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The role of the special advocate as an alternative to non-disclosure

Examining and looking beyond the balancing act

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Contents

List of abbreviations

Canadian Charter	Canadian Charter of Rights and Freedoms
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
IRPA	*Immigration and Refugee Protection Act 2001* (Canada)
SIAC	Special Immigration Appeals Commission (UK)
SIAC Act	*Special Immigration Appeals Commission Act 1997*
SIAC Rules	*Special Immigration Appeals Commission Procedural Rules* (2003) (UK)
SIRC	Security Intelligence Review Committee (Canada)
TPIM	Terrorism Prevention and Investigation Measures
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UK JCHR	United Kingdom Joint Committee on Human Rights
UNHRC	United Nations Human Rights Committee

'A passage in The Trial has a striking resonance for the present case. Joseph K was informed "… the legal records of the case, and above all the actual charge-sheets, were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea; accordingly it could be only by pure chance that it contained really relevant matter. . . . In such circumstances the Defence was naturally in a very ticklish and difficult position. Yet that, too, was intentional. For the Defence was not actually countenanced by the Law, but only tolerated, and there were differences of opinion even on that point, whether the Law could be interpreted to admit such tolerance at all. Strictly speaking, therefore, none of the Advocates was recognized by the Court, all who appeared before the Court as Advocates being in reality merely in the position of hole-and-corner Advocates".'

Lord Steyn, dissenting in *Roberts v Parole Board* [2005] UKHL 45 at [95]

1 Introduction[1]

An overview

In the post-cold war period, a number of countries, including the UK, Canada, and Australia, sought to detain and in some cases deport asylum seekers and refugees where they were believed to pose a security risk to the state. In this context, governments claimed that security related evidence should not be disclosed to the affected individual or their legal representative as this would compromise and reveal security investigations and investigative methods, informers' identities, and commitments made to foreign governments to keep such information secret (Roach 2012; Van Harten 2009). However, as this stance compromised entrenched procedural fairness rights, including the right to be informed of the accusation in issue and the right to confront and challenge supporting evidence, it inevitably became the subject of protests and extensive litigation.

In response, the special advocate procedure was devised by the UK government (and later adopted in Canada) on the basis that it reconciled the competing interests of state security with individual procedural fairness rights. A special advocate is a third lawyer (normally a barrister in the UK) who is provided (in contrast to the asylum seeker or refugee and their legal representative) with the closed (secret) evidence in a case. The role of the special advocate is to represent the affected individual's interests in relation to that evidence which the state wishes to keep secret. An application by the state party to keep evidence secret is conducted in a closed court (the public excluded) with neither the affected individual nor their legal representative present; instead the special advocate attends to protect and represent the individual's interests.

Reflecting upon the experiences of the UK and Canada, this paper assesses the effectiveness of the special advocate regime in its attempt to balance the tension between security risks and procedural fairness rights. To address this question, this paper begins by examining whether or not it is in fact possible to assess the security side of the tension. Next, the regime will be analysed in light of its

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contribution to procedural fairness rights, and to the maintenance of the separation of powers in a given state including the implications its operation has upon the accountability of executive decision makers and public confidence in the court system. Beyond this assessment, the regime's potential to become normalised, that is, applied within other areas of law beyond the forced migration context, will also be explored. This analysis will allow conclusions to be drawn as to whether or not the regime (or a reformed version) should indeed be utilised by the UK and Canada, and whether or not such a regime should be adopted by additional states, such as Australia.

The departure point: contextualising the theme of this research

In Australia, the federal government continues to assert a broad power to detain refugees on national security grounds. In the period January 2010 to November 2011, approximately fifty individuals who had arrived by boat on Australian shores, who had initially been assessed as refugees by Australian authorities, subsequently, without warning, had their protection visas withdrawn and were placed in detention (Flitton 2015; McAdam 2013). Although the majority remain detained, in 2015 some of these individuals were released without explanation. This includes a Tamil woman - Ranjini, and her toddler son, who was born, and who had grown up, in detention (Doherty 2015 and Flitton 2015).

Australian practices in this context have been described as wholly out of line with the approach of other liberal democratic states (Taylor 2002). This is due to the failure to disclose reasons for the adverse security assessment, to provide legitimate avenues of appeal against the security and detention decisions, and to effectively impose a period of detention without trial (Saul 2014). Additionally, in accordance with Australia's non-refoulement obligations, these individuals cannot be returned to their countries of origin, and contrary to Australian government requests they have been unable to be resettled in a safe third country (Saul 2012). Given the lack of an available legal remedy, these individuals have been described as stuck in a 'legal black hole' (Saul 2012: 6) and in August 2013, the UNHCR held that their detention was arbitrary and amounted to cruel, inhuman or degrading treatment (*FKAG and others v Australia* and *MMM and others v Australia*).

In light of this practice, some scholars have suggested that the special advocate regime could prove a useful addition to Australian law as it balances the individual's right to a fair hearing with the state's concern that security related evidence should not be disclosed to the individual or their legal representative (Saul 2014). This suggestion, together with the notion that the regime has been subjected to transplantation (established in the UK, mimicked in Canada, and most recently adopted in New Zealand), presents an opportunity to consider its effectiveness and the broader implications of its adoption prior to another state, such as Australia, following suit. Further, as the content and application of the regime continues to be contested, appearing in both recent litigation (*Canada (Citizenship and Immigration) v Harkat*) ('*Harkat*') and advisory body publications (New Zealand Law Commission 2015), the analysis and findings of this paper provide timely and relevant contributions to existing debates.

Key concepts and theories

Natural justice / procedural fairness

The principle of natural justice originated in natural law (*R v Archbishop of Canterbury*) but later became fundamental to the common law legal system (Lord Dyson in *Al Rawi & Ors v The Security Service & Ors* [2011], at [10]-[12]; Forsyth 2014). The phrase 'procedural fairness', now used interchangeably with natural justice (*R v Home Secretary ex p Santillo*), will be adopted for this paper. Although procedural fairness comprises two rules – that no man is to be a judge in his own cause (the bias rule) and that a man's defence must always be fairly heard (the fair hearing rule) (*Spackman v Plumstead District Board of Works*) – analysis of the special advocate regime will focus upon its compliance with the latter.

The fair hearing rule contains 'a package of rights' and is reflected in a number of international human rights instruments (ICCPR, arts 10, 14 and 26; UDHR, art 7 and 10) and domestic and regional human rights charters (Canadian Charter, s7, UK Human Rights Act 1998 art 6, ECHR art 6). This 'package' of rights includes: **the right to confront one's accuser** (*Duke of Dorset v Girdler*); **the right to an adversarial trial and equality of arms** (*Connelly v DPP*); **the right to be informed of the accusation in issue: the right to know the details of the charges** (in contrast to the evidence which supports them) (*Campbell and Fell v United Kingdom*); **the right to be presumed innocent** (*R v Lambert*); and **the right to have access to counsel** (*Steel and Morris v United Kingdom*). Most relevant to this analysis, the fair hearing rule also incorporates the **right to be heard**, which includes 'the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and try to establish by contrary evidence that it is wrong' (Lord Upjohn in *Re K (Infants)* at 405-406).

Considering procedural fairness more generally, Galligan (1996) notes that when determining what constitutes fair treatment, it is helpful to observe unfair treatment, that is, treatment that denies an individual something to which they are entitled. In contrast, Dworkin (1985) argues that treatment should be assessed according to the injustice factor. This, according to Kneebone, is an 'objective concept that assumes a special or moral injury has been suffered' (Kneebone 2002: 370). Additionally, she argues that procedural fairness is a standard rather than a goal. In the context of forced migration cases, judicial commentary states that a *high* standard of fairness should be afforded to affected individuals as profound implications including detention or deportation are at stake (*Charkaoui v Canada (Citizenship and Immigration)* ('Charkaoui'). It should be noted that although there also exists a dialogue in jurisprudence which maintains that the application of the fair hearing principle may be subject to a level of flexibility (*Russell v Duke of Norfolk*), this does not mean variable standards of procedural fairness exist (Forsyth 2014), but that application of the principles are 'as various as the situations in which they are invoked' (*R v Home Secretary ex p Moon*).

Given that laws are directed to guiding the behaviour of individuals it has been suggested that courts must apply and enforce those rules appropriately to ensure that legal order is impartially and regularly maintained (Rawls 1999). Further, Rawls (1999) proposes that confidence in possessing and exercising freedom is contingent upon the application of procedural fairness as if cases were not treated similarly or if the judiciary lacked integrity and failed to recognise certain defences, what the individual is at liberty according to law to do, would become uncertain. Additionally, Chedrawe (2012) argues that procedural fairness ensures that judicial decision-making is accurate and decision makers are held accountable for their actions.

Procedural fairness in the security context

A primary or 'quintessential' role attributed to the governing body of a state is to ensure, in accordance with its powers, that both order and security is maintained (Hobbes 2008 and Birkinshaw 2010: 33). This function results in a *duty* to develop and refine laws to ensure security (Ashworth and Zedner 2014). Additionally, it is broadly accepted that, in an emergency, the state may, in furtherance of this duty, exercise its powers beyond constitutional restriction (Ashworth and Zedner 2014). Reflecting the centrality of this protective function, a trend has emerged in the common law whereby national security interests are prioritised over procedural fairness rights owed to the individual (McGarrity and Santow 2012; Barak-Erez and Waxman 2009). As such, national security interests have been held to justify the non-disclosure of evidence (*Secretary of State for the Home Department v MB*). In this context, state parties have argued that disclosure of security related evidence should be avoided as this would compromise and reveal investigations, investigative methods, informers' identities, and commitments made to foreign governments to keep such information secret (Roach 2012; Van Harten 2009). These justifications, strengthened by the terrorist attacks of 11 September 2001, have now become broadly accepted (Saul 2014).

Given the discussion thus far, it is unsurprising that scholars have referred to national security information creating: a debate in 'conflicting values' (Hudson 2012: 13), 'a dilemma' (Roach 2006: 2189), a 'tension' (Macklin 2009: 6), or the raising of 'troubling rule of law questions' (Saul 2014: 93). In particular, conceptualisations of conflicts or tensions have inevitably created a dialogue in which the attainment of an appropriate balance between state interests and individual procedural rights is given normative priority (Roach 2006; Hudson 2012). As Gross describes, this metaphor of balance and of utilising a balancing test to locate an appropriate and just outcome has been relied upon so heavily following the terrorist attacks of 11 September 2001, that they are now referred to as 'ambient features of our political environment' (Gross 2014: 46). As an example, in Canada's *Anti-Terrorism Act* 2001, reference is made both to the need to protect Canada from terrorist activity, and to promote the rights guaranteed in the Canadian Charter (Coutu and Giroux 2006) which include, most relevantly, the right 'to be presumed innocent until proven guilty according to law in a fair and public hearing in an independent and impartial tribunal' (art 11(d)).

In contrast to the binary dialogue set up by the majority of the literature, this paper considers the special advocate regime against four factors as mentioned by Saul (2014) to be relevant in this context. These include not only state security interests and procedural fairness to individuals, but also accountability of decision makers and public confidence in an independent and impartial court system. Analysing the regime against these additional criteria ensures that other significant and relevant aspects of a fair and liberal democratic state are accounted for in the analysis. As public confidence in an independent and impartial court system arises when the judiciary remains separate from other areas of government including the executive and the legislature (Saul 2014), this factor will be considered by assessing the regime's impact upon the maintenance of the separation of powers in a state. Additionally, as the accountability of decision makers is a consequence of both the separation of powers principle and procedural fairness rights, it will be considered during the analysis of procedural fairness (chapter 4) and separation of powers (chapter 5).

The separation of powers principle

The separation of powers principle is derived from the works of Montesquieu, a French political theorist, and Madison, the fourth President of the United States, in his attempt to ensure ratification of the United States Constitution (Tomkins 2003). It provides that a state's three functions: legislative (making laws), executive (administering laws), and judicial (determining

disputes) should be carried out by separate institutions, and, being equal to one another, each should be responsible for the checking of power exercised by the other two (Tomkins 2003). This framework is said to ensure that laws are impartially administered; labour is divided equitably such that efficiency is achieved; and those who exercise powers remain accountable for their actions (Bellamy 1996). More generally, division of a state's functions was argued to provide an important safeguard against concentration of power and the potential for tyranny to occur (Barendt 1995).

Structure of this paper

This paper consists of seven chapters. **Chapter 2** provides an outline of the circumstances leading to the establishment of the special advocate in the United Kingdom and Canada, and briefly discusses its use in Hong Kong and New Zealand. **Chapter 3** considers whether or not it is possible to assess the security side of the balancing act. **Chapter 4** examines problematic aspects of the regime as against the requirements of procedural fairness principles outlined in this chapter. **Chapter 5** explores the operation of the regime in light of its impacts upon the separation of powers in a state including its effect upon the accountability of executive decision makers and long-term sustainment of public confidence in the court system. **Chapter 6** considers the potential for the regime to become normalised, that is, utilised within other areas of law. **Chapter 7** utilises these research findings to engage in a discussion as to the implications of the procedure including how effective it is in achieving the balance it is intended to deliver and therefore whether or not the current regime (or a reformed version) should continue to be used and be adopted by additional states.

2 The establishment of the special advocate regime as an example of norm transplantation

As the establishment of the special advocate regime and its subsequent modifications in the UK and Canada provide a clear example of the transplanting of a legal norm across states, numerous scholars have undertaken a tracing of this regime's history (Jenkins 2011; Donohue 2012). Given this literature is extensive, this chapter provides a summarised version of events, together with a brief outline of the use of special advocates in two additional countries: Hong Kong and New Zealand. Although these countries are excluded from the substantive critique of the regime, reference to them demonstrates the extent to which norm transplantation continues to occur.

The United Kingdom and Canada

As mentioned, prior to devising the special advocate system, the UK and Canada had claimed that security related evidence ought not to be disclosed to the refugee or asylum seeker who is assessed as a security risk, and who faces detention and/or deportation to their country of origin. However, in 1996, in *Chahal v United Kingdom ('Chahal')* the ECtHR held that the UK had breached procedural fairness rights enshrined in the ECHR, as Chahal, detained for almost six years and due to be deported on the grounds that he was a risk to national security, was denied both access to the evidence which supported the allegations against him, and the opportunity to challenge both the deportation and detention decisions. In this context, the ECtHR commended a model utilised by the Federal Court of Canada in which security cleared counsel were appointed to accommodate both state security concerns and procedural fairness rights. However, as described by Macklin, this model 'did not exist and had never existed'; rather the 'closest proxy' (Macklin 2009: 13) was the power of an administrative body, the SIRC, to appoint counsel to review evidence that had been

withheld from a deportee on the grounds of national security (Jenkins 2011: 299). Rather, the process conducted by the Federal Court of Canada remained almost entirely secret, with no special counsel, and very little disclosure made to the detainee and their legal representatives. In its reference to this so called Canadian system, the ECtHR erred both in attributing it to the Federal Court of Canada, and further, by failing to mention that such security cleared counsel were entitled to review all of the closed evidence and to communicate with the detainee before and after receiving it (Jenkins 2011: 300).

In response to *Chahal*, and inspired by the ECtHR's comments, the UK developed the role of special advocate within the *Special Immigration Appeals Commission Act 1997*. This Act established the SIAC, which was tasked with hearing appeals against immigration or asylum decisions that were made on national security grounds. The Act entitled the Lord Chancellor to publish procedural rules for SIAC's operation, including rules that permitted closed proceedings to occur in the absence of the appellant and their legal representative (s5(3)(b)). In addition, the Act expressly provided that the SIAC could appoint a special advocate to challenge the state's claim to the non-disclosure of security related evidence, in an application in which the public, the appellant, and their regular legal representative, are excluded (s5(3)(c) and s6).

The particulars of the special advocate regime introduced in the UK differed significantly from the SIRC procedures existing in Canada at the time. Some have argued this was a direct result of the ECtHR inaccurately describing Canada's use of security cleared counsel (Jenkins 2011: 320). Unlike the Canadian SIRC process, the special advocate in the UK system was unable to access all of the closed material in a case, to adduce evidence, or to communicate with the appellant and their legal representative following their receipt of the closed file (Jenkins 2011: 320-1). In addition, unlike the Canadian context, which required the refugee or asylum seeker to be provided with at least a summary of the closed evidence, the procedural rules governing the SIAC were unclear as to the minimum content that should be provided to the individual (Jenkins 2011: 322). In an effort to overcome some of these deficiencies, in 2003, SIAC's procedural rules were amended to allow the appellant and their lawyer to provide information to the special advocate after the special advocate had received the closed file. However, the special advocate was prohibited from replying (only to acknowledge receipt) (*Special Immigration Appeals Commission (Procedure) Rules 2003*, r36(6)). Additionally in 2007, the rules were further amended to allow the special advocate to adduce evidence (r35(b)).

In Canada, in 2001, the *Immigration and Refugee Protection Act* was introduced. This Act abolished the SIRC and required appeals against deportation decisions on national security grounds to be heard instead by the Federal Court (Forcese and Waldman 2007: 10). The Act provided that such appeals were to be heard by a judge and a government representative alone, without the appellant, their legal representative, or a special advocate present (s78(e) and (g)). As Jenkins notes, this failed to balance the competing interests of state security and procedural fairness rights as the judge was essentially placed into a 'quasi-investigate or inquisitorial role' and was therefore forced to assess the government's claims without hearing from the appellant (Jenkins 2011: 336). This regime was successfully challenged in *Charkaoui.* In this case, the Supreme Court of Canada held that such a process breached section 7 of the Canadian Charter, as the appellant was unable to know and challenge the case against them and was denied an independent and impartial hearing.

In response to the Court's decision in *Charkaoui*, pursuant to reforms to the IRPA, Canada adopted the 'British style' special advocate system utilised by the SIAC in 2008. In appeals against security certificates and deportation orders, the Federal Court was entitled to appoint a special advocate to represent the appellant's interests, challenge the closed status of the evidence, and cross-examine witnesses, all in a closed proceeding, without the appellant or their legal representative present (IRPA, s83(1)(b)). Additionally, like the British system, following receipt of the closed material, the special advocate was not entitled to communicate with the appellant or their lawyer without first obtaining leave of the court (IRPA, s85.1(3)-(4), 85.4(1)–(2)). As Macklin (2009: 14) describes, Canada had effectively acquired a 'special advocate scheme that mimics a deficient UK model that is itself a copy of a non-existent Canadian precedent'.

Hong Kong and New Zealand

Turning to Hong Kong, in 2002, the *National Security (Legislative Provisions) Bill* proposed that a system of special advocates be available for use in appeals against executive proscription of domestic organisations. Parliamentary papers regarding this proposal refer explicitly to a model based on English legislation (Hong Kong Department of Justice (Paper No 67) 2003). Significantly, members of the England and Wales Bar Associations submitted that the UK special advocate procedures had only been used in 'limited contexts', had been subjected to criticism, and had not been specifically endorsed by the ECtHR (The Bar of England and Wales Submission No. 195, date unknown). As such, and following protests, this Bill was subsequently withdrawn (Justice 2009).

However, despite the absence of a relevant statutory framework, in *PV v Director of Immigration* (a judicial review of a decision to refuse bail for a period of immigration detention) Hartmann J appointed a special advocate. Interestingly this appointment was a consequence of the applicant's counsel suggesting to the Court that it may be an appropriate procedure as his ability to advocate on behalf of his client was constrained given the Court's earlier ruling that some evidence would be subject to public interest immunity. The Court was referred to and based their acceptance of the suggestion on an English case: *R v H and Others*. In addition to this case, within a subsequent Hong Kong decision, *Epoch Group Ltd v Director of Immigration*, Cheung J held that 'even in the absence of statutory underpinning' courts in Hong Kong are permitted to consider the appointment of a special advocate, although such a request should be acceded to only in exceptional cases (at [20]).

In New Zealand, a special advocate was appointed for the first time in 2003 (Inverarity 2009). This occurred during the review of a security risk certificate issued in the name of an Algerian refugee: Mr Ahmed Zaoui (New Zealand Law Commission 2015: 38). During the review, the Inspector-General of Intelligence and Security held that Mr Zaoui was not entitled to a summary of the allegations that led to the issuing of the certificate as this would involve disclosure of classified security information (*Zaoui v Attorney-General* [2004]). This part of the decision, however, was overturned in *Zaoui v Attorney-General* [2005]. In the course of the statutory review, the Inspector General also appointed two special advocates, modeling their briefs on the roles established in the United Kingdom (Inverarity 2009: 473). These appointments were made pursuant to a broad statutory power contained within the *Inspector-General of Intelligence and Security Act 1996* (s19(8)) which entitles the Inspector General to regulate procedures as they see fit. Despite this, the special advocates' role was never tested, as the security risk certificate and the review were withdrawn (Glazebrook 2010: 4).

In response to the Zaoui matter, in 2009 New Zealand established new legislation to govern immigration (*Immigration Act*). Its purpose reflects the security/rights tension discussed in this paper: 'to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals' (s3(1)). The Act establishes the use of: closed hearings (s244), summaries of national security information (s38), and the appointment of special advocates (ss263-266). However, as at May 2015, none of these sections had been relied upon or tested within subsequent case law (New Zealand Law Commission 2015: 40). Ip (2009: 218) notes that the introduction of the special advocate regime was premised on the basis, as indicated by the New Zealand parliament, that the special advocate procedure was of 'international best practice' and therefore a legitimate mechanism to be adopted. Significantly, the special advocate regime has since been incorporated in another New Zealand statute, this time outside the immigration context. The *Telecommunications (Interception Capability) and Security Act 2013* provides for the appointment of special advocates (s105) in civil proceedings relating to the administration or enforcement of the Act (s101); which provides for, among other purposes, the interception capabilities of surveillance agencies (s5).

3 Security

As discussed, this paper intends to assess the effectiveness of the special advocate regime as a means of securing the so-called 'balance' it is intended to deliver. The first step in that examination involves an enquiry into whether or not the special advocate enhances or protects national security interests. However, the analysis that follows will demonstrate that it is in fact not possible to assess the security dimension, as it cannot be quantified, the domestic legal systems of the UK and Canada do not provide a clear definition of security, and a causal relationship between the disclosure or non-disclosure of security evidence and the threat to or protection of national security cannot be established. Additionally, it will also be suggested that the special advocate regime forms part of a wider scheme: the rapid securitisation of forced migrants, pursuant to which the very content of the relevant security threat remains unclear.

Defining national security

Although state parties ground their claims for non-disclosure on the risk posed to 'national security', there remains no definition of that phrase within the domestic legal systems of the UK or Canada (Amiri, 2015: 32). As such, courts in both states have adopted broad interpretations. In the UK, the House of Lords has described the concept as involving 'the security of the United Kingdom and its people including protection against overthrow of the government, activities against a foreign government and actions against a foreign state' (*Secretary of State for the Home Department v Rehman,* at [16]-[17]). Similarly, in Canada, in *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)* the Court, after considering a number of possible definitions, held that: 'national security means at minimum the preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada' (at [68]). Further, in *Kamel v Canada (Attorney General)*, the Court held that: 'of course, the definition of national security cannot be summed up in a few words. We must accord the term a fair, large and liberal interpretation' (at [34]).

Attributing a broad and general interpretation to the phrase has been said to ensure a level of flexibility, such that as circumstances change, governments may continue to act under the rubric of protecting 'national security' (Zedner 2003). As the phrase is therefore subject to continual testing in the face of new threats, it in effect becomes a relational concept (Zedner 2003). Given these qualities, it is understandable that the phrase has been described as conceptually 'fuzzy' (Bigo et al. 2015: 48). This characteristic alone lends itself to particularly significant problems in the legal context. An unclear and inconsistent concept will not only effect the special advocate's ability to challenge the closed status of the secret evidence on the grounds that its disclosure would not harm 'national security', but it will also affect the extent to which a judge in such a proceeding is able to rule with confidence and certainty the types of evidence that could, if disclosed, pose a national security threat (Amiri, 2015: 32). These issues may also cause a flow-on effect of limiting the accountability of the executive and their intelligence agencies (Bigo et al. 2015), as decisions made by these bodies may not be as heavily scrutinised as other factions of government.

The problem of causality

Although closed material proceedings and the special advocate were introduced to address the state's claim that withholding of security related evidence assists in the protection of national security, it is suggested that a causal relationship between these two factors cannot be established. This is for two reasons. Firstly, given that national security related evidence remains 'secret' we cannot know and assess whether its disclosure would in fact cause harm to the national security of a state. Secondly, we cannot know whether the non-disclosure of security evidence does in fact reduce risk to national security (as the government so asserts), as the national security status of a state also remains secret (Donohue 2012). Indeed, this proposition was acknowledged by Sedley LJ in *Secretary of State for the Home Department v AF* at [113]: 'it may be… that the answer to [the] question – what difference might disclosure have made? – is that you can never know'.

Zedner maintains that this quality of uncertainty is used to a government's advantage, easily invoked to justify government action: a 'curious inversion of the well-rehearsed Foucauldian maxim that knowledge is power, here instead lack of knowledge is power' (Zedner 2009: 58). Further, Waldron (2003) argues that if we cannot ascertain whether or not security will be enhanced, then we cannot be in a position to accept that some elements of individual procedural fairness rights must be forsaken in an effort to attain a balance. This is highly persuasive. It is only by acquiring a thorough understanding of the content of the two factors in tension that it is possible to ascertain whether or not the special advocate regime achieves a balance of both.

Positioning the special advocate regime in the securitisation literature

Acknowledging that the introduction of the special advocate mechanism is yet another manifestation of the securitisation of forced migrants not only contextualises its use into a certain political category, but it also exemplifies the notion that the content of the security threat posed by the asylum seeker or refugee, or by the disclosure of security related evidence, remains altogether unclear. The theory of securitisation arose out of the Copenhagen School of security studies, and has been described by Buzan et al., as a process in which an 'issue is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure' (Buzan et al. 1998: 23-24). In the context of forced migration, this process began at the end of the Cold War and was intensified following the terrorist attacks of 9/11 (Hammerstad 2010: 238). It has resulted, at various times, in members of government, the media, and international organisations such as UNHCR portraying refugees as a security threat (Hammerstad 2010: 238).

More particularly, the very nature of security language allowed governments to easily merge imagery of forced migrants together with terrorists, and therefore to mobilise harsh policies and laws that would, ordinarily, conflict with embedded liberal ideas and related understandings of constraints on executive power (Chimni 1998; Hampshire 2008). As such, traditional concepts of human rights were regarded inapplicable in the context of the forced migrant as they posed a particular existential threat to the host community.

By detaining and/or deporting asylum seekers or refugees on the grounds that they posed a national security risk to the state, without providing reasons for the decisions or the right to appeal those decisions, both the UK and Canada effectively mobilised harsh policies which compromised embedded rights to know the case against you and to be able to challenge that case. Further, the special advocate regime should be understood as a manifestation of the securitisation process, as without the state's withholding of security related evidence, the denial of an opportunity to challenge detention or deportation decisions, and the litigation that inevitably ensued, this new legal role would never have been established. In addition, both prior to and after the institution of the special advocate mechanism, the traditional conception of the human right to know the accusation in issue has been regarded inapplicable in the context of the asylum seeker or refugee on the grounds that they pose an 'existential threat' to the community, however the content or legitimacy of that threat remains largely unknown. Instead, the forced migrant has been bundled together with an 'alleged terrorist', imagery that has allowed the promise of security to necessitate the watering down of rights (Zedner 2003: 174; Zedner 2010).

Against this background, the analysis and findings that follow highlight the potential for the securitisation of an issue, and the manifestations of that process (such as the role of special advocate) to carve out an unprecedented path in the legal directions of a state (McDonald 2011). More particularly, securitisation will not only effect or place limitations on the application of procedural fairness rights of asylum seekers and refugees, but once its manifestation (the special advocate) becomes a feature of a legal system, the potential arises for it to be applied to limit procedural fairness rights of citizens and, most peculiarly, to limit rights of citizens and non-citizens outside the security context.

4 Procedural fairness

This part demonstrates that particular features of the special advocate regime significantly undermine, singularly and in combination, all of the rights associated with the right to a fair hearing. These include: restrictions on communications; limitations on access to evidence; a low standard of proof; the exclusion of rules of evidence; and an express exclusion of responsibility. Not only do these features impact upon procedural fairness, but they also have flow on effects that further exacerbate the individual's predicament. This includes limiting the ability of the special advocate to engage in effective cross-examination and significantly altering the role that would ordinarily be played by a judge in an adversarial proceeding. Combined, these elements result in the procedural fairness 'standard' (Kneebone 2002: 370), being largely ignored.

Communication

In both jurisdictions, the special advocate is prohibited from communicating with the affected individual and their legal representative after receiving the closed material (IRPA s85.4(2); SIAC

Rules r36(2)). This is said to avoid the risk that communication may result in inadvertent or purposeful conveyance of such information (Chedrawe 2012; Forcese and Waldman 2007), and effectively prohibits the special advocate from receiving instructions regarding procedure and response to substantive allegations (Chedrawe 2012) despite the fact that the asylum seeker or refugee is the person best placed to provide evidence in support of that challenge (Ip 2009). As a result, the special advocate becomes forced to base their case on mere conjecture (Murphy 2013).

Although the special advocate may apply to the court to have this restriction lifted (IRPA, s85.4(2)), in practice this provision is rarely relied upon as such an application may reveal case strategy and therefore provide an unfair benefit to the state party (Ip 2008, Chamberlain 2009). Additionally, when an application is made, the state party is known to frequently object on the grounds that allowing the communication may result in the inadvertent disclosure of closed material; an argument which, in practice, is regularly supported by the court (Ip 2009, Chedrawe 2012). As a result, special advocates generally make these applications not on the basis of seeking factual material, but in order to discuss case strategy with the ordinary legal representative to ensure consistency between the open and closed parts of the proceeding (Chedrawe 2012). In both countries, the asylum seeker or refugee and their legal representative are permitted to communicate in writing to the special advocate after the special advocate has received the closed material (although the special advocate may not respond beyond acknowledging receipt) (IRPA s85.4(2); SIAC Rules r36(2)). However, it has been argued that this is unlikely to provide any practical benefit, as neither the appellant nor their legal representative are aware of the closed evidence or of the content of the proceedings occurring in closed court (Ip 2009).

Scholars have described this feature of the regime as 'the most severe' (Kavanagh 2010: 838) or 'most dramatic departure' from fairness standards (Forcese and Waldman 2007: 36) as it implicates a number of the discrete rights associated with the right to a fair hearing. Firstly, as the special advocate is unable to be made aware of relevant conflicting evidence in the knowledge of the asylum seeker or refugee they are unable to represent their interests or to effectively challenge the state's case – thus denying the individual's right to be heard and to confront their accuser (Chedrawe 2012). Secondly, as the state party does not face the same communication restrictions there can be no equality of arms between the parties (Forcese and Waldman 2007). Thirdly, the asylum seeker or refugee's right to counsel is effectively denied. As Boon and Nash (2006) discuss, the role of an advocate is to make submissions to the court as their own client would were they in full knowledge of the law. However, the appointment of a special advocate effectively means that an appellant has two legal representatives, one with access to the closed material, and one with access to the individual. As neither has the full picture, they become effectively unable to fulfil their duties as advocates, and thus the individual is left without access to 'counsel' in accordance with the full meaning of the term (Boon and Nash 2006: 120). Finally, without knowledge of the asylum seeker or refugee's side of the story, the court may arrive at a conclusion that is not necessarily correct (Justice 2009).

In recognition of these implications, numerous parliamentary committees (including the Canadian Senate Committee on Anti-Terrorism, the UK House of Commons Constitutional Affairs Committee and the UK JCHR) have recommended that the communication ban be lifted, whilst special advocates themselves have argued that such restrictions make the procedures 'fundamentally unfair' (Cole and Vladeck 2014: 177).

The 'Minimum Level of Disclosure' standard

In contrast to criminal law that prohibits punishment on the basis of undisclosed evidence, both countries have at times, permitted evidence to be withheld from an individual who faces detention or deportation (Cole and Vladeck 2014). However, in the UK context, the ECtHR in *A v United Kingdom* held that, where the liberty of an individual is at stake, a minimum level of disclosure sufficient to enable effective instructions to be given to the special advocate must be provided. Additionally, where the open evidence merely consists of 'general assertions' and the decision to maintain detention is 'based solely or to a decisive degree on closed material' this will breach the detainee's right to challenge the lawfulness of the detention (ECHR, art 5(4)). Although at face value a procedural improvement for the individual asylum seeker or refugee, the specific quantity of information sufficient to avoid a breach of the ECHR remains unclear (Cole and Vladeck 2014; Barak-Erez and Waxman 2009), and regardless, a quantity of information will remain undisclosed (Ashworth and Zedner 2014). Moreover, in subsequent cases, this 'minimum level' of disclosure has been held inapplicable where liberty is not at stake, for example in appeals against citizenship decisions (*AHK and others v SSHD*; *Home Office v Tariq).* In Canada, however, no such distinction exists. Rather, all cases require disclosure of at least 'the essence' of the case, although the quantity of information sufficient to fulfil that standard has been held to be 'case specific' (*Harkat*). Significantly, in *Harkat*, the Court left open the possibility that the particular circumstances of the case may in fact result in 'no disclosure whatsoever' (at [57]).

It is clear then that an asylum seeker or refugee in either jurisdiction may receive very little or no disclosure of the evidence held against them, and although principles may apply as to the application of a 'minimum' level of disclosure, the precise quantity of that requirement is unclear. Not only may this deprive the individual of the right to be informed of the accusation in issue and the right to be heard (as they are unable to inform the special advocate of evidence sufficient to challenge the state's allegations) (Ip 2009), but it also implicates the accuracy of the outcome of the trial as the evidence remains free from full adversarial testing (Murphy 2013), in breach of the individual's right to that type of trial (Cole and Vladeck 2014).

Standard of proof, cross-examination and rules of evidence

When a court or commission embarks upon a consideration of whether evidence should be closed or open, the UK and Canada apply different standards of proof. In Canada, the civil standard 'balance of probabilities' is applied (*Charkaoui*), whilst in the UK the test is set lower, requiring the withholding of information to be maintained where disclosure would be contrary to the public interest (SIAC Rules, rule 38(7)). Accordingly, rather than a balance between non-disclosure and procedural fairness rights being considered, if there is 'any public interest against disclosure, that is the end of the matter' (JCHR 2007: 51). As a result, the existence of *any* possible harm to the public interest trumps the risk of harm incurred as a result of unfair proceedings (Liberty 2008: 14). Therefore, at least in the UK context, the embedded right of the individual to see the information held against them is simply ignored.

Considering these proceedings more generally, the standard of proof applied in determining whether or not an asylum seeker or refugee poses a security threat to a state is below that traditionally invoked in a civil ('balance of probabilities') or criminal trial ('beyond reasonable doubt'). In the UK, the relevant test is whether there exists 'reasonable grounds for belief or suspicion' (*Secretary of State for the Home Department v Rehman*). As this standard only requires the court or commission to 'conclude that the Home Secretary had *some grounds* for her belief'

(Justice 2009: 217), it is not a demanding standard to satisfy (*Ajouaou and others v Secretary of State for the Home Department*). Similarly, in Canada, the standard applied is 'reasonable grounds to believe' (*Re Jaballah*; IRPA s33). Again, this test is set below the civil standard and requires a bona fide belief in a serious possibility, based on credible evidence (*X v Canada (Public Safety and Emergency Preparedness)* and *Chiau v. Canada*). Reducing the standard of proof that would ordinarily be applied in a criminal or civil trial inevitably fails to afford the asylum seeker or refugee the presumption of innocence required to ensure their right to a fair hearing. Further, applying an undemanding standard of proof allows the state to escape scrutiny over their decision-making, therefore also failing to ensure that the individual is provided with a sufficient opportunity to confront their accuser. For these reasons, special advocates in the UK have urged that the standard be increased at least up to the balance of probabilities (Forcese and Waldman 2007).

Two aspects of the special advocate procedure implicate the cogency of the material admitted into evidence and thus the material considered by the commission or court in deliberation of the case. This, it is suggested, further undermines relevant fair hearing principles including equality of arms, and the right to comment and challenge the state's evidence. First, although special advocates are permitted to engage in cross-examination (SIAC Rules, r35, IRPA s85.2(b)), due to communication restrictions, they are unable to determine relevant questions that should be put to the witness in support of the refugee or asylum seeker's case. Lord Bingham has described this predicament as 'taking blind shots at a hidden target' (*R (Roberts) v Parole Board*, at [18]) whilst Lord Kerr has maintained that as a consequence, 'evidence which has been insulated from challenge may positively mislead' (*Al Rawi & Ors v The Security Service & Ors* [2011], at [93]). Further, in the Canadian context, the special advocate does not have an unlimited ability to cross-examine witnesses, rather the judge is permitted to exercise a discretion to refuse or allow this to occur, although it has been held that permission should be granted as a 'last resort' (*Harkat*). By restricting or excluding an opportunity to cross-examine witnesses relied upon by the state party, the asylum seeker or refugee is, in breach of their fair hearing rights, unable to challenge the opposition's evidence and to present a counter argument. This also deprives the court of counter arguments and investigations (Van Harten 2009), ultimately placing the court in a position where it is unable to assess the probative value of the secret evidence (Chedrawe 2012) and moreover, restricting the affected individual's right to safeguards inherent in an adversarial trial.

In both jurisdictions, relevant rules and legislation state that certain evidence normally deemed inadmissible in a court of law may be relied upon and used in the court or commission's determination of such a proceeding (IRPA s83(1)(h), SIAC Rules r44(3)). This means material such as second or third hand hearsay may be received into evidence, a feature that special advocates in the UK have labelled as one of the major concerns they have with the fairness of such proceedings (Cole and Vladeck 2014). In Canada, the relevant statutory provision has been held not to violate s7 of the Canadian Charter, which guarantees the provision of a fundamentally fair process (*Harkat*). In *Harkat* the Court held, somewhat surprisingly, that the rule against hearsay evidence provides 'a means towards' a fair process, but in the context of the IRPA, that right is guaranteed by providing 'the designated judge with broad discretion to exclude evidence that is not reliable and appropriate' (at [76]). However, it is suggested that relying upon the judge to exclude evidence that remains untested by cross-examination or which breaches fundamental rules of evidence will result in a failure to afford the asylum seeker or refugee with their right to an adversarial trial.

The special advocate's role

Unlike a traditional lawyer-client relationship in which a lawyer is responsible to the individual they represent, legislation in both countries states that the special advocate, although appointed to represent the asylum seeker or refugee's interests, is in fact not responsible to that individual (SIAC Act s6(4) and IRPA s85.1(3)). In *R v H and Others* Lord Bingham argued that this role is 'hitherto unknown to the legal profession' as it involves 'a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship to the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship' (at [22]). This statutory exclusion of responsibility raises particular issues as the ethical tradition of a lawyer pursing their client's best interests becomes inapplicable (Boon and Nash 2006). Some have argued that compromising this principle 'threatens to undermine the codes in which it is enshrined' and effectively means that the special advocate does not have a relevant code of ethics with which they should comply (Boon and Nash 2006: 101). Ashworth and Zedner (2014) argue that the special advocate, not being responsible to the individual they are to represent, is thus primarily appointed to address national security concerns. This arguably deprives the individual of their right to counsel and their right to be heard, as a special advocate is not responsible to the individual and, further, is unable to take instructions as to material to lead in the defence.

Special advocates in both countries are also unable to rely upon independent expert opinions or interpreters (Chamberlain 2009). This means closed evidence will only be interpreted or reviewed by experts appointed by the state. As such, special advocates inevitably face difficulties challenging the non-disclosure of closed material in a substantive manner, as unless they can show that the material is publically available, they will be unable to rebut the government's assessment that disclosure would pose a threat to national security (Chamberlain 2009: 4). As both parties are not entitled to the same resources there can be no equality of arms, and further, it is argued, this feature is likely to negatively impact upon both the accountability of executive decision makers, and the asylum seeker or refugee's right to effectively challenge the state's evidence (Chamberlain 2009).

The judge as gatekeeper

As noted in Chapter 1, one of the rights contained within the right to a fair hearing, is the right to be afforded an adversarial trial. This type of proceeding relies upon two or more parties advocating their respective cases in front of an unbiased and neutral judge. The judge, acting as 'umpire', is provided with submissions from all sides, and then determines the issues relevant to the case. In contrast, in *Harkat*, the Federal Court of Canada stated that in a proceeding involving a special advocate, the judge acts as 'gatekeeper' (at [46]) the 'crucial ingredient' for ensuring fairness (at [110]). Further, the Court maintained that the judge must remain 'vigilant and sceptical' (at [63]) regarding the State's confidentiality claims as they tend to be exaggerated, and that 'an unusual burden will continue to fall on judges to respond to the absence of the named person by pressing the government side more vigorously than might otherwise be the case' (at [46]). Similar statements emphasising the court's duty to test the state's evidence, given the absence of the affected individual, have been also been made by courts in the UK (*Malik v Manchester Crown Court & Ors* at [101]; *Secretary of State for the Home Department v MB* at [66]).

Given these remarks it is arguable that the role assigned to the judge in such a case moves away from the neutral umpire-like position that is customarily adopted in an adversarial trial. As one side, in effect, becomes 'absent' from the case, the judge, without the benefit of two equal sides providing submissions, is compelled to provide a check and balance on the state's case, and

further, to replace, to a certain extent, the 'missing' advocate. Although this may be an inevitable and necessary consequence of reducing the ability of one side to make submissions in support of their case, the judge's role of acting in the interests of the asylum seeker or refugee cannot replace the upholding of embedded legal rights that would follow were they afforded an 'advocate' in the full sense of the term. As the Chief Justice of Canada has noted, the Judge 'simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing' (*Charkaoui* at [63]).

5 Separation of powers

This chapter argues that the special advocate regime undermines the separation of powers principle as restrictions placed upon the special advocate's role cause the judge to increasingly rely upon or defer to the state's case, and the procedure of appointing a special advocate may cause a conflict of interest between the executive and the judiciary. Further, given these features may impact upon the continued maintenance of the separation of powers, they are therefore also likely to impact the accountability of executive decision makers and the long term sustainment of public confidence in an impartial and competent court system.

Reliance on the state's case

As discussed, courts in both jurisdictions have made clear that, as the asylum seeker or refugee is significantly disadvantaged in their ability to make submissions to the court challenging the state's case, the designated judge should assist in testing the state's evidence. However, despite this effort on the part of the judiciary to mitigate an inequality of arms between the parties, and thus ensure some level of procedural fairness is achieved, the judge is ultimately refused the customary opportunity to consider persuasive opposing evidence, nor is likely to possess the required security expertise sufficient to discern inconsistencies or weaknesses in the state's evidence (Forcese and Waldman 2007). Additionally, as Van Harten (2009) describes, it is a complex task to predict whether or not disclosure of the closed evidence may cause harm to the security of a state and to weigh this prediction of risk with the need to maintain procedural fairness. As such, Cole and Vladeck (2014) suggest that judges are likely to feel more competent assessing how much disclosure is required in order for the individual to be able to respond to the state's case, rather than second guessing the state as to their determination that certain evidence, if disclosed, will pose a security risk. Such 'second guessing' is particularly difficult when internationally acquired intelligence is relied upon as neither the court nor the state may be able to ascertain the methods used by foreign governments to acquire the information (Van Harten 2009). Additionally, the court may be particularly unwilling to interfere when disclosure of information would result in a breach of a commitment made to a foreign government (Van Harten 2009).

As a result of these issues, judges are said to increasingly rely on the government's case (Bigo et al. 2015). Not only does this contribute to the procedural unfairness already canvassed, it is also likely to jeopardise the maintenance of a clear distinction between court and executive functions as is required by the separation of powers principle. Significantly, such 'reliance' is not merely an academic inference; it has been recognised by members of the judiciary themselves. In 1985, well before the adoption of closed material proceedings, Lord Diplock stressed that national security 'is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems that it involves' (*Council of Civil Service Unions v. Minister for Civil Service,* at 391-

392). More particularly, in the special advocate context, successive cases have referred to the 'great weight' or 'significance' that should be attached to executive decisions regarding national security (*Secretary of State For The Home Department v. Rehman* at [31], *Al Jedda v Secretary of State for the Home Department*; *Lord Carlile of Berriew QC, & Ors, R (on the application of) v Secretary of State for the Home Department*). In other cases, the court has been more explicit. In *G v Secretary of State for the Home Department*, the Court held that as the Secretary of State is the 'primary decision maker' their decision will 'usually prevail' (at [28]), and in another, the court noted that in determining risks posed to national security, the 'Secretary is the expert and not ourselves' (*Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* at [64]). Moreover, Lord Hoffman, in *Secretary of State For The Home Department v. Rehman* discussed at some length, the limitations inherent in the appeal of a national security decision:

> *Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the commission, despite its specialist membership, cannot match….Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained* (at [57]).

Similar sentiments exist in Canadian jurisprudence. These are generally cast in 'deference' terms, that is, a high degree of deference should be placed in favour of the Minister's conclusions (*Baker v. Canada (Minister of Citizenship and Immigration); Rajadurai v. Canada (Citizenship and Immigration).* More particularly, in *Suresh v Canada (Minister of Citizenship and Immigration)*, the Court held that it should defer to the Minister's decision and only set it aside if it is 'patently unreasonable' (at [29]). This principle has been applied in subsequent cases including *Mahjoub v. Canada (Minister of Citizenship and Immigration).*

In *A v United Kingdom* the ECtHR held that although the use of closed evidence may be unavoidable, this does not necessarily mean that the decisions of authorities will be free from scrutiny exercised by domestic courts. However, given that the Court finds itself in a position of deferring or relying upon state assessments as to the national security risks posed by an individual, a presumption exists that the security agency has acted in good faith and according to its powers. Significantly in *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38, Lord Hope in his dissenting judgment warned against the court readily relying upon the state's case, noting that although the national interest may require some evidence to be kept secret, 'the court must be astute not to allow the system to be over-used by those in charge of that material' [96]. Given these comments, not only does reliance fail to ensure that a clear distinction between judicial and executive powers is maintained, but further, as a close scrutiny of security decisions is not engaged in by the judiciary, it is likely that the executive will not in fact be held as accountable in their decision making in the security context as in other areas (Bigo et al. 2015). This fails to ensure that the checks and balances required by the separation of powers principle are enforced, and also opens up the possibility that the executive may act arbitrarily, beyond power, or in contravention of human rights principles (Bigo et al. 2015: 48, Van Harten 2009). Beyond this, reliance on the state's case is also likely to implicate the legitimacy of the final outcome arrived at by the court (Chedrawe 2012).

Procedures for appointing special advocates

Legislative provisions detailing procedures for the appointment of special advocates also hold ramifications for maintaining a separation of powers. In both jurisdictions, relevant legislation outlines that the Attorney General, a member of parliament, and head legal advisor to the government, may select suitable members of the legal profession to form a pool of special advocates (SIAC Act s6(2); IRPA s85(1)). Additionally, in contrast to the Canadian context in which the relevant Judge may choose to appoint a special advocate when required (IRPA s83(1)), in the UK, the Attorney General may choose to accede to or reject requests made by courts for the appointment of a special advocate in a given case (SIAC Act s6(2)). It is suggested that this may cause particular issues with the separation of powers principle as a conflict of interest will be created when the state not only participates in a case, but is responsible for selecting an individual to represent the interests of the opposing party, and further, has the ultimate say on whether or not one should in fact be appointed. This conflict is further exacerbated when the Attorney themselves appears in the Court to advocate for the state's interests as was the case in *A & Ors v. Secretary of State for the Home Department*. In addition, unfairness arguably arises as the affected individual in the UK or Canada is not permitted to select their special advocate. Special advocates in the UK have noted that this is particularly problematic, and can result in the individual having 'little or no confidence' in them (Constitutional Affairs Committee 2005: 28).

Some may argue that given amicus curie[2] have always been appointed according to this procedure, there is no resulting conflict of interest. However, unlike an amicus curie who acts as a neutral third party, the special advocate is specifically appointed to represent the interests of a particular party (Justice 2009: 209). Additionally, unlike procedures governing the appointment of amicus curie, in the UK context, the Attorney General may refuse to appoint a special advocate (*Murungaru v Secretary of State for the Home Department and others*; Justice 2009: 211). Significantly, some members of the judiciary in the UK have recognised that this appointment procedure is 'by no means ideal' (*Interlocutory Application, Re* at [33]).

6 Normalisation of an exception

Reflecting upon developments in the UK, this chapter argues that, although a state may incorporate the special advocate mechanism into their legal system on the proviso that it is only to be used in the context of forced migrants assessed as a security threat and as a means of protecting national security interests, once present in the legal system the regime has the potential to be applied against both non-citizens and citizens inside and outside the security context. This means that, rather than protecting national security as originally envisaged, the special advocate regime may ultimately result in threats to the human rights and liberties of the state's citizens. In effect, a regime that was once a manifestation of the securitisation of forced migrants becomes a mechanism in which the state may exercise powers against its citizens beyond the restrictions of embedded legal principles.

[2] Latin for 'Friend of the Court'. A third party appointed to provide submissions in order to assist the Court in its deliberations, but who does not represent either party in the case.

The significance of normalisation

The normalisation of an exception refers to the phenomenon in which the adoption of a controversial legal measure on a limited or temporary basis, becomes gradually accepted over time, and therefore applied in other areas of law beyond its original context (Ip 2008; Kavanagh 2010). More particularly, normalisation is said to most easily occur when the exception is first introduced against a marginalised group such as immigrants (Zedner 2010: 395), as the general public will believe that such policies are not likely to pervade 'ordinary' laws and be applied against 'ordinary people' (Gross 2001: 44). In the UK, closed material proceedings have become increasingly legitimised or normalised (Kavanagh 2010) through legislative expansion, and judicially, when a statutory framework is absent. Curiously, as far as the author is aware, such normalisation is yet to appear in the Canadian context. However, the UK example should not, it is suggested, be treated as an anomaly, as New Zealand has also witnessed an expansion of the special advocate regime, with provisions made for their appointment included with telecommunications and interception legislation in 2013.

Statutory expansion in the United Kingdom

The introduction of the special advocate in the UK by way of legislation establishing the SIAC was described by ministers at the time as an 'exceptional measure', and given that the provisions governing their appointment were relied upon only three times between 1998 to 2001, it is clear that, at first instance, their use was as rare as had been envisaged (Ip 2009: 235). However, following the terrorist attacks of 9/11, a stream of legislative amendments were enacted to allow their appointment in a number of other contexts.

The first group of amendments relates to counter-terrorism measures. Between 2001-2005, section 23 of the *Anti-Terrorism Crime and Security Act 2001* provided that the SIAC could appoint special advocates in proceedings relating to the preventative detention of non-citizen terrorist suspects. Following declarations that such detention was unlawful (*A v SSHD*), this provision was repealed and replaced by the *Prevention of Terrorism Act 2005* (PTA). This Act permitted the appointment of special advocates in proceedings relating to control orders against terrorist suspects, both citizens and non-citizens. At this point, applicability to citizens severed the special advocate procedure from the immigration context (Ip 2008). The PTA was later repealed and replaced with the *Terrorism Prevention and Investigation Measures Act 2011*. Pursuant to this Act, special advocates may be appointed in TPIM notice applications or appeal proceedings (s10). In addition, special advocates may be appointed within proceedings: relating to financial restrictions under the *Counter-Terrorism Act 2008* (s68); under the *Terrorist Asset-Freezing Act 2010* (s28); and in appeals against proscription of an organisation by the Home Secretary in the Proscribed Organisation Appeals Commission ('POAC')(*Terrorism Act 2008*, s5). Most recently, according to the *Counter-Terrorism and Security Act* 2015, special advocates may now be appointed in applications for or appeals against temporary exclusion orders[3] (Sch 3, s10; Sch 3, s6). Significantly, such an application may be heard by the court in the absence of the individual, without notification to the individual, and without the individual having been given an opportunity to make representations to the court (s3(3)).

Beyond this specific counter-terrorism context, in 2002, SIAC's jurisdiction was further extended by the introduction of the *Nationality Immigration and Asylum Act*. This Act stipulates that the

[3] An order to prevent the readmission of an individual into the UK.

Commission is permitted to hear appeals against decisions to deprive an individual of their British citizenship (s40A (2)), and thus, special advocates may be appointed by SIAC in this context. Outside SIAC, and due to further legislative amendments, a special advocate or 'appointed representative' may now also appear in proceedings pursuant to the *Race Relations Act 1976* (s67A(1) and (2)); the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004* (Sch 1, s54(1); Sch 2, s8); and the *Town and Country Planning Act 1990* (s321). Additionally, following the ruling in *Al Rawi & Ors v The Security Service & Ors* [2011] which held that an ordinary civil claim for damages is not an appropriate venue for the adoption of a closed material proceeding, the government enacted the *Justice and Security Act 2013*. Section 6 of that Act provides that parties may apply for closed material measures (including special advocates) to be used in proceedings (other than proceedings in a criminal cause or matter) before the High Court, Court of Appeal, the Court of Session or the Supreme Court (s6(11)).

Significantly, a number of other Acts allow for the non-disclosure of evidence, the exclusion of the appellant and their legal representative, and the appointment of a special advocate, on grounds other than national security. Both the *Life Sentence Review Commissioners' Rules 2000* (rule 15) and the *Parole Commissioners' Rules (Northern Ireland) 2009* (rule 9) provide that evidence may be withheld where it may, for example, 'affect the safety of the individual', 'result in the commission of an offence', or 'facilitate an escape from lawful custody'. In addition, the *Parole Board Rules 2011*, allows the withholding of evidence on the basis of the 'prevention of disorder or crime' or the 'health or welfare of the prisoner or any other person' (s8).

This overview illustrates that the introduction of the special advocate regime on an exceptional basis paved the way for its mainstream application (Zedner 2010: 399). Taking this further, it would also appear that the role of the special advocate has been utilised by parliament as a way of legitimising the introduction of closed material proceedings in areas of law beyond the immigration context, and moreover, in some cases which may not involve national security concerns. Upon reflection, this has been a circular process. The government, responding to inadequate procedural safeguards ruled in breach of the ECHR by the Court in *Chahal*, went on to develop an 'exceptional mechanism', but has since proceeded to institute similar unfair predicaments in the form of closed material proceedings and has used the once 'exceptional mechanism' as a means of alleviating the resulting procedural unfairness that inevitably results from the non-disclosure of evidence. In this regard, Ip (2008: 741) has argued that: 'the availability of special advocates becomes a release valve that legitimates the more widespread use of classified material'.

Use absent a statutory framework in the United Kingdom

In *Secretary of State for the Home Department v Rehman*, the Court of Appeal established that where there is no supporting legislation, the Court may exercise its inherent power to appoint a special advocate. In this case, exercising such a power, the Court appointed a special advocate to act in an appeal from a decision of the SIAC. Similarly, in *R v H and Others*, the House of Lords held that the Court may request the appointment of special advocates in public interest immunity applications,[4] although such appointment should be exceptional and of last resort. Most controversially, in *R (Roberts) v Parole Board*, the House of Lords ruled that the Parole Board was entitled to withhold evidence from an individual where it was likely to endanger the security of an

[4] These proceedings are heard before the commencement of a criminal trial and allow the prosecution to apply for the non-disclosure of certain evidence on the grounds of public interest (such as where evidence is obtained through covert investigations).

informant, and further, to appoint a special advocate to act in their interests, despite the absence of a supporting statutory framework. In this case, Lord Steyn in his dissenting judgment, stressed the importance of recalling the context into which the special advocate procedure was introduced, i.e. national security cases, a particular group of cases which the case in question was not about, nor analogous to (at [92]). Additionally, Lord Steyn warned that if the decision of the Parole Board was upheld, 'it may well augur an open-ended process of piling exception upon exception by judicial decision outflanking Parliamentary scrutiny' (at [92]).

More recently, in *Secretary of State for the Home Department v AHK and Ors* the court considered the appointment of special advocates in judicial review proceedings against refusals by the Secretary of State to grant citizenship or nationality on character grounds. In this case the court recommended that when the state asserts that evidence should not be disclosed on the grounds of public interest, a special advocate may be appointed where there are 'significant issues or a significant number of documents', but it left open the possibility that 'where there are very few documents and the judge can readily resolve the issues simply by reading them' a special advocate may not be required (at [38]). This case demonstrates that the courts are willing to allow the non-disclosure of evidence without any mechanism for mitigation (as flawed as it may be). As such, it also illustrates that as special advocates may or may not be appointed according to inherent powers of the Court, there are no rules or procedures governing their appointment, and when appointed, no rules to guide their role and responsibilities. Although Courts in some cases such as *R (Roberts) v Parole Board* attempted to avoid this by ensuring some features of the legislative procedure were maintained (e.g. restrictions on communication) Ip and others have suggested that special advocates should only be appointed when a relevant statute allows it, as this will ensure that special advocates are only used in certain contexts (Ip 2008; Boon and Nash 2006).

Conclusions on normalisation

This part has demonstrated that not only has the use of special advocates expanded by legislative amendment and judicial rulings but that such expansion has resulted in special advocates being appointed outside the national security context. This is particularly problematic as although once introduced as an 'exceptional measure' (to ensure the maintenance of national security) now other interests have validated their use (Ip 2008). Further, given the expansion that has occurred, it has been suggested that special advocates may one day also be used in the criminal context (Ip 2008). This pervasion into other areas of law runs the risk, as Kavanagh (2010: 857) describes, of 'normalising secret evidence and changing our perception of the fundamental requirements of the right to a fair trial'. Although the literature warning against the effects of normalisation is compelling, it is arguable that it, in effect, validates the use of the 'exceptional' measure on the minority group upon which it was first introduced. Given procedural fairness rights are equally applicable to non-citizens and citizens, the same 'outrage' should follow when examining the impacts the regime has on the minority group in the first instance. Thus, it is suggested, focusing upon the effects the regime has upon the minority group may provide a more persuasive analysis of the legitimacy or inadequacies inherent in such a regime.

Nevertheless, when other states such as Australia, are considering the adoption of a special advocate system, any notion that such a procedure will remain confined in use to a specific set of circumstances or individuals is, as Gross (2014: 46) describes, 'misguided and dangerous', not only because it may undermine vigilance against unnecessary expansions but it tends to focus our thoughts on immediate impacts, thus concealing a consideration of the possibility for long term damage to result.

7 Discussion and conclusions

Achieving a balance?

As discussed, the special advocate regime was introduced as a means of securing a balance between security interests and procedural fairness rights. In that regard, although the security dimension cannot be quantified, tested or assessed, the regime, as it currently stands, effects not only the individual's right to know the case against them, but it also fails to contribute to the sustainment of every other element of a right to a fair hearing. The asylum seeker or refugee is denied their full entitlement to the right to be heard; to confront and challenge the state's case; to counsel (according to the full meaning of that term); to be informed of the accusation in issue; to be presumed innocent; to be afforded an adversarial trial; and to be treated on equal terms with the state party.

Given these rights are denied, applying Galligan's suggestion, the asylum seeker or refugee is treated unfairly. In different terms, applying Dworkin's method of assessment, it is argued that the procedures as they currently stand cause the individual to suffer a moral injury or injustice, as despite the addition of a special advocate, the individual fails to be afforded procedural fairness rights that would normally be guaranteed in any other matter. Critically, this sentiment has been recognised by members of the judiciary in both countries. In the UK, the Court in *Al Rawi & Ors v Security Service & Ors* [2010] stated that the regime 'cannot be guaranteed to ensure procedural justice' (at [57]), whilst Baroness Hale in *Secretary of State for the Home Department v MB*, reflecting upon earlier comments she had made about the regime's effectiveness, stated that: 'I was far too sanguine about the possibilities of conducting a fair hearing under the special advocate procedure' (at [101]). Further, in Canada, the court in *Harkat* held that the system is an 'imperfect substitute for full disclosure' and depending upon the circumstances, an 'unfair process may result' (at [77]).

The current regime also holds grave ramifications for maintaining a separation of powers. As canvassed, particular features of the regime cause judges to rely upon or defer to the government's case. This not only jeopardises the clear distinction between court and executive powers but it also fails to ensure that the judiciary performs their check and balance function against the executive's actions and decisions. Additionally, allocating a member of the executive with the power to appoint special advocates further fails to ensure a clear delineation between court and executive functions. Due to these effects, public confidence in the judicial system is likely to suffer. Moreover, this consequence is likely to be further exacerbated in the UK context, where secret evidence and special advocates are now used against citizens and non-citizens, and remarkably, in some cases, outside the security context.

Accordingly, despite the fact that the security dimension remains largely indeterminable, given the extent of the impacts upon individual procedural fairness rights, it would appear that a much greater commitment has been made to the security component of the tension. As such, as it currently stands, the special advocate regime cannot be considered an appropriate means by which state interests in non-disclosure, procedural fairness rights, and the maintenance of separation of powers are adequately balanced.

Considering alternatives to the balancing act

Given the 'conceptual fuzziness' of the security component, the merits of conceptualising the test as a balance has been questioned (Waldron 2003; Neocleous 2007; Murphy 2013). More particularly, some have suggested that the test is flawed as it incorrectly assumes that: a balance is a worthy and attainable goal (Neocleous 2007); there is a zero-sum game to be resolved (Waldron 2003); and the factors of security interests and human rights are in conflict (Lazarus and Goold 2007).

In contrast, others have suggested an alternative 'proportionality test' could prove useful (McGarrity and Santow 2012; Taylor 2002). The first part of this test requires a consideration of the security mechanism's intended objective, and whether or not it disproportionately impinges upon the affected individual's human rights (McGarrity and Santow 2012; Taylor 2002). However, this test is equally problematic, as it also relies upon a quantification of the alleged security threat and a consideration of the extent to which the proposed measure, despite possible infringements upon rights, will nevertheless ensure the protection of national security. Nevertheless, the second part of the test may prove more helpful, as it asks whether the same security objective could be achieved utilising an alternative, less harmful measure. Adopting a 'best practices' approach (Cole and Vladeck 2014: 171) this part aims to ensure that the chosen mechanism is the 'least oppressive means' of promoting the security goal (Taylor 2002). In effect, not only does it defend the asylum seeker or refugee's dignity, but it also attempts to ensure that the state's protective function of providing national security is unable to be completely 'divorced' from its commitments to entrenched procedural fairness principles (Jenkins 2011). This methodology also accepts the reality that, given that an 'engrained' concern of a liberal democratic state is to ensure order and security over its territory (Hobbes 2008), it will continue to develop laws and policies in pursuit of that aim, in some cases in contravention of embedded liberal ideas. However, rather than getting caught up in the inability to quantify or assess the security threat in real terms, or to ascertain causal relationships between the security threat and proposed rights restrictions, an examination of the security measure according to this method, has as its central concern, the promotion of individual rights, such that the least oppressive means of obtaining the security objective is ascertained.

Concluding remarks

At the outset, the use of secret evidence is, by its very nature, inherently problematic, as no procedural adaptation is likely to completely overcome the unfairness that results from an individual being unable to know all of the evidence held against them (Van Harten 2009; Forcese and Waldman 2007; Ashworth and Zedner 2014; Ip 2008). As Lord Woolf in *R (Roberts) v Parole Board* stated, the special advocate 'is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him' (at [60]). Significantly, the unfairness that remains despite the addition of a special advocate, led to two UK advocates resigning in 2004. One of those, Mr Ian MacDonald QC, maintained that whatever difference his role as special advocate may make, it is nevertheless 'outweighed by the operation of law, fundamentally flawed and contrary to our deepest notions of justice' (Murphy 2013: 35). As such, some have suggested that there may be 'no fair way' in which secret evidence can be relied upon (Cole and Vladeck 2014: 177); indicating that the crux of the problem with the use of special advocates may lie in the use of secret evidence itself (Chedrawe 2012).

Nevertheless, if we must accept that national security has been regarded a sufficient justification for the non-disclosure of evidence (*Secretary of State for the Home Department v MB*; Van Harten 2009), this becomes the starting point for considering how a regime may mitigate the unfairness likely to result upon an affected individual. In this context, the special advocate regime as it is currently formulated should be acknowledged as a 'second best' alternative to non-disclosure. Despite its limitations, the special advocate is in a position to assist the individual (at least to some degree) by contesting the closed status of the evidence, and by making submissions that highlight inconsistences or exculpatory features within the evidence (Chamberlain 2009). As such, both scholars and special advocates themselves have conceded that the mechanism has the potential to advance the individual's interests and increase the quantity of evidence that is disclosed (Chamberlain 2009; Boon and Nash 2006; Justice 2009).

However, given that current features of the regime pose significant threats to the maintenance of the right to a fair hearing and to the separation of powers, substantial reforms are necessary and should be considered by the UK and Canadian governments, and other states, such as Australia, who may be contemplating instituting the regime into their own legal system. Adopting the best practices test for guidance, the relevant 'security objective' is the need to withhold security related evidence, and thus those features of the special advocate regime that only serve to exacerbate procedural unfairness caused by the use of secret evidence, should be abolished. This means, in effect, that restrictions on communication and the statutory exclusion of responsibility should be lifted; the standard of proof and evidentiary rules normally applied to a civil proceeding should be enforced (Cole and Vladeck 2014; Justice 2009); in Canada, the special advocate should be permitted to engage in cross-examination without restriction; and in the UK, the Attorney General's discretion to approve or refuse a request to appoint a special advocate should be abolished (Justice 2009).

These changes would retain the security objective of keeping some evidence closed (if the special advocate is unsuccessful in disputing that status) whilst also ensuring that the court's capacity to respect and protect procedural fairness rights are maximised. This would also have the flow on effect of limiting any negative impact upon maintaining a separation of powers in the state, and as an additional consequence, minimise negative impacts posed to the on-going accountability of executive decision makers and to public confidence in the judicial system. Additionally, a reformed version of the regime should be utilised and maintained as an exceptional measure in the state's legal system, clearly restricted to those cases in which an individual has been assessed as a security risk and the state claims that certain evidence should not be disclosed on the basis of national security. Finally, collective vigilance should be exercised to prevent expansion of application. In combination, it is envisaged that these reforms would not only contribute to minimising the negative implications evidenced by its use to date as highlighted in this paper, but they would also ensure that the rights and dignity of the individual asylum seeker or refugee are defended, as they become the central concern in devising a method upon which the unfairness resulting from the withholding of evidence, may be effectively mitigated.

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