of PII. A hearing had taken place before the judge, in the absence of the applicant or his lawyers. The ECtHR reiterated the principles set out in cases such as *Doorson*¹⁰⁰ before considering their applicability to the case. The Court noted ‘that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury’¹⁰¹ and also highlighted the fact that the decision not to disclose the material was taken by a judge who was fully aware of

⁹⁴ *ibid* [220].

⁹⁵ *Doorson v Netherlands* (1996) 22 EHRR 330.

⁹⁶ *ibid* [67].

⁹⁷ *ibid* [73].

⁹⁸ *ibid* [76].

⁹⁹ *Jasper v United Kingdom* (2000) 30 EHRR 441.

¹⁰⁰ *ibid*.

¹⁰¹ *ibid* [55].

the issues before and during the trial.¹⁰² The ECtHR concluded that there had been no breach of Article 6.¹⁰³

By contrast, in *Edwards and Lewis*,¹⁰⁴ the ECtHR found that there had been a violation of Article 6. Successful PII applications had been made in the absence of the applicants and their legal representatives in both cases. The applicants considered that they had been entrapped into committing the offences by police officers or informers and sought to argue that the evidence against them should be excluded. This would have led to the discontinuation of the trials. The Court therefore considered these applications to be ‘of determinative importance’ to the respective trials.¹⁰⁵ Of further contrast with the case of *Jasper*, the material withheld from the defence on grounds of PII was material relevant to these applications. Furthermore, the relevant decision makers on these important questions were judges, rather than juries, and the judges were privy to information gained in the course of the PII applications of which the defence was unaware. The Court therefore concluded that the procedures did not comply with the requirements of adversarial proceedings and the equality of arms, nor did it incorporate adequate safeguards to protect the interests of the accused.¹⁰⁶

(ii) Canada

(a) Security Certificates

In order to understand the evolution of Canada’s special advocate system, it is important to begin with a discussion of the Supreme Court’s landmark 2007 decision in *Charkaoui I*.¹⁰⁷ In this case the Supreme Court held that the Immigration and Refugee Protection Act (IRPA), as it was constituted at the time, suffered from two main defects, the first of which concerned the use of secret evidence. At the time, section 78(g) allowed for the use of evidence that was not disclosed to the named person without the provision of adequate measures to safeguard against violations of the named person’s section 7 Charter rights. The Court considered whether this violation could be justified under section 1 (the reasonable limits clause)¹⁰⁸. Pointing to approaches in other countries, such as the special advocate system in the UK, as well as home-grown approaches such as that used by the Security Intelligence Review Committee (SIRC) in Canada, the Court decided that there were less intrusive means to protect confidential security information and that the violation could not be justified under section 1 of the Charter¹⁰⁹. The Court declared the provision to be of no force or effect and subsequently gave Parliament one year to amend the law in order to bring it into accordance with the Charter. Within a year, the government had introduced Bill C-3 and amended the IRPA to include a special advocate

¹⁰² *ibid* [56].

¹⁰³ *ibid* [58].

¹⁰⁴ *Edwards and Lewis v UK* (2005) 40 EHRR 24.

¹⁰⁵ *ibid* [57].

¹⁰⁶ *ibid* [46].

¹⁰⁷ *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 [hereafter *Charkaoui I*].

¹⁰⁸ This is often referred to as the *Oakes* test, established in *R v Oakes* [1986] 1 SCR 103.

¹⁰⁹ *Charkaoui I* (n 107) 77-78.

procedure. However, judicial scrutiny of the use of secret evidence would continue and heighten in the years to come.

Within a year, the Supreme Court of Canada was once again hearing an appeal from the Federal Court in *Charkaoui II*.¹¹⁰ The main issue in this case was whether Charkaoui had a right to obtain notes of the interviews that CSIS had conducted with him in 2002. He had been informed that this disclosure would be impossible due to a CSIS policy, contained in section 12 of the CSIS Act, that led its officers to destroy their original notes once they had completed their analytical reports. Moreover, the case raised further questions about the application of section 7 outside of criminal proceedings and about CSIS's disclosure obligations. In the trial judgment that was at issue in this appeal, Justice Noel of the Federal Court rejected Charkaoui's argument that his section 7 rights had been violated and that he was entitled to a remedy, arguing that security certificates were not criminal proceedings and, as such, his Charter rights did not apply. Moreover, he concluded that CSIS was not a police agency that was subject to disclosure obligations.¹¹¹

In a unanimous judgment, the Supreme Court allowed Charkaoui's appeal and held that he should have access to the original interview notes, subject to appropriate editing by the reviewing judge. In doing so, they sent a strong message to CSIS that the intelligence it collects could be subject to disclosure in subsequent proceedings by finding that their operational policy under section 12 of the CSIS Act 'rests on an erroneous interpretation of that provision'.¹¹² Moreover, the Court found that the appropriate consideration for the application of section 7 of the Charter in proceedings was not the formal area of law itself but, rather, the severity of the consequences of the state's actions for the individual's fundamental interests of liberty, security and the right to life. Since the security certificate procedure could place these rights in serious jeopardy, it thus becomes necessary to recognize a duty to disclose evidence based on section 7 that goes beyond mere summaries.¹¹³ Mr Charkaoui had applied for a 'stay of proceedings' remedy to his rights violation but the Court thought it would be premature at such an early stage of the proceedings to determine how the destruction of the notes would affect the reliability of the evidence. Instead, the Court decided that, '[t]he only appropriate remedy is to confirm the duty to disclose Mr Charkaoui's entire file to the designated judge'.¹¹⁴

Following the Supreme Court's decision, Mr Charkaoui's legal battle continued. Counsel representing the Ministers in the five cases involving security certificates notified the Court that in accordance with the *Charkaoui II* decision they had asked CSIS to scrutinize the information and other evidence in each of the five cases in order to determine whether the original operational notes had been retained. It was determined that certain original operational notes had been retained. On the same day, in response to an order of the Supreme Court, the Assistant Director (Intelligence) for CSIS wrote that,

¹¹⁰ *Charkaoui v Canada (Citizenship and Immigration)* [2008] 2 SCR 326 [hereafter *Charkaoui II*].

¹¹¹ *Re Charkaoui* [2005] FCJ No. 139 [17].

¹¹² *Charkaoui II* (n 110) [38]-[39], [43].

¹¹³ *ibid* [50], [53]-[54].

¹¹⁴ *ibid* [77].

to the best of his knowledge, CSIS had disclosed all relevant information and other evidence that could be disclosed to Mr Charkaoui without causing injury to national security or the safety of any person. Mr Charkaoui then asked to cross-examine a CSIS representative about the sufficiency of the disclosure of public evidence. On September 19, 2009, this Court, reiterating the judge's obligation to ensure the confidentiality of information, dismissed that application.

The Court was of the opinion that it had to examine the evidence in an in camera proceeding, with the assistance of the special advocates, before determining whether any additional information would be disclosed. The Court held that the disclosure of certain evidence would not be injurious to national security or the safety of a person, and it issued a number of orders requiring its disclosure. The Ministers disagreed with the Court's determinations, and decided to withdraw that evidence rather than disclosing it in accordance with the Court's orders (under paragraph 83 (1)(j) of the IRPA). The Ministers subsequently stated that, in their opinion, the evidence remaining in the file was not sufficient to meet their burden of showing that the certificate was reasonable.

Subsequently, the Court in Charkaoui III declared Adil Charkaoui's certificate to be void and held that there would be no further appeals in his case, ending a legal battle that lasted almost a decade.¹¹⁵ Mr Charkaoui is presently suing the government for 24.5 million dollars.

On December 14th, 2009, Hassan Almrei also saw his battle with the security certificate regime come to an end after Justice Richard Mosley issued a 185-page judgement dismissing his certification.¹¹⁶ In Almrei, Mosley J concluded that, while it was reasonable to believe that Hassan Almrei posed a threat to the security of Canada in the aftermath of September 11, 2001, much had changed since that time and it was no longer reasonable to believe that he was a security threat.¹¹⁷ He also heavily criticized the intelligence services and the Ministers for providing information about Almrei that was shown to be inconsistent and incomplete when the Charkaoui II ruling ordered the production of additional material¹¹⁸. As such, Mosley J found that 'the service and the Ministers were in breach of their duty of candour to the Court'.¹¹⁹ Mosley J chose not to comment on the Government's possible questions for appeal, opting instead to 'allow the parties some time to consider whether they wish to re-submit or withdraw their proposed questions or submit questions'.¹²⁰ To date, no such appeal has been launched and Hassan Almrei is currently in the process of suing the government for 16 million dollars.

¹¹⁵ (*Re*) Charkaoui [2009] FC 1030 [hereafter *Charkaoui III*].

¹¹⁶ (*Re*) Almrei [2009] FC 1263..

¹¹⁷ Almrei (n 116) [6].

¹¹⁸ ibid [502].

¹¹⁹ ibid [503]

¹²⁰ ibid [512]

(b) Prosecutions Under the Anti-Terrorism Act

In *Ahmad*, the Supreme Court of Canada heard an appeal from the Ontario Superior Court of Justice pertaining to the validity of the section 38 scheme of the Canada Evidence Act that grants jurisdiction to the Federal Court to determine questions of disclosure of information pertaining to international relations, national defence or national security.¹²¹ The Supreme Court had to decide if the exclusive jurisdiction of the Federal Court to make national security determinations under section 38 violated the inherent jurisdiction of the provincial superior courts or the section 7 rights of the accused to a fair trial. The case concerned the ongoing prosecution of what has been infamously termed the ‘Toronto 18’, a group of 18 people who were arrested in June 2006 on the suspicion that they were plotting terrorist attacks. The Superior Court judge had found that the section 38 scheme was unconstitutional as it violated section 96 of the Constitution Act (because it conferred the responsibility to rule on non-disclosure claims exclusively to the Federal Court) and section 7 (because it violated the accused’s right to a fair trial and could not be justified under section 1 of the Charter since it could not be said to be a minimal impairment if the accused’s rights could be better protected by allowing trial judges to make non-disclosure decisions)¹²².

The Supreme Court disagreed and held the section 38 CEA scheme to be constitutional. In doing so, it held that

the prosecution’s refusal to disclose relevant (if sensitive or potentially injurious) information in the course of a criminal trial may on the facts of a particular case prejudice the constitutional right of every accused to a fair and public hearing and the separately guaranteed right to be tried within a reasonable time (Charter, ss. 11(d) and (b), respectively). Where the conflict is irreconcilable, an unfair trial cannot be tolerated. Under the rule of law, the right of an accused person to make full answer and defence may not be compromised. However, s. 38, as we interpret it, preserves the full authority and independence of the judge presiding over the criminal trial to do justice between the parties, including, where he or she deems it necessary, to enter a stay of the proceedings.¹²³

The remedy of a stay of proceedings, authorized under the CEA in section 38.14, was thus relied on heavily by the Court in arguing that the criminal trial judge would still retain ultimate authority over the proceedings because he or she could order a stay in the event that they concluded a fair trial would not be possible in light of a non-disclosure order made by the Federal Court.

The implication of this decision is that trial judges will be put in an immensely difficult position. Once the Federal Court has made a non-disclosure order, they are unable to

¹²¹ *R v Ahmad* [2011] SCC 6.

¹²² *R v Ahmad* [2009] OJ No. 6156.

¹²³ *Ahmad* (n 121) [2].

revise such an order. This is especially difficult because these orders are often made at the pre-trial stage before proceedings have commenced and issues in the trial have arisen. At this point, it is only the Attorney General of Canada who still retains the power for secret information to be disclosed, despite the order. The situation that then ensues is a game of cat and mouse between the trial judge (who must be wary both of the fairness of the trial but also of the effect on public confidence in the judicial system if a major terrorism prosecution is halted by a stay of proceedings) and the Attorney General.

(c) Criminal Prosecutions Outside of the Terrorism Context

Disclosure of evidence can also be a complex issue in criminal proceedings outside of the national security context. In *McNeil*, the Supreme Court of Canada held that the police were required to hand over disciplinary records as part of its disclosure obligation to the defence in criminal proceedings and, in the process, clarified complexities in the realm of third-party production that had been confusing lower courts for years.¹²⁴ *McNeil* was convicted of cocaine possession with intent to traffic, with PC Hackett being the primary witness at his trial. Whilst awaiting sentencing, *McNeil*'s defence learned that Hackett was standing trial for a number of criminal offences, and had several pending Police Act charges, relating to the ongoing use, sale and transportation of narcotics. Subsequently, *McNeil* sought production of all documents related to the arresting officer's misconduct in order to assist him in preparing an application to introduce fresh evidence to appeal his conviction. During this process, Hackett pleaded guilty to one of the criminal charges brought against him, and evidence of this was relied upon in setting aside *McNeil*'s conviction. The Crown chose not to re-prosecute him and, despite the fact that the production issue in this case was rendered moot and the accused withdrew his participation in the appeal, the Court appointed an amicus curiae and heard the appeal.

McNeil contains important dicta on the process for disclosure of information from third parties. Prior to the case, the *O'Connor* procedure¹²⁵ required judges to engage in a complex balancing of the privacy interests in the document to be produced with the accused's right to full answer and defence, once it had been successfully argued that the document was relevant to the accused's case¹²⁶. The Supreme Court in *McNeil* did away with the privacy factor, ordering that records would be disclosed as long as they were relevant and, in the process, made a strong statement about the accused's right to make full answer and defence. Writing for the majority, Madam Justice Louise Charron stated that, '[t]he accused's interest in obtaining disclosure of all relevant material in the Crown's possession for the purpose of making full answer and defence will, as a general rule, outweigh any residual privacy interest held by third parties in the material'.¹²⁷ Charron J did note that residual privacy interests in the contents of criminal investigation files should not be disregarded, holding that the court should ensure that a production

¹²⁴ *R v McNeil* [2009] 1 SCR 66.

¹²⁵ Established in *R v O'Connor* [1995] 4 SCR 411.

¹²⁶ *McNeil* (n 124) [28], [34]-[35].

¹²⁷ *ibid* [20].

order is properly tailored to meet the exigencies of the case, but no more. As such, when just and appropriate to do so, the court may well impose restrictions on the dissemination of information produced that is not relevant to the accused's full answer and defence or prosecution of an appeal.¹²⁸

(iii) United States

In the United States, criminal proceedings take place under the protection of the United States Constitution. In particular, the Fifth, Sixth, and Fourteenth Amendments provide a variety of due process and fair trial guarantees. Relevantly for present purposes, the Sixth Amendment provides that (among other things):

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...[and] to be confronted with the witnesses against him...

As the Supreme Court noted in *Delaware v Fensterer* (1985), cases on the 'confrontation clause' tend to fall within one of two categories: 'cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination'.¹²⁹ As to the first category, an example is the decision of *Crawford v Washington* (2004), in which the Supreme Court ruled that the Sixth Amendment barred 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination'.¹³⁰ As an example of the second category and cross-examination of witnesses more generally, the Supreme Court stated in *Fensterer* that 'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'.¹³¹ Turning from witnesses and evidence generally to secret evidence more particularly, we next examine an example of a post-9/11 case of relevance to our specific discussion.

The United States' use of Guantanamo Bay over the last decade has led to numerous streams of litigation. In *Al-Odah v United States* (2009),¹³² the Court of Appeals for the DC Circuit considered issues arising out of one such stream. The Court of Appeals emphasised that applicants would have a right to access secret evidence where that evidence was both relevant and material,¹³³ and that it was the role of the courts to assess the evidence against these criteria. In so doing, the Court of Appeals made a number of points of interest to our analysis. It was insufficient to establish materiality, the Court of Appeals held, for the government simply to certify that the classified information did 'not support a determination that the detainee is not an enemy combatant': it was the court's

¹²⁸ *ibid* [43]-[44], [46].

¹²⁹ *Delaware v Fensterer* 474 US 15 (1985) 18.

¹³⁰ *Crawford v Washington* 541 US 36 (2004) 53-54.

¹³¹ *Delaware v Fensterer* 474 US 15 (1985) 20.

¹³² *Al Odah v United States* 559 F 3d 539 (2009) (US Ct App, DC Circuit).

¹³³ *ibid* 544-549.

role to assess materiality.¹³⁴ Moreover, the court must assess whether the classified information ‘is actually inculpatory’.¹³⁵ Part of that assessment involves assessing ‘the reliability of the sources upon which the return is based’ and ‘indications of unreliability are themselves material’.¹³⁶ The government had also argued ‘that the petitioner does not have a “need to know” information pertaining to individuals other than the detainee’. The Court of Appeals, however, noted that information ‘not exculpatory on its face may also be material if it contains the names of witnesses who can provide helpful information’.¹³⁷ Ultimately, the Court of Appeals stated:

Information that is exculpatory, that undermines the reliability of other purportedly inculpatory evidence, or that names potential witnesses capable of providing material evidence may all be material.¹³⁸

The Court of Appeals did, however, leave open the possibility that ‘alternatives to disclosure’ might ‘effectively substitute for unredacted access’. In general terms, such alternatives might include ‘a statement admitting relevant facts that the specific classified information would tend to prove’ or ‘a summary of the specific classified information’.¹³⁹

Secret evidence has also arisen in the US under the Classified Information Procedures Act (1980) (18 USC App III §§1-16) (CIPA). In terms of the discovery of classified information by criminal defendants, section 4 of CIPA states:

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Section 5 of CIPA also requires a defendant to give notice to the United States attorney and the court if the defendant ‘reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant’. Section 6 provides a hearing process for determining claims of classified information and for the possibility of an

¹³⁴ *ibid* 545.

¹³⁵ *ibid* 545 (emphasis in original).

¹³⁶ *ibid*.

¹³⁷ *ibid*.

¹³⁸ *ibid* 546.

¹³⁹ *ibid* 547. These examples are an analogy drawn from proceedings under the Classified Information Procedures Act – 18 USC App III §6(c)(1).

alternative route whereby the government may provide a statement admitting or summarising aspects of the classified information. Section 6(d) also provides that, if the court decides against disclosing the classified information, the records of any in camera hearing will be sealed and kept for any appellate hearing. Section 8 of CIPA provides, with respect to ‘Introduction of Classified Information’:

(a) Classification Status.— Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) Precautions by Court.— The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

(c) Taking of Testimony.— During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the United States to provide the court with a proffer of the witness’ response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

Moreover, the Australian Law Reform Commission’s Keeping Secrets report noted that other techniques used in the United States have included:

- having witnesses give evidence in open court which can only be heard through headsets provided to the judge, jury and parties to the proceedings; and
- using techniques such as the US ‘silent witness rule’, under which the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury (This rule was adopted in *United States v Zettle* 835 F 2d 1059 (4th Cir, 1987), 1063).¹⁴⁰

¹⁴⁰ See also Keeping Secrets: The Protection of Classified and Security Sensitive Information (ALRC Report 98), 270-271.

(iv) Australia

In 2004, the Supreme Court of New South Wales upheld the constitutional validity of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth). This unsuccessful constitutional challenge was made by Faheem Khalid Lodhi, a defendant on trial for terrorism offences. Lodhi was charged in April 2004 with four federal offences preparatory to an act of terrorism: possessing a ‘thing’, collecting documents, making a document, and doing an act in preparation for a terrorist act.¹⁴¹ Lodhi had been arrested after French terrorist suspect Willie Brigitte was deported by Australian authorities. Lodhi had allegedly taken aerial photographs of defence establishments, sought and possessed bomb-making information, and collected plans of electricity grids.

In the NSW Supreme Court, Lodhi sought to challenge the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSIA) on the ground that it allowed those accused of committing terrorist offences to be sentenced via a process that was incompatible with the exercise of judicial power (and therefore in breach of the separation of powers implied through the structure of the Australian Constitution).¹⁴² Justice Whealy held that the legislation was not inconsistent with the exercise of judicial power because it primarily set down a procedure for determining the pre-trial disclosure of evidence rather than one for excluding evidence during the trial itself.¹⁴³ On appeal in the New South Wales Court of Criminal Appeal, Chief Justice Spigelman upheld Justice Whealy’s decision, stating that the NSIA merely ‘tilted the balance’ in favour of national security without rendering the legislation invalid.¹⁴⁴ This was so despite the fact that s 31(8) requires the judge or magistrate to give ‘greatest weight’ to the interests of national security when deciding whether or not classified information will be disclosed. In 2008, an application for special leave to appeal to the High Court was denied,¹⁴⁵ and the legislation has not been the subject of any other major judicial or parliamentary review since.

While Lodhi was decided on constitutional grounds, the approach taken by the NSW Supreme Court seems consistent with the Australian approach to procedural fairness when national security considerations arise in other areas of law (see below section 4B (iv)). This suggests that, while applicants to Australian courts need to be afforded a right to procedural fairness, the content of this right will be dramatically reduced in practice when national security considerations intervene.

¹⁴¹ Criminal Code Act 1995 (Cth), ss 101.4(1), 101.5(1), 101.6.

¹⁴² [2006] NSWSC 571.

¹⁴³ *R v Lodhi* [2006] NSWSC 571 [82]-[85].

¹⁴⁴ *Faheem Khalid Lodhi v R* [2007] NSWCCA 360 [66]-[67].

¹⁴⁵ *Lodhi v The Queen* [2008] HCATrans 225.

C. Conclusion

- Detention of Suspected Terrorists and Control Orders:

The UK takes a qualified approach, with particular focus on balancing the need for a fair trial with countervailing interests such as fighting terrorism. The Supreme Court has emphasised that a controllee must be given ‘sufficient information’ about the allegations against him/her to enable effective instructions to be given. It is important to note that this modified position adopted by the Supreme Court in *AF (No 3)* was a result of the ECtHR decision in *A v United Kingdom* (which found a breach of Article 5(4) where the applicants had not been provided with sufficient information to mount an effective challenge). Though there was some disagreement in the Supreme Court about the findings of the ECtHR, their Lordships ultimately agreed that a new position was required to comply with the ECtHR decision.

In Canada, special advocates were introduced after a Supreme Court decision found that the use of secret evidence lacked the requisite procedural safeguards required by the Charter. The special advocate system has since been subject to challenge, and the Supreme Court has held that section 7 of the Charter requires disclosure of original interview notes (beyond a mere summary). In the US the Court of Appeals for the DC Circuit has also emphasised that applicants will have a right of access to secret evidence where this evidence is both relevant and material.

The cases from the ECtHR, Canada and the US demonstrate that the courts will not simply accept a government’s assertion of the need for secret evidence. In particular, the cases stress the importance of the courts in determining what information should be disclosed.

- Criminal Cases:

At the European level, the ECtHR permits exceptions to the substantive protections of Article 6 in criminal cases only where these are strictly necessary to preserve important public interests such as national security. The ECtHR has considered this issue in the context of claims for Public Interest Immunity, and where the material is significant to the case, has been prepared to find a violation of Article 6. A similar approach has been adopted in Canada, where the Supreme Court has held that disciplinary records should be produced if they are relevant to the case. The Court has stressed the importance of the accused’s interest in obtaining disclosure of all relevant material. In the context of prosecutions under the Anti-Terrorism Act, the Supreme Court has held that the trial judge retains the power to order a stay of proceedings if necessary to do justice between the parties. In contrast in Australia, the content of procedural fairness has been drastically reduced in the face of national security concerns in proceedings related to terrorist offences.

- Parole Board Hearings:

In the UK the use of secret evidence in Parole Board hearings has been reluctantly condoned, but strong reservations have been expressed about whether its use can ever guarantee the time-honoured trappings of a fair trial.

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- Pre-Charge Detention Hearings:

The situation in the UK is not at all clear, and the issue has been considered only in a particular context. While the Court held that there was no rule of law requiring the police to give a suspect advance notice of the topics to be covered in an interview, it did note that the interview must be fairly conducted.

3. GENERAL CIVIL PROCEEDINGS

A. The Position in the UK

In *Al Rawi and Others v Security Service*,¹⁴⁶ a majority of the Supreme Court held that the ordinary civil courts cannot order a closed procedure for the presentation of secret evidence in a civil claim for damages. The government sought to rely on secret evidence in its defence to actions brought by several claimants arising out of their alleged mistreatment whilst held in detention by foreign governments abroad. Their claims included damages for breach of contract, negligence, misfeasance in a public office, false imprisonment, trespass to the person, conspiracy to injure and torture.

According to the ordinary rules of public interest immunity, the government could have withheld material were its disclosure against the public interest. However, in those circumstances neither party could rely on the material. The government sought to rely on that material in its own defence, and therefore requested that the court exercise its inherent jurisdiction to order a closed procedure.

The Supreme Court rejected this contention. Lord Dyson (with whom Lord Kerr agreed)¹⁴⁷ held that the court could not exercise its inherent jurisdiction ‘in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice.’¹⁴⁸ His Lordship went on to consider whether a closed procedure could be compatible with the principles of natural justice in this context. In considering whether the use of special advocates could compensate for the disadvantages of a closed procedure, Lord Dyson commented:

No doubt, special advocates can mitigate these weaknesses to some extent and in some cases the litigant may be able to add little or nothing to what the special advocate can do. For example, this will be the case where the litigant has no knowledge of the matters to which the closed material relates ... But in many cases, the special advocate will be hampered by not being able to take instructions from his client on the closed material. A further problem is that it may not always be possible for the judge (even with the benefit of assistance from the special advocate) to decide whether the special advocate will be hampered in this way.¹⁴⁹

Short of concluding that a closed material procedure could never be in the interests of justice, Lord Dyson expressed reservations about how an exception might be

¹⁴⁶ [2011] UKSC 34.

¹⁴⁷ *ibid* [88].

¹⁴⁸ See further [72] (Lord Hope).

¹⁴⁹ *ibid* [36].

circumscribed.¹⁵⁰ He was also concerned that such an exception could develop into something ‘more defined and exorbitant.’¹⁵¹ In light of these considerations, His Lordship concluded that the matter ought to be left to Parliament:

The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved.¹⁵²

Before the Supreme Court issued its judgment, the government had agreed an out-of-court settlement with the claimants. It is therefore unclear whether, had the action proceeded in light of the Supreme Court decision, it would have been struck out; or the government would have been liable as a result of having to admit to those allegations denied in the closed material.

The power to strike a claim in these circumstances was exercised in *Carnduff v Rock*.¹⁵³ A police informant sought to recover payment for information and assistance provided to the police. The police sought to rely in their defence on information that could not be disclosed in the public interest. The Court of Appeal held that the case ought to be struck on the grounds that it could not be tried justly without consideration of the closed material.¹⁵⁴ The claimant’s subsequent appeal to the ECtHR for breach of Article 6 was rejected as unfounded.¹⁵⁵ The majority of their Lordships in *Al Rawi* appeared to endorse this approach as a legitimate response to cases of this kind.¹⁵⁶

B. Comparative Experiences

(i) European Court of Human Rights

There is limited guidance on the effect of national security considerations on general civil litigation. However, in the case of *Kennedy*,¹⁵⁷ a case raising issues of covert surveillance (considered further below), the ECtHR quoted the principles from its jurisprudence in the criminal context (set out in Part 2 above) as to the circumstances when restrictions on the right to a fully adversarial procedure can be permitted on the grounds of national security, before stating shortly that a ‘similar approach applies in the context of civil proceedings.’¹⁵⁸

¹⁵⁰ *ibid* [39], [46].

¹⁵¹ *ibid* [44]. See further [73] (Lord Hope).

¹⁵² *ibid* [48]. See further [74] (Lord Hope), [86] (Lord Brown), [192] (Lord Phillips).

¹⁵³ [2001] 1 WLR 1786.

¹⁵⁴ *ibid* [36].

¹⁵⁵ *Carnduff v United Kingdom* (Application No 18905/02) (unreported) 10 February 2004.

¹⁵⁶ *ibid* [108] (Lord Mance).

¹⁵⁷ *Kennedy v UK* (2011) 52 EHRR 4.

¹⁵⁸ *ibid* 184.

(ii) Canada

The use of secret evidence and CEA section 38 proceedings also extends into civil proceedings, particularly in cases where the government is being sued for damages pursuant to claims of torture or complicity in torture. In 2006, Abdullah Almaki, Ahmad Abou-Elmaati and Muayyed Nureddin sought compensatory damages from the Government of Canada for, among other things, alleged complicity in their detention and torture in Syria and Egypt and breach of their rights under the Charter.¹⁵⁹ Canada disclosed to the respondents' counsel approximately 500 documents, of which 290 were in redacted form. The respondents moved in the Superior Court for an action requiring production of the documents without redaction and also filed a constitutional question pertaining to the validity or applicability of section 38 of the CEA. The Government of Canada argued successfully in the Superior Court that section 38 enabled only the Federal Court to determine claims of disclosure. As such, the motion for production was dismissed and the issue of disclosure of the information was referred to the Federal Court (see discussion of Almaki below). However, the motion judge also found that 'where a claim is made to enforce the constitution (including the Charter) in a civil proceeding, to the extent that section 38 precludes a judge of the Superior Court of Justice at the trial of an action or the hearing of an application from judicially reviewing a claim of Crown privilege, it is of no force or effect and must be read down accordingly'.¹⁶⁰

While the Government appealed the above motion judge's decision, it proceeded in the Federal Court to determine the privilege issues in relation to the respondents' requests for pre-trial production. In Almaki, Justice Mosley extensively detailed the process of non-disclosure under section 38 in civil proceedings. What is of most relevance for present purposes is Mosley J's analysis of the Ribic case.¹⁶¹ Ribic specified a three part test that: (1) considers the relevance of the material to the underlying proceeding; (2) considers whether its disclosure would be injurious to national security, international relations or national defence; and (3) whether the public interest in disclosure is outweighed by the public interest in non-disclosure.

Mosley J's analysis relating to parts (2) and (3) of the test was in-depth and carefully considered and varied according to the type of information in question. Mosely J's judgment provides an illustration of the different interests at play, including: 'giving considerable weight to the Attorney General's submissions... given the access that office has to special information and expertise'¹⁶²; considering the 'quality of the evidence'¹⁶³; considering the 'methods of operations and investigation'¹⁶⁴ and; 'the use of human source information'.¹⁶⁵ Moreover, Mosley also thoroughly discussed the related public

¹⁵⁹ *Canada (Attorney General v Almaki* 2010 FC 1106 [6].

¹⁶⁰ *Abou-Elmaati v Canada (Attorney General)* 2011 ONCA 95 [6].

¹⁶¹ *Ribic v Canada (Attorney General)* [2005] 1 FCR 33..This case has been applied in a number of cases in which Federal Court judges decide whether to make an order pursuant to section 38.06 of the CEA, including the *Khadr* and *Khawaja* cases which will be discussed below.

¹⁶² *ibid* [70].

¹⁶³ *ibid* [90]-[94].

¹⁶⁴ *ibid* [125]-[128].

¹⁶⁵ *ibid* [163]-[170].

inquiries that this report will later turn to investigating. The end results of his decisions on the disclosure of the various types of information are set out in a table attached as ‘Annex A’ to the disclosure order that was released as part of his judgment.

The subsequent Abou-Elmaati case focuses on the appeal of the Canadian Government against the motion judge’s declaration that section 38 is of no force or effect to the extent that it deprives a Superior Court judge of the jurisdiction to review a claim of crown privilege.¹⁶⁶ In deciding the case, Justice Sharpe JA first turned to analysis of whether the motion judge erred in dismissing the respondents’ motion for production and upholding the constitutional validity of section 38 at the pre-trial stage.¹⁶⁷ Sharpe J found that

Section 38 does not remove anything that falls within the core jurisdiction of the Superior Court and that is protected by s. 96. To the contrary, s. 38 provides for a more generous form of judicial review – albeit in another court – than was ever available in the Superior Court at common law.¹⁶⁸

As such, he concluded that, ‘[i]t follows that in relation to pre-trial discovery, s. 38 does not deprive the Superior Court of the core jurisdiction protected by s. 96 of the Constitution Act, 1867.’¹⁶⁹

Sharpe JA disagreed with the motion judge’s conclusion that section 38 was of no force or effect to the extent that it deprived the Superior Court of the power to decide claims of privilege at a trial involving a claim to enforce the constitution, including the Charter. Sharpe JA held that it was ‘unnecessary for the motion judge to have ruled on this question in this case’.¹⁷⁰ According to Sharpe JA, how or why privilege issues that arise at trial were not resolved at the pre-trial discovery phase will have to be resolved at trial. In the instant case, there was no factual basis for the motion judge to make an important constitutional ruling and ‘[i]t is not only unnecessary but unwise to attempt to decide constitutional issues in the absence of a concrete factual situation’.¹⁷¹ As such, Sharpe JA set aside that portion of the motion judge’s order and said that the issue would best be decided if and when a concrete factual situation was to arise.

As with the cases discussed in Part 2, above, the end result of the Almaki and Abou-Elmaati decisions is that, despite the complex challenges the operation of the CEA provides for judges, ministers, litigants, the accused, lawyers and other involved parties, the scheme itself is still constitutionally valid. There have, however, been many recommendations for change to the CEA, many of which have originated from public inquiries that have themselves used in camera proceedings.

¹⁶⁶ *Abou-Elmaati* (n 160).

¹⁶⁷ *ibid* [12].

¹⁶⁸ *ibid* [33].

¹⁶⁹ *ibid* [35].

¹⁷⁰ *ibid* [38].

¹⁷¹ *ibid* [40].

(iii) United States

Secret evidence issues have also arisen in the United States in the context of civil litigation linked to national security issues. Two illustrative examples are provided by the court decisions in the Jeppesen Dataplan litigation and the General Dynamics Corp case. In both these cases, litigation could not proceed without disclosing national security information. As such, the courts held the litigation could not proceed at all. The judgments in these cases illustrate that the courts will assume responsibility for ensuring that an appropriate balance is struck between protecting national security information and maintaining an open judicial system.

The *Binyam Mohamed v Jeppesen Dataplan* litigation related to the United States' extraordinary rendition program after 9/11.¹⁷² Several plaintiffs who claimed to have been extraordinarily rendered sued Jeppesen Dataplan under the Alien Tort Statute, alleging that the company had been involved in providing 'flight planning and logistical support services to the aircraft and crew on the [alleged extraordinary rendition] flights'. The United States government swiftly 'moved to intervene and to dismiss plaintiffs' complaint under the state secrets doctrine'.¹⁷³ The case ultimately made its way to an en banc hearing of the US Court of Appeals for the Ninth Circuit 'to resolve questions of exceptional importance regarding the scope and application of the state secrets doctrine'.¹⁷⁴ The Ninth Circuit emphasised that the US Supreme Court 'has long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely'.¹⁷⁵ It went on to outline the two applications of this principle:

One completely bars adjudication of claims premised on state secrets (the "Totten bar"); the other is an evidentiary privilege ("the Reynolds privilege") that excludes privileged evidence from the case and may result in dismissal of the claims.¹⁷⁶

This litigation was characterised by disagreement over the scope and applicability of the Totten bar and the Reynolds privilege. For the majority of the en banc Ninth Court, the Totten bar applied 'to cases in which "the very subject matter of the action" is "a matter of state secret"'.¹⁷⁷ In stating its view of the Reynolds privilege, the en banc majority stated:

Unlike the Totten bar, a valid claim of privilege under Reynolds does not automatically require dismissal of the case. In some instances, however, the assertion of privilege will require dismissal because it will become

¹⁷² *Mohamed v Jeppesen Dataplan (en banc rehearing)* (8 September 2010) (No 08-15693) 13515 (2010) (US Ct App, 9th Circuit).

¹⁷³ *ibid* 13528.

¹⁷⁴ *ibid*.

¹⁷⁵ *ibid* 13529 (emphasis added).

¹⁷⁶ *ibid* (emphasis in original). The references are to *Totten v United States* 92 US 105 (1876) and *United States v Reynolds* 345 US 1 (1953).

¹⁷⁷ *Mohamed v Jeppesen Dataplan* (n 172) 13531.

apparent during the Reynolds analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.¹⁷⁸

In terms of how to apply the Reynolds privilege in practice, the Court outlined three steps. First, there were certain procedural requirements. Second, the court should independently evaluate whether the information is actually privileged. The court should examine claims of this privilege ‘with a very careful, indeed a skeptical, eye’.¹⁷⁹ Importantly, if the court concludes that the material is privileged, then ‘the evidence is absolutely privileged, irrespective of the plaintiffs’ countervailing need for it’.¹⁸⁰ As such, this analysis ‘places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system’.¹⁸¹ Third, the court must consider how the matter should proceed: ‘whether it is feasible for the litigation to proceed without the protected evidence and, if so, how.’¹⁸² Often, it would be sufficient to simply exclude or wall off the privileged information. But in some cases application of the privilege may require dismissal of the proceedings. Such dismissal might be required if, for example, ‘litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets’.¹⁸³ Applying the Reynolds calculus, the majority of the en banc Court of Appeals stated that while it was ‘precluded from explaining precisely which matters the privilege covers lest we jeopardize the secrets we are bound to protect,’ it could state that ‘we have independently and critically confirmed that their disclosure could be expected to cause significant harm to national security’.¹⁸⁴ The Court of Appeals went on to conclude that dismissal of the proceedings was:

required under Reynolds because there is no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets.¹⁸⁵

The majority was able to make these predictions and reach this conclusion while also noting that adversarial litigation ‘is inherently complex and unpredictable’.¹⁸⁶ The minority opinion raised specific concerns about dismissing on the basis of Reynolds at the pleading stage and at an appellate level, when assessments were necessarily hypothetical and made by a body not ordinarily involved in fact-finding.¹⁸⁷ The majority acknowledged that dismissal at the pleading stage was ‘a drastic result and should not be readily granted’.¹⁸⁸ In its conclusion, the majority stated:

¹⁷⁸ *ibid* 13533.

¹⁷⁹ *ibid* 13537.

¹⁸⁰ *ibid*.

¹⁸¹ *ibid*.

¹⁸² *ibid* 13538.

¹⁸³ *ibid* 13539-13540.

¹⁸⁴ *ibid* 13546.

¹⁸⁵ *ibid* 13548.

¹⁸⁶ *ibid* 13550.

¹⁸⁷ *ibid* 13562-13565.

¹⁸⁸ *ibid* 13550.

it should be a rare case when the state secrets doctrine leads to dismissal at the outset of a case. Nonetheless, there are such cases – not just those subject to Totten’s per se rule, but those where the mandate for dismissal is apparent even under the more searching examination required by Reynolds.¹⁸⁹

The Supreme Court’s decision in *General Dynamics Corp v United States* (2011)¹⁹⁰ was decided shortly after the announcement that the Supreme Court would not consider an appeal in *Jeppesen Dataplan*. In *General Dynamics*, a unanimous Supreme Court considered the appropriate judicial remedy when, in order to protect state secrets, a Government contractor’s prima facie valid affirmative defense to the Government’s allegations of breach of contract, is dismissed by a court.¹⁹¹

The litigation arose out of a dispute over contracts to research and develop stealth aircraft for the US Navy.¹⁹² Scalia J for the Court stated that, while ‘[m]any of the Government’s efforts to protect our national security are well known’,

protecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret....[The Supreme Court has] recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets.¹⁹³

Focusing on the Totten class of cases, the Court went on to state that:

Where liability depends upon the validity of a plausible superior-knowledge defense, and when full litigation of that defense “would inevitably lead to the disclosure of” state secrets [citing Totten], neither party can obtain judicial relief.¹⁹⁴

The risks of allowing litigation to continue were outlined by Scalia J:

Every document request or question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed. Each assertion of the privilege can provide another clue about the Government’s covert programs or capabilities...¹⁹⁵

¹⁸⁹ Also, note that in May 2011, the Supreme Court of the United States denied certiorari. The denial of *certiorari* came shortly before the Supreme Court’s decision in *General Dynamics Corp v United States* 563 US __ (2011) (Supreme Court of the United States), which is considered below.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid* (at 1 of official PDF judgment).

¹⁹² *ibid* (at 1 of official PDF judgment).

¹⁹³ *ibid* (at 5 of official PDF judgment).

¹⁹⁴ *ibid* (at 7-8 of official PDF judgment).

¹⁹⁵ *ibid* (at 8 of official PDF judgment).

Ultimately, the Supreme Court adopted the ‘traditional course’ under the common law, which was to ‘leave the parties where they stood when they knocked on the courthouse door’.¹⁹⁶ Scalia J’s judgment concluded by warning that declaring ‘a Government contract unenforceable because of state secrets’ was ‘the option of last resort, available in a very narrow set of circumstances’.¹⁹⁷

C. Conclusion

In the UK the majority decision in *Al Rawi* was characterised by an overarching concern with violation of common law principles. The Supreme Court expressed a desire not to extend exceptions to these common law principles without a compelling reason. Lord Dyson also expressed some concern over whether a closed procedure was compatible with the principles of natural justice.

In other jurisdictions the courts have also grappled with how to reconcile the principles of natural justice with the use of secret evidence. In Canada the use of secret evidence under section 38 of the CEA has been extended to civil proceedings (such as claims for damages). The Federal Court has applied a three-part test which asks (1) the relevance of the material to the proceedings, (2) whether disclosure would be injurious to national security, international relations or national defence and (3) whether the public interest in disclosure is outweighed by the public interest in non-disclosure. This test requires the judge to undertake a balancing exercise which considers the competing interests at play, meaning that closed proceedings will not be automatically accepted. While the constitutionality of section 38 has been challenged, to-date it has been upheld (despite a ruling of a motion judge to the contrary). In the US a majority of the US Court of Appeals for the Ninth Circuit has found that a valid claim for privilege does not automatically require the dismissal of the case. However, the Court has emphasized that at times the application of the Reynolds evidentiary privilege will require the dismissal of proceedings. In the context of government contractors the Supreme Court has confirmed that at times it will be too risky to allow litigation to continue. Both the US and Canadian cases demonstrate that it is the courts who will bear the ultimate responsibility for monitoring the balance struck between protecting national security and ensuring open justice.

¹⁹⁶ *ibid* (at 9 of official PDF judgment).

¹⁹⁷ *ibid* (at 13 of official PDF judgment). The cases were remanded ‘for further proceedings consistent with this opinion’: at 14 of official PDF judgment. .

4. ENTRY, STAY, DEPORTATION AND EXCLUSION OF ALIENS OR RESIDENT ALIENS

A. The Position in the UK

The Special Immigration Appeals Commission (SIAC) was set up to hear appeals against deportation decisions made by the Home Office and also decisions depriving persons of UK citizenship. The Anti-Terrorism Crime and Security Act 2001 also confers on the SIAC the jurisdiction to hear appeals from those detained on the basis of suspicion that they are international terrorists.¹⁹⁸ The Commission enjoys statutory authorization to conduct closed hearings and to consider 'closed material' in the absence of the appellant and his legal representative.¹⁹⁹ Section 6 of the SIAC Act provides for the use of a special advocate to represent the interests of the appellant at closed hearings.

The first substantive appeal heard by the SIAC was in the matter of Mr Rehman, a Pakistani national appealing against a deportation order he had been given on the basis of his alleged involvement with an Islamic terrorist organization. The SIAC granted the appeal and the Home Office appealed against that decision. The matter eventually came up before the Court of Appeal²⁰⁰ and thereafter the House of Lords.²⁰¹ The House of Lords held that the SIAC had been wrong in applying the civil standard of proof in reviewing the Home Secretary's assessment of future risk. It was held that in assessing whether deportation could be justified on the grounds of national security, 'it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.'²⁰² In *Rehman*, the issue of the fairness of the closed material procedure was not in issue before the House of Lords and was therefore not addressed. This issue has, however, been squarely addressed in subsequent cases.

In *RB & U (Algeria); OO (Jordan) v Secretary of State for the Home Department*,²⁰³ the appellants challenged the use of secret evidence by the Special Immigration Appeals Commission (SIAC) when considering whether the deportee faces a real risk of torture or ill-treatment, contrary to Article 3, on return to his country of origin. The House of Lords rejected the submission that there could be no justification for the use of secret evidence in this context. Lord Phillips accepted that the disclosure of personal information about foreign citizens or officials, or of conversations between diplomatic officials and government ministers, could prejudice international relations and the free and frank

¹⁹⁸ Anti Terrorism Crime and Security Act 2004, Part 4.

¹⁹⁹ Special Immigration Appeals Commission (Procedure) Rules 2003, Rule 37 as amended by the Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007.

²⁰⁰ *Secretary of State for the Home Department v Shafiq Ur Rehman* (2000) 3 All ER 778.

²⁰¹ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153.

²⁰² *ibid* [56] (Lord Hoffman).

²⁰³ [2009] UKHL 10, [2010] 2 AC 110.

exchange of information between countries.²⁰⁴ Their Lordships went on to deny that the use of secret evidence in this context was unfair at common law. Lord Phillips reasoned that the 2003 Rules ‘afford a substantial degree of protection to the deportee and are, in one respect, more favourable than those governing discovery in civil and criminal proceedings.’²⁰⁵ Lord Hope attached importance to the fact that SIAC retained discretion to preclude reliance on secret evidence where this would result in ‘substantial unfairness’:

The special advocate procedure too provides an opportunity for questions as to the weight to be attached to undisclosed evidence to be tested and for SIAC itself, exercising its substantial experience in these matters, to distinguish between sensitive material the withholding of which will not result in substantial unfairness and core material to which weight cannot be given unless it is made public.²⁰⁶

Lord Phillips further considered whether the Supreme Court decision in MB warranted a different conclusion. His Lordship interpreted that case as laying down a rule that the individual must have an opportunity to meet the case against him.²⁰⁷ On the issue of safety on return, His Lordship held that this requirement was always likely to be satisfied. This was for three reasons. Firstly, because the deportee is ‘unlikely to have information to impart that will be critical to meeting the case of the Secretary of State in relation to safety on return.’²⁰⁸ As His Lordship explained:

Even if he is in a position to demonstrate that suspicions held about him by the receiving state are groundless, this will not have significant bearing on the risk that he will face on his return.²⁰⁹

Secondly, His Lordship reasoned that the deportee was likely to have an adequate opportunity to meet the case against him without sight of the secret evidence.²¹⁰ In this respect, His Lordship distinguished deportation from Control Order proceedings:

It is true that, if that deportee will be at real risk of a violation of his human rights on return to his own country, this is likely to be because of facts that are personal to him. The difference is that he will normally be aware of those facts and indeed he will be relying on them to establish the risk that he faces on his return. His situation is not that of an individual who is unaware of the case that is made against him.²¹¹

²⁰⁴ *ibid* [93].

²⁰⁵ *ibid* [103].

²⁰⁶ *ibid* [223].

²⁰⁷ *ibid* [102].

²⁰⁸ *ibid*.

²⁰⁹ *ibid* [96].

²¹⁰ *ibid* [95].

²¹¹ *ibid*.

Thirdly, His Lordship argued that ‘it is hard to conceive of a situation in which the deportee will not be well aware of the issues that relate to safety on return.’²¹² This is because of the rule laid down by Ouseley J in *Y and Othman v Secretary of State for the Home Department*, that any ‘substantive assurance’ upon which the Home Secretary is seeking to rely must be made openly, whilst ‘the key documents or conversations relied on to show that an appellant’s return would not breach the UK’s international obligations’ must also be disclosed.²¹³

B. Comparative Experiences

(i) European Court of Human Rights

As noted in the Introduction, the ECtHR in the case of *Maaouia*²¹⁴ ruled that Article 6 did not apply to issues concerning the entry, stay, and deportation of aliens. As such, the jurisprudence of the Court has been developed on the basis of other articles.

One of the leading cases in this area is *Chahal*. The Home Secretary decided that the applicant be deported for reasons of national security and the international fight against terrorism. He was detained pending deportation on national security grounds and his applications for bail and habeas corpus were also opposed by the Home Secretary on grounds of national security. The applicant complained of violations of Article 5(4), which provides for the right to take proceeding to determine the lawfulness of detention. The ECtHR recognised that the use of secret material might be unavoidable where national security was at stake, but held that this did not mean that the executive could be free from effective control by the domestic courts whenever they asserted that national security and terrorism were involved.²¹⁵ The Court found there was a breach in that the High Court, which decided the applicant’s habeas corpus application, did not have access to the secret material on which the Home Secretary had based his decision. Although there was an advisory panel which had full sight of the secret information, the applicant was not entitled to legal representation before it and was only given an outline of the case against him, the panel had no power of decision and its advice to the Home Secretary was not binding and was not disclosed.²¹⁶

The Court in *Chahal* also made observations about what it described as ‘a more effective form of judicial control’ developed in Canada in national security cases, where a judge held an in camera hearing of all the evidence where the individual was provided with a statement summarising, as far as possible, the case against him. The evidence was examined in the absence of the individual and his lawyers by a security-cleared counsel. A summary of the evidence, with necessary deletions, was provided to the individual.

²¹² *ibid* [102].

²¹³ [2006] UKSIAC 36/2005 [58].

²¹⁴ *Maaouia v France* (2001) 33 EHRR 42.

²¹⁵ *ibid* [131].

²¹⁶ *ibid* [130].

Note that SIAC's secret evidence procedure is currently subject to a challenge before the European Court of Justice for its compatibility with European Union law. The case of *ZZ v SSHD* concerns the exclusion from the UK of a dual French and Algerian national on the basis of reasons of national security.²¹⁷ He appealed to the SIAC. His appeal was heard using the typical closed material procedure and was dismissed. In June 2011, the Court of Appeal referred the following question to the European Court of Justice regarding the matter:

Does the principle of effective judicial protection require that a judicial body considering an appeal from a decision to exclude a EU citizen from a member state on grounds of public policy and public security under chapter VI of Directive 2004/38 ensure that the EU citizen concerned is informed of the essence of the grounds against him, notwithstanding the interests of state security?

At present, the ECJ's determination is still pending.

(ii) Canada

The leading case in this area is *Suresh*.²¹⁸ Mr Suresh was a refugee from Sri Lanka who applied for landed immigrant status. In 1995, he was detained by the Canadian government and deportation proceedings on security grounds were commenced against him based on the Canadian Security Intelligence Service's opinion that he was a member of Liberation Tigers of Tamil Eelam, an alleged terrorist organization. The Federal Court upheld the deportation certificate against Suresh as reasonable and, following a deportation hearing, an adjudicator held that he should be deported. The Minister of Citizenship and Immigration then issued an opinion declaring Suresh to be a danger to the security of Canada under s. 53(1)(b) of the Immigration Act and concluded that he should be deported. Mr Suresh was not provided with a copy or a summary of the reasons for this decision, nor was he given an opportunity to respond to them orally or in writing. As such, he applied for judicial review, arguing that: the Minister's decision was unreasonable; the procedures under the Act were unfair; and that the Act infringed sections 7, 2(b) and 2 (d) of the Charter. After the Federal Court of Appeal upheld a decision to dismiss the application, the case reached the Supreme Court of Canada.

The Supreme Court allowed Suresh's appeal and ordered a new deportation hearing. While the Court concluded that deporting a refugee to face a substantial risk of torture would generally violate section 7 of the Charter and rejected the argument that the terms 'terrorism' and 'danger to the security of Canada' were unconstitutionally vague, they held that Mr Suresh's hearing did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death.²¹⁹

²¹⁷ *ZZ v Secretary of State for the Home Department* [2011] EWCA Civ 440.

²¹⁸ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

²¹⁹ *ibid* [6].

The Court's decision pertaining to the procedural safeguards (or lack thereof) afforded to Mr Suresh is of central importance for the purposes of this project. While the Court stopped short of requiring the Minister to conduct a full oral hearing or a complete judicial process, it argued that section 7 of the Charter provided that a person facing deportation to torture under s. 53(1)(b) must be informed of the case to be met and have an opportunity to respond to the case presented by the Minister.²²⁰ The Court held that the violation of section 7 could not be justified by section 1.²²¹

Suresh can be seen as a landmark case in that it was one of the first instances in which the Supreme Court of Canada signaled to the Canadian government that the use of secret evidence, absent necessary safeguards, would violate fundamental rights enshrined in the Charter. It has been cited numerous times, including in the Charkaoui cases noted above and the Khadr case to be discussed below (in the section on covert surveillance).

(iii) United States

In several cases involving the exclusion of permanent residents or the removal of aliens, the United States courts have demonstrated some of the difficulties that arise from the use of secret evidence in judicial proceedings.

In *Rafeedie v Immigration and Naturalization Service* (1989),²²² Rafeedie was a lawful permanent resident alien living in Ohio. He applied for and obtained an INS permit that would allow him to travel overseas and return to the United States. The ostensible reason for his travel was to visit family in Cyprus; the actual reason was to visit Syria for 'the First Conference of the Palestine Youth Organization (PYO)'. The INS claimed that the PYO had links to terrorist organisations. On his return to the United States, Rafeedie was questioned by INS and FBI officers. The INS eventually brought summary exclusion proceedings against Rafeedie on the basis of new confidential information. The INS, however, gave Rafeedie 'no indication of the nature of the confidential information upon which it relied to use summary proceedings'.²²³ The District Court granted a preliminary injunction prohibiting the INS from conducting exclusion proceedings against Rafeedie. The Court of Appeals for the DC Circuit dealt with a number of arguments. Relevantly, the INS argued that the federal courts had intervened too prematurely: the litigation might subsequently prove unnecessary if the INS Regional Commissioner reached a decision in the summary exclusion proceeding that Rafeedie was not excludable.²²⁴ The Court of Appeals, however, invoked Franz Kafka's *The Trial* in dismissing this argument and noted the absurdity of a situation in which:

Rafeedie – like Joseph K. in *The Trial* – can prevail before the Regional Commissioner only if he can rebut the undisclosed evidence against him, ie, prove that he is not a terrorist regardless of what might be implied by

²²⁰ *ibid* [122].

²²¹ *ibid* [128].

²²² *Rafeedie v Immigration & Naturalization Service* 880 F 2d 506 (1989) (US Ct App, DC Circuit).

²²³ *ibid* 509.

²²⁴ *ibid* 516.

the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden...²²⁵

On the basis of this reasoning, and related reasoning, the Court of Appeals concluded that there would be 'minimal' administrative or judicial interests in requiring Rafeedie to exhaust his administrative remedies before the Regional Commissioner.²²⁶

In *American-Arab Anti-Discrimination Committee v Reno* (1995),²²⁷ the Court of Appeals for the Ninth Circuit considered a number of cases involving attempts to deport aliens from the United States. Relevantly for present purposes, the case involved the INS appealing against a US District Court finding in favour of two aliens, Bakarar and Sharif. Bakarar and Sharif had applied for 'legalization' of their migration status under US law.²²⁸ The INS sought to use undisclosed secret information in the legalization proceedings. The relevant dispute before the Court of Appeals was whether 'reliance on undisclosed information to determine legalization satisfies the demands of due process'.²²⁹ The Court of Appeals held that the relevant test was that drawn from *Matthews v Eldridge*:

Under the test, the court must weigh:

First, the private interest that will be affected by the official action;
second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²³⁰

The Court of Appeals proceeded to apply that test to the facts of this case. It held that the private interests affected by the official action in this case were 'truly substantial': the 'liberty interest in remaining in their homes' and 'the opportunity...to work'.²³¹ Second, the Court approved the District Court's statement that 'One would be hard pressed to design a procedure more likely to result in erroneous deprivations.'²³² Moreover:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be

²²⁵ *ibid* 516 (emphasis added).

²²⁶ *ibid* 517.

²²⁷ *American-Arab Anti-Discrimination Committee v Reno* 70 F 3d1045 (1995) (US Ct App, 9th Circuit).

²²⁸ Other issues were involved, such as an allegation of selective enforcement of immigration law in violation of aliens' First Amendment rights.

²²⁹ *Reno* (n 227) §93.

²³⁰ *ibid* §§46-48, citing *Matthews v Eldridge* 424 US 319 (1976) 335.

²³¹ *Reno* (n 227) §§104-105.

²³² *ibid* §107.

disclosed to the individual so that he has an opportunity to show that it is untrue....²³³

The Court of Appeals went on to note that ‘As judges, we are necessarily wary of one-sided process’ and stated that ‘the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error’.²³⁴ Having concluded that the District Court was correct in finding ‘an exceptionally high risk of erroneous deprivation,’ the Court of Appeals moved on to consider the governmental interest.

The Government argued that it sought to remove people it perceived as threatening the US’ national security while also protecting its confidential sources. The Court of Appeals, however, noted that ‘the Government has offered no evidence to demonstrate that these particular aliens threaten the national security of this country’.²³⁵ Indeed, the Government claimed that it need not do so and relied instead ‘on general pronouncements in two State Department publications...and on the President’s recent broad Executive Order...’.²³⁶ There was, however, no indication ‘that either alien has personally advocated [prohibited] doctrines or has participated in terrorist activities’.²³⁷ The Court of Appeals went on to note that ‘the exceptions to full disclosure are narrowly circumscribed’ and that, in this case:

the Government does not seek to shield state information from disclosure in the adjudication of a tort claim against it; instead, it seeks to use secret information as a sword against the aliens.²³⁸

Ultimately, the Court of Appeals concluded that the government’s interest was insufficient ‘to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved’.²³⁹

Since 1996, the United States has also had in operation the Alien Terrorist Removal Court.²⁴⁰ The US Code provisions contain references to the use of confidential information but the Court does not appear to be active or hearing cases.²⁴¹

²³³ *ibid* §109.

²³⁴ *ibid* §110.

²³⁵ *ibid* §112.

²³⁶ *ibid* §112.

²³⁷ *ibid* §112.

²³⁸ *ibid* §114.

²³⁹ *ibid* §115.

²⁴⁰ See 8 USC §§ 1531-1537,

available at http://www.law.cornell.edu/uscode/8/usc_sup_01_8_10_12_20_V.html

²⁴¹ See, eg, Keeping Secrets: The Protection of Classified and Security Sensitive Information (ALRC Report 98) 414-415.

(iv) Australia

As previously suggested, the content of the right to procedural fairness in Australia is drastically reduced in practice when national security considerations intervene. This is clearly the case in immigration decisions. In *Leghaei v Director-General of Security*,²⁴² a prominent Sydney Shiite cleric had his permanent residency visa revoked on the basis of a security assessment made by the Australian Security Intelligence Organisation (ASIO).²⁴³ Leghaei argued that the ASIO officers in charge had failed to afford him procedural fairness because they had not provided any reasons as to why he should be considered a security risk. The trial judge recognised that, in theory, the Sheikh should have been afforded procedural fairness. However, he also emphasised that, in practical terms, national security considerations would reduce this requirement to ‘nothingness’.²⁴⁴ This decision was upheld on appeal to the Full Court of the Federal Court.²⁴⁵ Similar reasoning was also applied against two Iraqi refugees seeking to challenge an ASIO security assessment in a recent 2011 decision.²⁴⁶ In that case, the Federal Court emphasised that security organisations are ‘usually better placed to assess the impact of disclosure of particular material than are the courts.’²⁴⁷

C. Conclusion

The ECtHR has found that Article 6 is not applicable to issues concerning the entry, stay, and deportation of aliens. As a result, the House of Lords has considered the situation at common law, and has held that the use of secret evidence by SIAC is not unfair. In other jurisdictions the courts have been more willing to intervene. At the ECtHR level, although Article 6 is not available, the ECtHR has found (in *Chahal*) that the use of secret material can amount to a breach of Article 5(4). This was primarily because the High Court did not have access to the secret material on which the Home Secretary had based his decision. The Canadian courts have also been willing to find infringements of the Charter. In particular, the Supreme Court has found that the use of secret evidence in the context of deportation may result in a breach of section 7 (which cannot be justified under section 1). The Court has stressed that a person facing deportation must be informed of the case to be met and have an opportunity to respond to a case presented by the Minister. The US courts have focused on the need for the court to assess the balance struck between the competing interests, and have placed particular emphasis on the risk of erroneous deportation. In Australia however, the right to procedural fairness is a weak safeguard where national security considerations arise.

²⁴² [2005] FCA 1576.

²⁴³ Adverse security assessments are issued under and governed by Pt IV of the Australian Security Intelligence Organisation Act 1979 (Cth).

²⁴⁴ *Leghaei v Director-General of Security* [2005] FCA 1576 [88].

²⁴⁵ *Leghaei v Director-General of Security* (2007) 97 ALD 516.

²⁴⁶ See *Sagar v O’Sullivan* [2011] FCA 182.

²⁴⁷ *ibid* [84].

5. PUBLIC INQUIRIES

A. Public Inquiries in Canada

In Canada there have been several major public inquiries that have dealt with the use of confidential information in the context of national security. These include the Maher Arar Commission,²⁴⁸ the Air India Inquiry,²⁴⁹ and the Iacobucci Report.²⁵⁰ Each of these reports concluded that the Attorney General had overclaimed national security confidentiality. In addition, each inquiry had to conduct some hearings in camera or to deal with the publication of potentially injurious information. These reports not only galvanized the public but they have also been subject to consideration by the courts. This makes them particularly relevant to any consideration of the use of secret evidence in judicial proceedings.

The Maher Arar Commission was established in February 2004 to investigate how the actions of Canadian officials may have contributed to Arar's extraordinary rendition to Syria. Justice Dennis O'Connor, then Associate Chief Justice of Ontario, led the inquiry and released its final report on September 18, 2006. The report contains an entire chapter describing the factual inquiry process and the complexities that surrounded that process.²⁵¹ O'Connor J acknowledges that,

Numerous procedural challenges arose from the tension among three different, sometimes competing requirements: making as much information as possible public, protecting legitimate claims of NSC, and ensuring procedural fairness to institutions and individuals who might be affected by the proceedings.²⁵²

O'Connor J also concludes that the Government overclaimed national security confidentiality.²⁵³ This conclusion was later further verified on August 9, 2007, when an addendum to the report containing previously undisclosed portions was released as a result of a Federal Court ruling.²⁵⁴

²⁴⁸ Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa 2006) [hereafter *Maher Arar Commission*].

²⁴⁹ Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy* (Ottawa 2010) [hereafter *Air India Inquiry*].

²⁵⁰ The Honourable Frank Iacobucci QC LLD, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa 2008) [hereafter *Iacobucci Report*].

²⁵¹ *Maher Arar Commission* (n 248) Part VIII, pp. 279-307.

²⁵² *ibid* 279.

²⁵³ *ibid* 301-4.

²⁵⁴ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. *Addendum to Report of the Events Relating to Maher Arar: Volume I, II, and Analysis and Recommendations* (Ottawa, 2007).

While the Maher Arar Commission report was seen as a landmark at the time it was released because of its use of *amicus curiae* and *in camera* hearings, subsequent post-Charkaoui inquiries are perhaps more relevant to this discussion of secret evidence. The Iacobucci Report, chaired by the Honourable Frank Iacobucci, was released in October 2008. A supplementary report was released on February 23, 2010, which provided additional information that had been withheld for national security confidentiality considerations. Iacobucci J was directed not to disclose information that would be injurious to international relations, national defence, national security or the conduct of any investigation or proceeding which, as he noted, is language similar to that used in section 38.²⁵⁵ If he disagreed with a position taken by the government, he was allowed under the terms of reference of the inquiry to notify the Attorney General, in which case Federal Court proceedings under section 38 of the CEA could be initiated to resolve the matter.²⁵⁶

Finally, the Air India Inquiry, headed by retired Supreme Court Justice John Major, was completed on June 17, 2010. Major J made many recommendations about how the right to a fair trial could be balanced against national security confidentiality concerns. For example, he noted that the IRPA ‘has led to a cadre of security-cleared lawyers with experience in matters involving national security confidentiality’²⁵⁷ and recommended that these special advocates be used to protect the accused’s interests during section 38 proceedings. Moreover, Major took issue with the two-court system used in deciding section 38 applications, describing it as being ‘out of step with systems in other democracies’ and recommending that the system be abolished in favour of national security confidentiality determinations being left to Superior Court judges²⁵⁸. At present, the Government of Canada has not signaled any desire to propose amendments to section 38 that would respond to Justice Major’s concerns.

B. Conclusion

The Canadian experience of public inquiries may be valuable to the UK in considering whether public inquiries are appropriate, and how they are to be conducted. In the UK context, the Green Paper recognises that public inquiries may be an alternative to inquests (where the exclusion of material may mean the coroner is unable to complete their investigation). However, the Green Paper suggests that public inquiries are expensive and complex and should be considered as a last resort. The public inquiries conducted in Canada demonstrate that the complexities present in the criminal, quasi-criminal and civil contexts where secret evidence might be used are also present in the public inquiry process. National security confidentiality is often overclaimed during this process, which often results in further inquiry information being released following court rulings.

²⁵⁵ *Almaki* (n 159) [10].

²⁵⁶ *ibid.*

²⁵⁷ *Air India Inquiry* (n 249) 167-8.

²⁵⁸ *ibid* 160-5.

6. SECURITY CLEARANCE AND VETTING

A. The Position in the UK

Employees of certain governmental departments, who are exposed to sensitive information in the course of their employment, are often required to undergo a process of security vetting before receiving ‘security clearance.’ In 1997, the Security Vetting Appeals Panel (SVAP) was set up to hear appeals from those to whom security clearance is refused or withdrawn. The SVAP operates using closed material procedure with separate open and closed hearings and the use of special advocates.

In *Home Office v Tariq*,²⁵⁹ the appellant, a Pakistani national, was an immigration officer employed by the Home Office. His security clearance was revoked in 2006; thereafter he appealed to the SVAP and his appeal was dismissed. The appellant also challenged the Home Office’s decision before the Employment Tribunal on the basis that it was discriminatory. As discussed above, the Supreme Court addressed the question of whether the closed material procedure employed by the Employment Tribunal breached Tariq’s right to a fair trial. The Supreme Court held that it did not. In so holding, reference was made to the sensitive nature of security vetting and the importance of closed procedures in such cases:

security vetting is a highly sensitive area. Its intensity will no doubt vary from case to case, but common to them all is the need to preserve the integrity of sources of information and the methods of obtaining it. That must always be the paramount consideration, whatever the nature of the proceedings in which the issue arises. It ensures that the national interest is protected when people are appointed to posts where security clearance is required. Issues of employment and discrimination law raised by people appointed to those posts may require access to the way this process has been carried out. It was no doubt for that reason that the use of the closed procedure and the appointment of special advocates was expressly authorised by the statute.²⁶⁰

Such comments reveal the level of judicial deference adopted with regard to matters of security clearance and vetting. As Lord Dyson observed in *Tariq*, there is a strong line of support for the proposition that in cases of surveillance and vetting ‘an individual is not entitled to full article 6 rights if to accord him such rights would jeopardise the efficacy of the surveillance or security vetting regime itself.’²⁶¹ While the courts have earlier held that a person is entitled to a summary (or ‘gist’) of the closed material relied upon against

²⁵⁹ [2011] UKSC 35.

²⁶⁰ *ibid* [75].

²⁶¹ *ibid* [158].

them, this right is not absolute. In *Tariq*, a majority of the Supreme Court held that ‘gisting’ was not required in every context where Article 6 was engaged.²⁶²

B. Comparative Experiences

(i) European Court of Human Rights

Security clearance and vetting decisions invariably involve civil servants. As outlined above, the previous approach of the ECtHR was to consider many matters affecting civil servants as falling outside Article 6 of the Convention. This meant that many cases were considered under Article 8, such as the leading case of *Leander*.²⁶³ In this case the applicant sought employment in a naval museum located adjacent to a naval base which was a restricted military zone. The applicant was refused security clearance for reasons which were never provided to him. The ECtHR held that while there was an interference with the right to private life as guaranteed by Article 8(1), the interference could be justified under Article 8(2).²⁶⁴ The ECtHR stated that

There can be no doubt as to the necessity, for the purpose of protecting national security, for the Contracting States to have laws granting the competent domestic authorities power, firstly, to collect and store in registers not accessible to the public information on persons and, secondly, to use this information when assessing the suitability of candidates for employment in posts of importance for national security.²⁶⁵

In ruling that the measures were proportionate, the ECtHR attached significant weight to the bodies that supervised such covert surveillance, including the presence of parliamentarians on the National Police Board, the Chancellor of Justice, the Parliamentary Ombudsman, and the Parliamentary Committee on Justice.

More recently the ECtHR has taken a very different approach, and the cases of *Pellegrin*²⁶⁶ and *Eskelinen*²⁶⁷ mean that a much greater proportion of civil servants will be able to rely on Article 6 rights. However, while Article 6 is now in principle available, a government can exclude certain civil servants from claiming the benefit of Article 6 rights if particular steps are taken. In *Eskelinen*, the ECtHR indicated that civil servants could be excluded if (1) the State in its national law has expressly excluded access to a court for the post or category of staff in question, and (2) the exclusion is justified on objective grounds in the State’s interest.²⁶⁸

²⁶² *ibid* [83].

²⁶³ *Leander v Sweden* (1987) 9 EHRR 433.

²⁶⁴ *ibid* [48].

²⁶⁵ *ibid* [59].

²⁶⁶ *Pellegrin v France* (2001) 31 EHRR 651.

²⁶⁷ *Eskelinen v Finland* (2007) 45 EHRR 43.

²⁶⁸ *ibid* [62].

(ii) Canada

The Canadian Security Intelligence Service is responsible for security screening in Canada under the mandate of the CSIS Act. It provides security assessments for all federal government departments and agencies, under sections 13 and 15 of the CSIS Act. Its performance, including its security vetting determinations, is reviewed by the Security Intelligence Review Committee (SIRC), which was established in 1984 as an independent, external review body. SIRC has the power to hear complaints, in a quasi-judicial hearing, including those about denials of security clearances to federal government employees and contractors.²⁶⁹

In Canada, no case has arisen in which a security clearance has been revoked as a result of allegations based on secret or sensitive material. The only major Supreme Court case of relevance is Thomson.²⁷⁰ In that case, Thomson had been offered a position in the Ministry of Agriculture, subject to him obtaining security clearance. CSIS conducted a report and advised against granting the clearance and, subsequently, the Ministry's Deputy Minister rescinded the job offer. Thomson filed a complaint pursuant to section 42 of the CSIS Act, which SIRC investigated in two meetings in which the parties were present. SIRC issued a report recommending that Thomson be granted the clearance, but Thomson nonetheless was denied the clearance by the Deputy Minister.

The main issue for the Supreme Court to consider in this case was whether a Deputy Minister was bound to follow the 'recommendations' of SIRC. Ultimately, the court found that the final decision should be left to the Deputy Minister, deciding not to interpret 'recommendations' expansively. For the purposes of this report, the most important aspect of the case is what it says about the appropriate safeguards in this process. Although secret evidence was not used in this case, the majority asserts that procedural fairness was maintained during this process because Thomson was apprised of the reasons for his security clearance denial and because he was given the opportunity to respond in the hearing before SIRC.²⁷¹

(iii) United States

In *Greene v McElroy* (1959),²⁷² the Supreme Court of the United States considered the case of a petitioner who was deprived of his security clearance on suspicion of Communist sympathies. The reasoning in *Greene* remains of interest more than half a century after it was decided. The petitioner, an aeronautical engineer, was unable to obtain work in that field after his security clearance was taken away. The petitioner complained that the proceedings in which the security clearance was taken away lacked the safeguards provided by the rights to confrontation and cross-examination. For example, it was evident that the Industrial Employment Review Board 'relied on

²⁶⁹ 'About SIRC' accessed from: <http://www.sirc-csars.gc.ca/abtprp/index-eng.html> on 12 October 2011.

²⁷⁰ *Thomson v Canada (Deputy Minister of Agriculture)* [1992] 1 SCR 385.

²⁷¹ *ibid* [23]-[24].

²⁷² *Greene v McElroy* 360 US 474 (1959).

confidential reports which were never made available to petitioner'.²⁷³ It was also evident that he was not given the chance to challenge persons who made adverse statements or to question the government investigators, and that the Board itself had never challenged or questioned these sources.²⁷⁴

After a later hearing, security grounds were cited as a reason for the petitioner being refused 'a detailed statement of findings supporting the Board's decision' to deny the petitioner security access.²⁷⁵ The key issue for the majority in *Greene v McElroy* was whether the Department of Defense was authorized to conduct a security clearance program which rested on fact determinations based on 'proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination'.²⁷⁶

The Supreme Court's majority holding was carefully constructed by Warren CJ:

In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures, under the circumstances, comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that, in the absence of explicit authorization from either the President or Congress, the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.²⁷⁷

Concurrences emphasised the narrowness of the holding.²⁷⁸ A dissent by Clark J framed the issue as being, in part, whether there was 'a constitutional right to have access to the Government's military secrets'.²⁷⁹ Clark J found that existing authorisations were sufficient to ground the security clearance review programs and warned that the majority's decision could 'turn into a rout of our internal security'.²⁸⁰

The US Classified Information Procedures Act (1980) (18 USC App III §§1-16) (CIPA) provides various protections for classified information. Section 3 of CIPA states:

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the

²⁷³ *ibid* 479.

²⁷⁴ *ibid* 479-480.

²⁷⁵ *ibid* 489-490.

²⁷⁶ *ibid* 493.

²⁷⁷ *ibid* 508 (emphasis added).

²⁷⁸ See, eg, *ibid* 508 (Frankfurter, Harlan, and Whittaker JJ); 509-510 (Harlan J).

²⁷⁹ *ibid* 511.

²⁸⁰ *ibid* 524.

United States to any defendant in any criminal case in a district court of the United States.

The CIPA provisions may extend to allowing courts to order that lawyers obtain security clearances.²⁸¹ Other rules providing for security clearances cover specialist US tribunals and courts.²⁸²

C. Conclusion

In the context of security clearances and vetting procedures the courts have tended to exhibit more deference towards the decisions of governments than they have in other areas. In general, the use of secret evidence is often justified on the basis of the highly sensitive nature of the security and vetting process; to disclose the secret evidence in these circumstances is considered to undermine the very purpose of the vetting process. Although in *Greene v McElroy*, which was decided in 1959, the US Supreme Court held that there was no explicit authorization for a procedure that denied cross-examination and consultation, the Court's findings were limited and case-specific. In the UK, Canada and the ECtHR the courts have tended to uphold security clearances even where secret evidence is relied upon in the proceedings. While the availability of Article 6 to civil servants has been relaxed by the ECtHR, it is still possible for governments to restrict access to Article 6 rights if certain conditions are met.

²⁸¹ See also *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC Report 98) 184-185.

²⁸² *ibid* 185-186.

7. COVERT SURVEILLANCE

A. The Position in the UK

The Investigatory Powers Tribunal (IPT) was established in 2004 to hear complaints about surveillance and communication interception carried out by security and intelligence services. In its first preliminary hearing in 2003, the IPT held that its rule that all hearings be held in private was ultra vires.²⁸³ However, it maintained that the tribunal's secret evidence procedures were compatible with Article 6 and were necessary for the effective operation of intelligence services:

The disclosure of information is not an absolute right where there are competing interests, such as national security considerations, and it may be necessary to withhold information for that reason, provided that, as in the kind of cases coming before this Tribunal, it is strictly necessary to do so and the restriction is counterbalanced by judicial procedures which protect the interests of the Complainants...²⁸⁴

The use of covert surveillance (both in the UK context and more generally) has also been considered by the ECtHR.

B. Comparative Experiences

(i) European Court of Human Rights

The ECtHR has not always taken a consistent line in relation to the use of covert surveillance. In *Klass*,²⁸⁵ the applicants argued that a law that permitted the state to covertly intercept telephone calls and correspondence breached Article 6 because there was no obligation on the state to notify the person whose calls or correspondence were intercepted, and there was also no remedy before the domestic courts against the ordering or executing of such measures. The European Commission²⁸⁶ took the view that covert surveillance did not come within the meaning of Article 6.²⁸⁷ The ECtHR did not express a view on this issue, but dismissed the complaint on other grounds stating:

²⁸³ IPT/01/62 and PIT/01/77, 23 January 2003.

²⁸⁴ *ibid* [182].

²⁸⁵ *Klass v Germany* (1979-80) 2 EHRR 214 [75]. See also *Klass and Others*, Report of the Commission, Series B no 26, [57]-[61]; *The Association For European Integration and Human Rights and Ekimdzhiiev v Bulgaria*, Application No 62540/00, 28 June 2007, [106].

²⁸⁶ *Klass v Germany* Report of the Commission, Series B no 26.

²⁸⁷ *ibid* [61].

As long as it remains validly secret, the decision placing someone under surveillance is thereby incapable of judicial control on the initiative of the person concerned, within the meaning of Article 6; as a consequence, it of necessity escapes the requirements of that Article.

In *Association for European Integration and Human Rights*²⁸⁸ without hearing submissions from the parties, the ECtHR adopted the view of the European Commission in *Klass* that Article 6 was inapplicable to covert surveillance.²⁸⁹

More recently, in *Kennedy*,²⁹⁰ the ECtHR instead ruled that Article 6 did apply to covert surveillance. The Court concluded that the restrictions on a normal adversarial procedure which included no disclosure of documents (even in redacted form), no special advocate, limitations on oral and public hearings, lack of reasons for decisions (other than that no determination had been made in the applicant's favour) 'were both necessary and proportionate and did not impair the very essence of the applicant's Article 6 rights.'²⁹¹

(ii) Canada

A number of Supreme Court decisions touch upon the use of covert evidence. In addition to the case of *Charkaoui II*, discussed in Part 2 above, *Khadr* also contains some relevant dicta.²⁹² *Khadr* was a Canadian who had been detained at Guantanamo Bay since 2002, and while at Guantanamo Bay was interviewed by Canadian officials, including CSIS agents. The product of these interviews was shared with US authorities.

Khadr sought disclosure of all documents relevant to his charges, including the interviews. The Federal Court of Appeal granted the disclosure of unredacted copies of all relevant documents under section 38 of the CEA. The Supreme Court confirmed that *Khadr* was entitled to disclosure from the appellants of the records of the interviews, and of information given to US authorities as a direct consequence of conducting the interviews. The Court held that as *Khadr*'s present and future liberty were at stake, the CSIS was required by section 7 of the Charter to comply with the principles of fundamental justice. In the circumstances of this case, where the authorities had acted contrary to Canada's international human rights obligations, section 7 included a duty of disclosure.²⁹³

Khadr and *Charkaoui II* can be seen as a continuation of a line of cases that have significant implications for the retention and disclosure of intelligence. In the *Air India*

²⁸⁸ *Association for European Integration and Human Rights v Bulgaria* (62450/00), 28 June 2007.

²⁸⁹ *ibid* [106].

²⁹⁰ *Kennedy v UK* (2011) 52 EHRR 4.

²⁹¹ *ibid* [190].

²⁹² *Canada (Justice) v Khadr* [2008] SCJ No. 28 [2008] 2 SCR 125 (SCC).

²⁹³ *ibid* [29]-[31].

trial, for instance, the CSIS's destruction of intelligence was also held to be a violation of the accused's section 7 rights.²⁹⁴ More recently, the Khawaja terrorism prosecution found that the mosaic effect – the traditional argument that the disclosure of even innocuous information can still benefit the enemy – no longer holds the weight that it once did.²⁹⁵ These cases illustrate that the courts are becoming more willing to scrutinize the activities of intelligence agencies and the Government's non-disclosure claims under section 38 of the CEA or under the IRPA.

(iii) United States

In the US, covert surveillance is regulated by legislation including the US Foreign Intelligence Surveillance Act (FISA),²⁹⁶ which has been amended a number of times post- 9/11. Under Section 1802 of FISA, the federal executive branch has considerable surveillance powers. That Section provides that 'the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year' if the Attorney-General certifies that certain conditions are complied with.

Among other things, FISA created the Foreign Intelligence Surveillance Court, which may make ex parte orders (that is, orders in the application for which the target is not represented) allowing electronic surveillance if the judge is satisfied of certain conditions.²⁹⁷

Broadly analogous procedures apply to physical searches.²⁹⁸ As of September 2011, Amnesty International is currently pursuing litigation in US federal courts seeking to challenge 'the constitutionality of broadened wiretapping powers that Congress approved in 2008 at the urging of the George W. Bush administration'.²⁹⁹

C. Conclusion

The use of covert surveillance is common to all the jurisdictions under consideration. While the ECtHR initially held that covert surveillance did not fall within the scope of Article 6, it has since held that Article 6 is applicable. However, the ECtHR has found that the use of secret evidence procedures in the UK is necessary for the effective operation of intelligence services and is compatible with the right to a fair trial. Contrastingly, the Supreme Court of Canada has been more willing to scrutinize the use of covert surveillance. This has included, in the case of Khadr, finding a violation of section 7 of the Charter and ordering disclosure.

²⁹⁴ *R v Malik* [2004] BCJ No 842, 119CRR (2d) 39 (BCSC).

²⁹⁵ *Canada (Attorney General) v Khawaja* [2008] FCJ No. 702 (FC).

²⁹⁶ 50 USC Chapter 36.

²⁹⁷ *ibid* §1805.

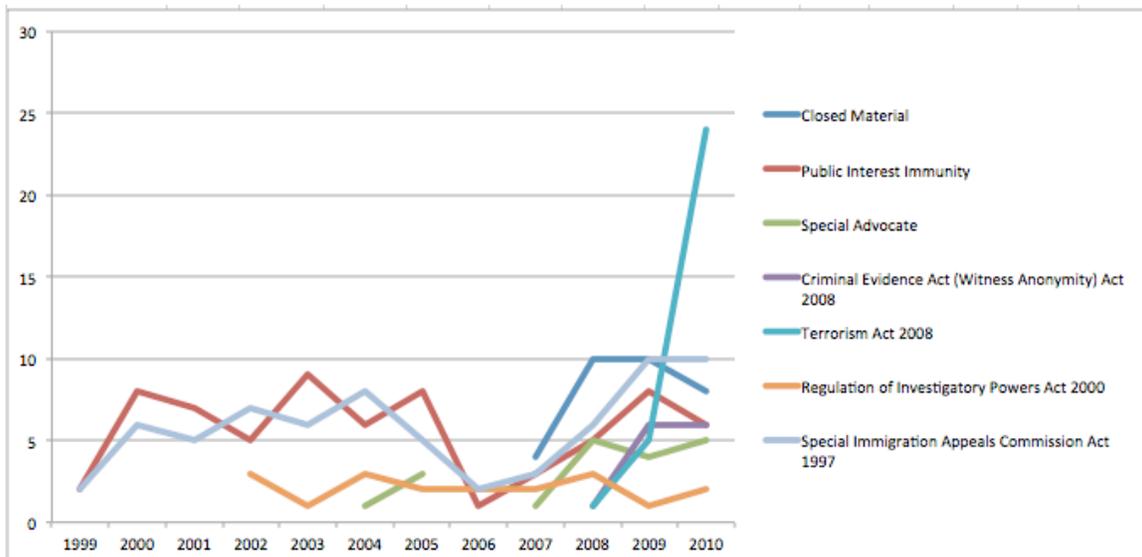
²⁹⁸ *ibid* §§1821-1829.

²⁹⁹ See, for example, Lichtblau, E, 'Split Decision and Barbed Comments Show a Court Deeply Divided on Wiretapping', *The New York Times* (22 September 2011), page A15 and available online at <http://www.nytimes.com/2011/09/22/us/split-court-decision-on-wiretapping-and-barbed-comments.html>

APPENDIX A

Statistical Analysis of the Use of Secret Evidence

It is difficult to ascertain the precise extent of the use of secret evidence in UK courts. This is partly because cases in lower courts are generally not reported. In addition, database search results may indicate only a brief reference to a particular term in a case. Nevertheless, a search of Westlaw based on a range of key terms and legislation gives some indication of the extent to which secret evidence has been used since 1999.



	1999	2000	2001	2002	2003	2004	2005
Closed Material							
Public Interest Immunity	2	8	7	5	9	6	8
Special Advocate						1	3
Criminal Evidence (Witness Anonymity) Act 2008							
Terrorism Act 2008							
Regulation of Investigatory Powers Act 2008				3	1	3	2
Special Immigration Appeals Commission Act 1997	2	6	5	7	6	8	5

	2006	2007	2008	2009	2010	2011
Closed Material		4	10	10	8	7
Public Interest Immunity	1	3	5	8	6	6
Special Advocate		1	5	4	5	1
Criminal Evidence (Witness Anonymity) Act 2008			1	6	6	
Terrorism Act 2008			1	5	24	5
Regulation of Investigatory Powers Act 2008	2	2	3	1	27	
Special Immigration Appeals Commission Act 1997	2	3	6	10	10	8