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Closed Material Procedures and the Right to a Fair Trial

JOHN SULLIVAN[†]

INTRODUCTION

Imagine being charged with a crime and then sent to jail without having an opportunity to hear or rebut the evidence against you. While this may sound like a “Kafkaesque”¹ nightmare, it has become a reality for some.² In the United Kingdom, *ex parte* proceedings are used to convict defendants, and their use has expanded markedly in recent years through both court decisions and acts of Parliament.³ These proceedings, known as Closed Material Procedures (CMPs) or “secret courts,”⁴ are used when the government presents information to the court, the disclosure of which would be “contrary to the public

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1. After reviewing evidence related to the use of Closed Material Procedures, the Parliamentary Joint Committee on Human Rights “found it hard not to reach for well worn descriptions of it as ‘Kafkaesque.’” JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2006-7, H.L. 157, H.C. 394, at 55 (U.K.) [hereinafter JOINT COMMITTEE ON HUMAN RIGHTS].

2. See, e.g., Ann King, *Row Continues Over Secret Jailing of Wanda Maddocks at Father's Stoke-on-Trent Care Home*, SENTINEL (Apr. 26, 2013), <http://www.stokesentinel.co.uk/Row-continues-secret-jailing-Wanda-Maddocks/story-18812294-detail/story.html> (explaining recent acts and decisions concerning Closed Material Procedures).

3. See Christopher Forsyth, *Principle or Pragmatism: Closed Material Procedure in the Supreme Court*, U.K. CONST. L. BLOG (July 29, 2013, 6:56 AM), <http://ukconstitutionallaw.org/2013/07/29/christopher-forsyth-principle-or-pragmatism-closed-material-procedure-in-the-supreme-court/>.

4. Owen Bowcott, *What are Secret Courts?* GUARDIAN, June 15, 2013, at 19.

interest”⁵ or “damaging to the interests of national security.”⁶ The use and expansion of secret courts has come against the cries of human rights activists, including Parliament’s own Joint Committee on Human Rights (Joint Committee).⁷

This comment argues that CMPs violate the right to a fair trial, a right protected by the European Convention on Human Rights (ECHR), to which the United Kingdom is a party,⁸ and undermine the adversarial legal system. Part I of this article will discuss the creation of the ECHR and how it interacts with laws in the United Kingdom.⁹ Part II will explore the history of CMPs, outlining their origin, the expansion of their use, and their role today.¹⁰ Part III will assess the compatibility of CMPs with the ECHR and discuss the benefits and drawbacks of their use.¹¹ Part IV will conclude the comment with a look at how the use of CMPs can be modified to comport with human rights in the future.¹²

I. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE RIGHT TO A FAIR TRIAL

In 1950, the United Kingdom helped draft, and then adopted, the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights.¹³ The ECHR guarantees a number of human rights and fundamental freedoms, including the right to a fair trial, the right

5. Terrorism Prevention and Investigation Measures Act, 2011, c. 23, § 18, sch. 4 (U.K.).

6. Justice and Security Act, 2013, c. 18 (U.K.).

7. See JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2006-7, H.L. 157, H.C. 394, at 55 (U.K.) (concluding that the process is “offensive to the basic principles of adversarial justice”). The Joint Committee for Human Rights is a select committee with members from both the House of Commons and House of Lords. *Joint Committee on Human Rights –Role*, U.K. PARLIAMENT, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/> (last visited Nov. 10, 2013).

8. See European Convention on Human Rights, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

9. See *infra* Part I

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. European Convention, *supra* note 8; *Human Rights*, U.K. MINISTRY OF JUSTICE, <https://www.justice.gov.uk/human-rights> (last updated Nov. 15, 2013).

to life, and the right to liberty.¹⁴ It provides for freedom of speech and prohibits torture and discrimination.¹⁵

The right to a fair trial is provided for in Article 6 of the ECHR.¹⁶ Under this right, individuals are entitled to “a fair and public hearing” and a public pronouncement of the judgment, “but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security.”¹⁷ An individual charged with a criminal offense has additional rights, including the right “to defend himself . . . through legal assistance of his own choosing” and “to examine or have examined witnesses against him.”¹⁸

The language of the ECHR indicates that the right to a public judgment is not absolute.¹⁹ This exception, however, is not tied to any right relating to the procedure or substance of a trial—it merely refers to the pronouncement of the judgment. Moreover, it only allows the exclusion of the press and public, not parties to the litigation.²⁰ In the sections relating to rights in criminal proceedings, they are referred to as “minimum rights” and contain no exception.²¹

The ECHR also established a permanent court “[t]o ensure the observance of the engagements undertaken by the . . . Parties in the Convention and the Protocols thereto.”²² This court, known as the European Court of Human Rights, hears cases between individuals and States as well as inter-State disputes.²³ Decisions by the Court are binding on the parties;²⁴ however, the Court does not have the ability to strike domestic legislation that is found to be incompatible with the

14. European Convention, *supra* note 8, arts. 2, 5, 6.

15. *Id.* arts. 3, 10, 14.

16. *Id.* art. 6.

17. *Id.*

18. *Id.*

19. *See id.*

20. *See id.* (“[T]he press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”)

21. *Id.*

22. *Id.* art. 19.

23. EUR. CT. H.R., THE ECHR IN 50 QUESTIONS 6 (2012) [hereinafter ECHR IN 50 QUESTIONS], available at http://www.echr.coe.int/Documents/50Questions_ENG.pdf.

24. *Id.* at 9.

ECHR.²⁵ The Court's ability to provide relief is limited to providing a declaratory judgment that the ECHR has been violated and "just satisfaction to the injured party" in the form of a financial award.²⁶

When a violation is found, the Committee of Ministers of the Council of Europe is charged with ensuring the offending state complies with the Court's judgment.²⁷ The Committee of Ministers then "confers with the country concerned . . . to decide . . . how to prevent similar violations of the Convention in the future."²⁸ However, it ultimately falls to the state to amend or adopt legislation to fix incompatibilities.²⁹

In 1998, the United Kingdom passed the Human Rights Act 1998 (1998 Act), which made the ECHR enforceable in U.K. courts.³⁰ The 1998 Act requires legislation, "[s]o far as it is possible to . . . be read and given effect in a way which is compatible with the Convention rights."³¹ If it is not possible, a court can make a declaration of incompatibility, however, such a declaration "does not affect the validity, continuing operation or enforcement of the provision."³² The 1998 Act provides for remedial orders, which allows legislation to be quickly amended when a court finds an incompatibility.³³ However, this is permissive, rather than mandatory authority, and it still requires Parliament to pass the amended legislation.³⁴ Therefore, while the European Court of Human Rights and U.K. courts can declare a law incompatible with the ECHR,

25. *General Measures: Information from Cases Closed*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex_en.asp (last visited Mar. 28, 2014) [hereinafter *General Measures*].

26. Ingrid Nifosi-Sutton, *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective*, 23 HARV. HUM. RTS. J. 51, 52 (2010).

27. ECHR IN 50 QUESTIONS, *supra* note 23, at 10.

28. *Id.*

29. *General Measures*, *supra* note 25.

30. Human Rights Act, 1998, c. 42 (U.K.); *Human Rights*, *supra* note 13.

31. Human Rights Act, art. 3.

32. *Id.* arts. 3–4.

33. DEP'T FOR CONSTITUTIONAL AFFAIRS, A GUIDE TO THE HUMAN RIGHTS ACT 1998: THIRD EDITION 7 (2006), available at <https://www.justice.gov.uk/downloads/human-rights/act-studyguide.pdf>.

34. JOINT COMMITTEE ON HUMAN RIGHTS, SEVENTH REPORT, 2001-02, H.L. 73, H.C. 151 (U.K.).

Parliament still has complete authority over U.K. laws, even when they violate human rights.

II. THE DEVELOPMENT OF SECRET COURTS

A. *Use in the Family Division*

The use of secret courts has long been a facet of the family court system in the United Kingdom.³⁵ In cases before the Family Division, such as the removal of a child from his or her parents, it is illegal to reveal details of the proceedings or the judgments.³⁶ The names of the social workers and others who allege misconduct are similarly kept secret.³⁷ The justification for this secrecy is to protect the children involved.³⁸ However, these practices have come under scrutiny in recent years.³⁹ This level of secrecy makes it possible for the family courts to make decisions without facing the kind of exposure that ensures accountability.⁴⁰

Recognizing this problem in *Re J (A Child)*, Sir James Munby, president of the Family Division of the High Court,⁴¹ rejected portions of an injunction that sought to prevent video of a child being seized by British authorities from being distributed.⁴² The purpose of the injunction was to protect the identity of the child, but called for the local authority and social workers identities' to also be protected in order to achieve this goal.⁴³ Responding to this argument, Lord Justice Munby stated, "I simply fail to see how naming the local authority, [or] the social workers . . . can in any realistic way be said

35. See Bowcott, *supra* note 4 ("Cases in the family division of the high court relating to child custody and divorce issues are regularly held in camera to protect privacy").

36. Editorial, *Unnatural Justice*, TELEGRAPH, Aug. 26, 2007, at Tel. 24.

37. Steve Doughty, *Top Judge's War on Secret Courts: Family Hearings Must be Exposed to 'Glare of Publicity'*, DAILY MAIL (Sept. 5, 2013), <http://www.dailymail.co.uk/news/article-2413373/Top-judges-war-secret-courts-Family-hearings-exposed-glare-publicity.html>.

38. *Id.*

39. See, e.g., *Unnatural Justice*, *supra* note 36 (discussing the United Kingdom's use of forcible adoptions and criticizing the lack of transparency in the U.K. courts which use secret proceedings to accomplish these "appalling acts of injustice").

40. See Doughty, *supra* note 37.

41. Owen Bowcott, *Order to Publish Secret Family Court Judgments*, GUARDIAN, Jan 17, 2014, at 14.

42. *Re J (A Child)*, [2013] EWHC (Fam) 2694 [84] (Eng.).

43. *Id.* ¶ 69.

to make it ‘likely’ that [the child] will be identified, even indirectly. The risk is merely fanciful.”⁴⁴

In his judgment, Lord Justice Munby discussed the need for more transparency in the family justice system as a whole.⁴⁵ One aspect of this need for transparency is the right of the public to know “what is being done in its name.”⁴⁶ Furthermore, confidence in the family justice system requires the freedom of speech that comes with transparency, which “facilitates the exposure of errors in the . . . administration of justice of the country.”⁴⁷ Lord Justice Munby then stressed how important family court decisions are to illustrate why vigilance is needed to guard against the risks of “miscarriages of justice.”⁴⁸ As a result of this ruling, judgments in the family court will be published, excluding the names of the families involved.⁴⁹ This will help the court’s “workings to be properly scrutinized—so that the judges and other participants in the process remain visible and amenable to comment and criticism.”⁵⁰

However, despite this step in the right direction, the family courts are only the beginning when it comes to secret courts in Britain.⁵¹ In the family court, secrecy was used to prevent identifying details from being released to the public. This lack of transparency was concerning for all of the reasons stated by Lord Justice Munby, but the parties to the proceedings had access to all of the information presented to the court. CMPs, on the other hand, prevent parties from

44. *Id.* ¶ 70.

45. *Id.* ¶¶ 25–40.

46. *Id.* ¶ 27.

47. *Id.* ¶ 31 (quoting *Abrams v. United States*, 250 U.S. 616 (1919)) (internal quotation marks omitted).

48. *Id.* ¶ 29. “When a family judge makes a placement order or an adoption order in relation to a twenty-year old mother’s baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 or even 70 years, and the baby for what may be upwards of 80 or even 90 years.” *Id.* ¶ 28.

49. See Sue Reid, *For Years I Fought Against Secret Courts Breaking Up Families. At Last There’s Hope*, DAILY MAIL (July 24, 2013), <http://www.dailymail.co.uk/news/article-2377084/SUE-REID-For-years-I-fought-secret-courts-breaking-families-At-theres-hope.html>.

50. Re J (A Child), [2013] EWHC 2694 [32] (Eng.).

51. See Bowcott, *supra* note 4 (suggesting that U.K. courts are likely to see more intelligence-related cases in the future).

seeing evidence presented against them, which may result in being the basis for a decision.⁵²

B. The Introduction of CMPs

The use of CMPs in the United Kingdom started with immigration proceedings, when the government wanted to detain or deport an individual on the basis of national security.⁵³ However, in 1996 in *Chahal v. United Kingdom*,⁵⁴ the European Court of Human Rights found this system to violate Article 13 of the ECHR.⁵⁵ In the underlying deportation proceeding, a panel advised the Home Secretary as to whether there were grounds to deport Chahal; however, the contents of this advice was not provided to Chahal nor was he allowed legal representation.⁵⁶ Furthermore, because of the secrecy behind the advice, it was not available for review upon appeal, and the higher court merely “satisf[ied] themselves that the Home Secretary had balanced the risk to Mr. Chahal against the danger to national security.”⁵⁷ The Court said that these procedures “could not be considered to offer sufficient procedural safeguards for the purposes of Article 13.”⁵⁸

In response to this ruling, Parliament passed the Special Immigration Appeals Commission Act 1997 (1997 Act).⁵⁹ The 1997 Act created the Special Immigration Appeals Commission (SIAC), which hears appeals in cases involving “exclusion, departure or deportation in the interests of national security.”⁶⁰ The 1997 Act allows the Lord Chancellor of the Commission to exclude the “appellant and any legal representative appointed by him.”⁶¹ When the appellant is excluded from a proceeding, the 1997 Act allows a

52. *See id.* (stating that special advocates can only reveal a “loose summary” of the evidence).

53. *See Q&A: Secret Court Explained*, BBC NEWS (Apr. 28, 2004, 10:23 AM), http://news.bbc.co.uk/2/hi/uk_news/3666235.stm (discussing the Special Immigration Appeals Commission).

54. App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1996).

55. *Id.* ¶ 155. Article 13 reads: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” *Id.* ¶ 140.

56. *Id.* ¶ 130.

57. *Id.* ¶ 153.

58. *Id.* ¶ 154.

59. Special Immigration Appeals Commission Act, 1997, c. 68 (U.K.).

60. *Id.* § 2(1)(g).

61. *Id.* § 5(3)(b).

person to be appointed to “represent the interests of [the] appellant,” but the representative “shall not be responsible to the person whose interests he is appointed to represent.”⁶² The SIAC heard very few cases before the September 11 attacks.⁶³ However, after the attacks, Parliament passed the Anti-terrorism, Crime and Security Act 2001 (2001 Act).⁶⁴ The 2001 Act allowed the Home Secretary to detain terrorist suspects without trial.⁶⁵ Their appeals went to the SIAC, which is where the procedure used in CMPs today began to take shape.⁶⁶

In order to initiate a CMP, the Home Secretary notifies the Attorney General that the decision to detain was based in part on secret intelligence.⁶⁷ The Attorney General then appoints a “special advocate” to the appellant, as provided for in the 1997 Act.⁶⁸ As the 1997 Act states, this special advocate represents the interests of the appellant but is not responsible to him.⁶⁹ In practice, this means that the representative is allowed to see the secret evidence presented by the Home Secretary and advocate on behalf of the appellant when the judge considers this evidence, but the representative may not disclose it or discuss it with the appellant afterwards.⁷⁰ This takes place before the hearing, when the judge decides whether evidence should be opened.⁷¹ Then, after the appellant puts on his case, and all other open evidence is presented, the special advocate takes over again to challenge the closed evidence.⁷² However, because the appellant is excluded from this phase, the special advocate cannot take instruction from the appellant.⁷³

62. *Id.* § 6(1), (4).

63. *See Q&A: Secret Court Explained*, *supra* note 53 (“SIAC was rarely used as deportations of this nature were few and far between.”).

64. Anti-terrorism, Crime and Security Act, 2001, c. 24 (U.K.).

65. *Q&A: Secret Court Explained*, *supra* note 53.

66. *See id.*

67. *Id.*

68. *Id.*

69. Special Immigration Appeals Commission Act, 1997, c. 68, § 6(4) (U.K.).

70. *Q&A: Secret Court Explained*, *supra* note 53.

71. *Id.*

72. *Id.*

73. *Id.*

The authority of the government to detain suspects under the 2001 Act was later declared to be incompatible with the ECHR.⁷⁴ As discussed previously, a declaration of incompatibility under the 1998 Act does not mandate a change to the offending legislation;⁷⁵ however, Parliament decided to fix the incompatibility in the 2001 Act with the Prevention of Terrorism Act 2005 (2005 Act).⁷⁶ The 2005 Act repealed the detention provisions of the 2001 Act and replaced them by giving the Home Secretary the authority to issue “control orders,” which restrict suspects from carrying certain objects or carrying out specified activities.⁷⁷ While this change limited the cases in which secret courts would be needed, it did nothing to address the fairness concerns when CMPs are used.

In 2007, the Joint Committee published a report after hearing oral evidence from special advocates as to how CMPs operate.⁷⁸ The Joint Committee found that special advocates “had a number of very serious reservations about the fairness of the system to the people whose interests they are appointed to represent.”⁷⁹ These reservations included the lack of information provided to the individual, the prohibition on communication between the special advocate and the individual once the advocate has seen the evidence, and the low standard of proof.⁸⁰ The special advocates testified that CMPs have “absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.”⁸¹ After hearing this testimony, the Joint Committee “found it hard not to reach for well worn descriptions of [CMPs] as ‘Kafkaesque.’”⁸²

C. *Recent Expansion of the Use of CMPs*

Despite condemnation from the Joint Committee, Parliament passed the Counter-Terrorism Act 2008 (2008 Act), which authorized

74. *A & others v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56 (appeal taken from Eng.).

75. *See supra* notes 30–32 and accompanying text.

76. Prevention of Terrorism Act, 2005, c. 2 (U.K.).

77. *Id.* §§ 1, 16. “Control orders” were repealed and replaced with a similar mechanism by the Terrorism Prevention and Investigation Measures Act 2011. Terrorism Prevention and Investigation Measures Act, 2011, c. 23, §§ 1, 2 (U.K.).

78. JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2006-7, H.L. 157, H.C. 394 (U.K.).

79. *Id.* ¶ 192.

80. *Id.* ¶ 193.

81. *Id.* ¶ 210.

82. *Id.*

the use of CMPs in cases involving the funding of terrorist organizations.⁸³ The statute also allowed CMPs to be used by certain appellate courts, although it did not mention the Supreme Court.⁸⁴ In 2013, however, the Supreme Court found it had the implicit authority under the 2008 Act to use a CMP to review evidence that had been presented to a lower court in a CMP.⁸⁵ In this case, *Bank Mellat v. Her Majesty's Treasury*, Parliament approved a Treasury order to shut down Bank Mellat's U.K. operations because of their potential involvement with funding Iran's nuclear program.⁸⁶ The Court read the closed judgment from the earlier CMP, and heard argument on it in a closed session of its own.⁸⁷ In reversing the order, the Court said, "there was no point in our seeing the closed judgment. There was nothing in it which could have . . . influenced the outcome of th[e] appeal."⁸⁸ The Court then explained guidelines for appellate courts to follow related to CMPs.⁸⁹

Judges who rely on closed material in closed judgments are instructed to "say in the open judgment as much as can properly be said about the closed material which he has relied on."⁹⁰ This will also lessen the need for a closed hearing on appeal if the information presented in the CMP was not central to the judgment.⁹¹ Judges are urged to try to avoid CMPs in the first place, but if they are necessary, as much of the information provided should be given to the excluded party as is possible.⁹²

While some saw the decision as limiting the role of CMPs in Britain,⁹³ it came against the backdrop of the Court finding it had the

83. Counter-Terrorism Act, 2008, c. 28 (U.K.).

84. *Id.* "[R]ules of court' means rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session." *Id.* § 73.

85. *Bank Mellat v. Her Majesty's Treasury*, [2013] UKSC 38 [64–65] (appeal taken from Eng.).

86. *Id.* ¶¶ 15–16.

87. *Id.* ¶ 65.

88. *Id.* ¶ 66.

89. *See id.* ¶¶ 67–74.

90. *Id.* ¶ 69.

91. *Id.*

92. *Id.* ¶ 72.

93. *See, e.g.*, Owen Bowcott, *Supreme Court Quashes Iran Bank Sanctions and Criticises Secret Hearings*, *GUARDIAN* (June 19, 2013, 7:30 AM),

implicit authority to use CMPs.⁹⁴ Writing in dissent, Lord Hope took the position that because CMPs erode fundamental common law principles, the Court did not have the authority to use them absent an express grant by Parliament.⁹⁵ In two separate dissents, Lords Kerr and Reed echoed this sentiment.⁹⁶ Lord Dyson, meanwhile, wrote that he believed the Supreme Court had the authority to use CMPs but that they should decline to do so in the case at hand.⁹⁷ The Court therefore urged restraint when appellate courts consider CMPs, but ignored its own advice and set the precedent that secrecy was permissible even at the highest level of the court system.⁹⁸

The dissenters in *Bank Mellat* relied heavily on the opinion of Lord Dyson in *Al Rawi & Ors v. Security Service & Ors*.⁹⁹ In that case, the Supreme Court refused to extend CMPs to civil cases absent express authorization from Parliament.¹⁰⁰ The claimants sued the government for being “complicit in the detention and ill-treatment of them by foreign authorities at various locations including Guantanamo Bay.”¹⁰¹ The government wanted to present evidence to rebut this claim, but said it was in the public interest to prevent its disclosure and requested the court to allow a CMP to review the evidence.¹⁰² The claimants argued that the government should be required to follow the Public Interest Immunity (PII) procedure if it wanted to withhold evidence.¹⁰³ A PII allows the government to

<http://www.theguardian.com/law/2013/jun/19/supreme-court-iran-bank-mellat-sanctions-secret-hearing> (observing that “[t]he government’s enthusiasm for secret courts has suffered a setback after the UK’s most senior judges quashed an anti-terrorist sanction imposed on an Iranian bank and dismissed the intelligence involved as irrelevant”).

94. See *Bank Mellat v. Her Majesty’s Treasury* [2013] UKSC 38 [65] (where the Court decided to have a closed hearing).

95. “[T]he issue is so fundamental that it must be left to an express and carefully defined provision by Parliament. I do not think that a point of such fundamental importance can be left to implication.” *Id.* ¶ 87 (Hope, L., dissenting).

96. “The plain fact is that Parliament . . . did not introduce such a procedure for the Supreme Court.” *Id.* ¶ 125 (Reed, L., dissenting). “[F]or the court to conduct a closed hearing is contrary to a fundamental principle of the common law, and therefore requires clear statutory authority. Even interpreted as generously as possible, the 2005 Act cannot in my opinion be said to provide clear authority.” *Id.* ¶ 138 (Hope, L., dissenting).

97. *Id.* ¶ 141–45 (Dyson, L., dissenting in part).

98. See *id.* ¶¶ 96–100, 137.

99. [2011] UKSC 34 (appeal taken from Eng.).

100. *Id.* ¶ 47.

101. *Id.* ¶ 3.

102. *Id.* ¶ 4.

103. *Id.* ¶ 5.

present evidence to a judge, who then determines whether “the public interest which demands that the evidence be withheld outweighs the public interest in the administration of justice.”¹⁰⁴ If the judge finds the evidence should be withheld, the government does not have to share it with the other party. However, unlike in a CMP, the evidence is prevented from being admitted or relied on by either party.¹⁰⁵

The Court discussed the notion of open justice, finding it to be a key principle of common law.¹⁰⁶ The Court also recognized that:

[T]he common law is flexible. It develops over time in response to changing circumstances. But any change must be justified, otherwise the law becomes unstable. Sometimes, it takes giant steps forward. More often it evolves gradually and cautiously. This is particularly important where a change involves an inroad into a fundamental common law right. The introduction of a closed material procedure in ordinary civil claims (including claims for judicial review) would do just that.¹⁰⁷

In *Tariq v. Home Office*¹⁰⁸ the Court found that CMPs in front of the Employment Tribunal did not violate Article 6 of the ECHR, but the Court stated that this was a separate question from whether it violated the common law because it is “open to member states to provide for rights more generous than those guaranteed by the Convention.”¹⁰⁹ Following these principles, the Court decided that the introduction of CMPs to civil trials was too great a departure from common law, and should only occur if Parliament “sees fit to do so.”¹¹⁰

Parliament indeed saw fit to do just that with the Justice and Security Act 2013 (2013 Act),¹¹¹ which gained Royal Assent on April

104. *Id.* ¶ 145 (Clarke, L.).

105. *Id.* ¶ 146.

106. *Id.* ¶ 11 (Dyson, L.).

107. *Id.* ¶ 67.

108. [2011] UKSC 35 (appeal taken from Eng.).

109. *Al Rawi*, [2011] UKSC at ¶ 68 (quoting *R (Ullah) v. Special Adjudicator* [2004] UKHL 26).

110. *Al Rawi*, [2011] UKSC at ¶ 69.

111. Justice and Security Act, 2013, c. 18 (U.K.).

25, 2013.¹¹² The 2013 Act expanded the use of CMPs to civil cases for the first time.¹¹³ The Joint Committee on Human Rights issued reports along the way, which monitored the bill from its introduction as a Green Paper¹¹⁴ until its enactment.¹¹⁵ In its final report before the 2013 Act was passed, the Joint Committee reiterated its skepticism that there was an actual, as opposed to hypothetical, need to expand CMPs to civil cases.¹¹⁶

Next, the Joint Committee addressed the principle of “equality of arms.”¹¹⁷ This principle states “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”¹¹⁸ The European Court of Human Rights has recognized this principle as being a component of the concept of a fair trial, which is guaranteed by article 6 of the ECHR.¹¹⁹ The draft of the 2013 Act reviewed by the Joint Committee gave only the government the right to initiate a CMP.¹²⁰ The Joint Committee recommended that the bill be amended so that either party, or the court on its own, could move for a CMP.¹²¹ This would also be more in line with the government’s asserted justification for the bill, which was to increase fairness for both parties.¹²² The Committee also recommended an amendment that would have allowed the court to consider whether a PII claim

112. Tom Hickman, *Turning Out the Lights? The Justice and Security Act 2013*, U.K. CONST. L. BLOG (June 11, 2013, 11:11 AM), <http://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/>.

113. *See id.* (discussing how CMPs are an alternative to PII procedure in civil cases).

114. “A Green Paper is a Government publication that details specific issues, and then points out possible courses of action in terms of policy and legislation.” *What is a Green Paper?*, GUARDIAN (June 18, 2009), <http://www.theguardian.com/careandsupportreform/what-green-paper>.

115. *See* JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, 2012-13, H.L. 59, H.C. 370, ¶ 33 (U.K.) (stating that its report on the Green Paper, the Committee considered the Government’s justification for using CMPs in civil proceedings).

116. *Id.* ¶¶ 33–34.

117. *See id.* ¶¶ 46–52.

118. *De Haas & Gijssels v. Belgium*, App. No. 19983/92, 25 Eur. H.R. Rep. 1, 40 (1997).

119. *See id.* at 39–40 (reiterating that equality of arms is a component of the concept of a fair trial).

120. JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, 2012-13, H.L. 59, H.C. 370, ¶ 47 (U.K.)

121. *Id.* ¶ 51.

122. *Id.* ¶¶ 50–51

would better balance the “degree of harm to . . . national security if the material is disclosed [compared to] the public interest in the fair and open administration of justice.”¹²³ Additionally, the Joint Committee recommended a provision that CMPs only be used when “a fair determination of the proceedings is not possible by any other means.”¹²⁴

Another concern of the Joint Committee was the effect the 2013 Act would have on the media and public trust in the judiciary.¹²⁵ The government proposed a database accessible to special advocates that listed head notes of closed judgments; however, the Joint Committee preferred for the media to be “notified of any application for closed material procedures to be used, to ensure an opportunity for the media to make representations on that question, and to provide a mechanism for a party to apply for a closed judgment to become an open judgment.”¹²⁶ Finally, the Joint Committee requested a system of monitoring and annual review of the use of CMPs, in order to ensure the intended limitations were not eroded.¹²⁷

The Joint Committee’s report originally appeared to be a significant setback for the legislation.¹²⁸ Nonetheless, the bill moved forward while adopting some, but not all, of the proposed amendments.¹²⁹ One commenter suggested that the bill was originally so lopsided so the government could appear to make significant concessions while drawing attention away from “other issues of more concern.”¹³⁰ One of these concessions was allowing both parties in addition the court to initiate CMPs, as well as for periodic reviews of how often CMPs are used in civil cases.¹³¹

123. *Id.* ¶¶ 61–62

124. *Id.* ¶ 67.

125. *Id.* ¶ 107.

126. *Id.* ¶¶ 107–08.

127. *Id.* ¶¶ 111–12.

128. See James Chapman, *Plans for Secret Justice Left in Turmoil After Ministers ‘Fail to Win the Argument’ to Justify More Hearings Being Held Behind Closed Doors*, DAILY MAIL (Nov. 12, 2012), <http://www.dailymail.co.uk/news/article-2232125/Ministers-fail-win-argument-secret-courts.html> (suggesting that “the Government will have difficulty getting the legislation through the House of Lords”).

129. Hickman, *supra* note 112.

130. *Id.*

131. *Id.*

Despite the Joint Committee's report, the government was able to hold its ground in a few areas. First, it prevented the language allowing CMPs only when fair proceedings are "not possible by any other means" and from requiring judges to consider whether a PII claim should have been made instead.¹³² The government also avoided the application of a balancing test in regards to specific evidence presented to the court.¹³³ Instead, once a court enters a CMP, all of the material presented is barred from being disclosed, instead of the court being allowed to disclose the evidence presented that it believes would do little or no harm.¹³⁴ Shortly after the bill passed, there was an effort to enhance the role of judges' discretion under the system with a new amendment, but the measure failed to gain a majority in the House of Lords.¹³⁵

III. DO CMPs VIOLATE THE RIGHT TO A FAIR TRIAL?

Article 6 of the ECHR provides for the right to a fair and public trial, with limited exceptions allowing for private judgments and the exclusion of the press and public.¹³⁶ Measured against the plain language of the ECHR, CMPs are seemingly incompatible with this and other associated rights.¹³⁷ The appointment of a special advocate has been criticized for denying the right to choose one's legal assistance.¹³⁸ This may not be an issue in a case where a defendant cannot pay for legal representation and is appointed an attorney, because the choice has already been taken out of his hands. In that case, a neutral court appoints the representation, instead of the Attorney General, who is an interested party.¹³⁹ However, in a case

132. JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL (SECOND REPORT), 2012-13, H.L. 128, H.C. 1014, at 4-5 (U.K.).

133. Tom Hickman, *Justice & Security Bill: Defeat, or Not a Defeat: That is the Question*, U.K. CONST. L. BLOG (Nov. 27, 2012, 9:40 AM), <http://ukconstitutionallaw.org/2012/11/27/tom-hickman-justice-security-bill-defeat-or-not-a-defeat-that-is-the-question/>.

134. *Id.*

135. See Nicholas Watt, *Last-Ditch Bid to Dilute Secret Courts Plan Fails*, GUARDIAN (Mar. 26, 2013) <http://www.theguardian.com/law/2013/mar/27/secret-courts-plan-fails> (stating that the Labour amendment would permit "the CMPs to be convened only if a judge rules that it would be impossible to reach a fair verdict 'by any other means.'").

136. European Convention, *supra* note 8, art. 6.

137. See EQUAL. & HUMAN RIGHTS COMM'N, *Article 6: The Right to a Fair Trial*, in HUMAN RIGHTS REVIEW 2012, 227-40 (2012), available at http://www.equalityhumanrights.com/uploaded_files/humanrights/hrr_article_6.pdf.

138. *Id.* at 238.

139. *Id.* at 229.

such as *Bank Mellat*, a large international bank clearly has the resources to pay for their legal counsel, and appointing them a special advocate would therefore violate their right to choice of legal assistance.

CMPs also violate the right of a defendant to examine witnesses against him.¹⁴⁰ A defendant in a CMP is not presented with the evidence against him, and has no opportunity to rebut it.¹⁴¹ The special advocate may do his best to challenge evidence on behalf of his client, but without being able to discuss the information with the defendant, his ability to do this is severely limited.¹⁴²

While the plain language of the Convention clearly would not permit CMPs, the European Court of Human Rights has found that there are implicit limitations to the right to a fair trial.¹⁴³ In *Edwards and Lewis v. United Kingdom*, the Court said:

The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to . . . keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to . . . safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Furthermore, 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

140. LEFT IN THE DARK: THE USE OF SECRET EVIDENCE IN THE UNITED KINGDOM, AMNESTY INTERNATIONAL 11 (2012), available at <http://www.amnesty.org/en/library/asset/EUR45/014/2012/en/546a2059-db83-4888-93ba-8b90cc32a2de/eur450142012en.pdf>.

141. *See id.* (describing how individuals are only given “vague and broad allegations” about their case and are not provided the opportunity to respond to the case against them).

142. *See id.* at 11–12 (discussing how special advocates often are only checking the evidence for inconsistencies or identifying where the evidence does not support the allegations, rather than directly challenging the evidence).

143. *Edwards & Lewis v. United Kingdom*, nos. 39647/98 and 40461/98, Eur. Ct. H.R. 16 (2004).

sufficiently counterbalanced by the procedures followed by the judicial authorities.¹⁴⁴

Under this standard, there appears to be room for CMPs in some form. The European Court of Human Rights used the language “strictly necessary,” however the British acts that authorize the use of CMPs have much lower thresholds.¹⁴⁵ In fact, the “strictly necessary” standard is very similar to the “not possible by other means” language that the government was able to avoid having placed in the 2013 Act.¹⁴⁶

The Joint Committee also raised concerns that the scope of information that the government could use to trigger a CMP was too broad.¹⁴⁷ While the threshold was raised from material that could harm the “public interest” as written in the Green Paper to material which “carries a real risk of harm to national security,” in the actual legislation the question remained as to what constituted “material” for the purposes of the 2013 Act.¹⁴⁸ The Committee recommended that material be confined to two narrow categories: (1) information that would reveal the identity of intelligence officers or their sources and (2) information that was “provided by another country on a promise of confidentiality.”¹⁴⁹ The Committee specifically addressed diplomatic exchanges and said that they should not be covered, even if they were labeled as secret, and even if their disclosure would result in embarrassment or damage international relations.¹⁵⁰ These

144. *Id.*

145. *See* Justice and Security Act, 2013, c. 18, § 6(11) (U.K.) (“[M]aterial the disclosure of which would be damaging to the interests of national security”); Terrorism Prevention and Investigation Measures Act, 2011, c. 23, § 2(b), sch. 4 (U.K.) (“[D]isclosures of information are not made where they would be contrary to the public interest”); Counter-Terrorism Act, 2008, c. 28, § 66(2)(b) (U.K.) (“[D]isclosures of information are not made where they would be contrary to the public interest”); Prevention of Terrorism Act, 2005, c. 2, § 2(b) (U.K.) (“[D]isclosures of information are not made where they would be contrary to the public interest”).

146. *See* JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, 2012–13, H.L. 128, H.C. 1014, at ¶ 77 (U.K.) (disagreeing with the Government’s removal of the “last resort” amendments and advising that the bill be amended to include “not possible by any other means” language).

147. JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, 2012–13, H.L. 59, H.C. 370, at ¶¶ 99–100 (U.K.).

148. *Id.* ¶¶ 20–22.

149. *Id.* ¶ 29.

150. *Id.* ¶ 26.

kinds of materials might be said to harm the public interest, but do not reach the standard of a “real risk of harm to national security.”¹⁵¹ Ultimately, Parliament ignored the Committee’s recommendations, as neither the proposed clauses nor any similar language restricting what defines “sensitive material” was included in the final legislation.¹⁵²

This language would have been an opportunity to limit CMPs to the “strictly necessary” standard by defining what “sensitive material” was rather than through the definition of when a CMP could be used (i.e., harm to public interest vs. national security). The failure of Parliament to do so in either form means that the government’s authority to use CMPs is broader than the European Court of Human Rights deemed permissible and is therefore incompatible with the ECHR.

In addition to the burdens CMPs place on a defendant trying to avoid criminal punishment, CMPs also limit the ability of those who have been wronged from recovering from the government.¹⁵³ With the expansion of CMPs to civil cases, individuals who have had their rights violated, such as the plaintiff in *Al Rawi*, may have no way of proving their case. For example, if a prisoner alleges he was tortured and sues the government, the government could initiate a CMP, making it impossible for the plaintiff to discover evidence that might be essential to his case. This allows the government to not only avoid judgments against it, but to hide behaviors deserving of public scrutiny.¹⁵⁴

While the authority of the government to use CMPs and the fairness of the procedures involved raise major human rights issues, there are arguments to be made in support of CMPs. First and foremost is the possibility that certain evidence would, if released to

151. *Id.* ¶ 21.

152. Justice and Security Act, 2013, c. 18, § 6(11) (U.K.) (“[S]ensitive material’ means the disclosure of which would be damaging to the interests of national security.”).

153. See LEFT IN THE DARK, *supra* note 140, at 34 (discussing the concern that the use of CMPs undermines the Government’s ability to ensure that anyone alleging that the U.K. was responsible for human rights violations “has access to a fair and effective procedure for establishing their claims and obtaining an effective remedy”).

154. See *id.* at 36.

the public, threaten national security.¹⁵⁵ As the Joint Committee identified, information related to the identities of intelligence agents, or the methods used to obtain certain evidence against a defendant, could threaten national security if released.¹⁵⁶ This argument does hold water, as even the European Court of Human Rights has acknowledged that national security may sometimes require the abridgement of some rights.¹⁵⁷ However, the issue is not that there is never a time or place for CMPs, but that their use has been extended to situations far beyond what is necessary.¹⁵⁸ Parliament has given the government the ability to use them in cases where national security is likely not threatened.¹⁵⁹ The Joint Committee devoted a large portion of their report on the 2013 Act to this issue,¹⁶⁰ but the final legislation remained unchanged.

Another argument in support of CMPs is the fact that the evidence presented by the government, while not released to the opposing party, is still reviewed by an impartial judge.¹⁶¹ In *Bank Mellat*, the evidence that was shown in secret was unconvincing to the Court, and the government lost the case.¹⁶² Similarly, in civil cases, while the government may be able to hide the evidence of its actions from the plaintiff, a judge will still review it and can still find

155. See James Chapman & Jason Groves, *Secret Courts Plan in Chaos: Lords Reject Closed Hearings by Crushing Majority*, DAILY MAIL (Nov. 22, 2012), <http://www.dailymail.co.uk/news/article-2236585/Secret-courts-plan-chaos-Lords-reject-closed-hearings-crushing-majority.html> (stating that the security services argued that countries may no longer share intelligence with Britain if that intelligence could be disclosed in open court).

156. JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, 2012-13, H.L. 59, H.C. 370, ¶ 99 (U.K.).

157. *Edwards & Lewis v. United Kingdom*, nos. 39647/98 and 40461/98, Eur. Ct. H.R. 12 (2004).

158. See JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, 2012-13, H.L. 59, H.C. 370, ¶ 64 (U.K.) (emphasizing that CMPs be adopted only when strictly necessary).

159. See *id.* (stating that there is nothing in the Bill “to ensure that CMPs will only be resorted to as a matter of last resort when a trial could not otherwise proceed”).

160. See *generally id.* (recommending several amendments limiting the scope of CMPs, such as making the matter of application subject to genuine judicial discretion and ensuring that a CMP is only permitted as a last resort).

161. See JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, 2012-13, ORAL EVIDENCE H.C. 370-I-III (U.K.) (stating that it should be left to the court rather than the government to trigger a CMP so that the decision maker is impartial and independent of the Executive).

162. *Bank Mellat v. Her Majesty’s Treasury*, [2013] UKSC 38, ¶ 96 (appeal taken from Eng.).

that the government is guilty. However, this should not provide too much comfort. In the situation of a civil case, while the government may still be responsible for the actions alleged, the details of its actions are still hidden from the public.¹⁶³ Lord Justice Munby stressed how important public scrutiny of the government is in relation to the Family Courts,¹⁶⁴ and it is similarly important in the context of monitoring how the government treats its citizens, prisoners, or anyone else.

Furthermore, while an impartial judge may review the evidence, CMPs eliminate the adversarial component to trials that is fundamental to the U.K. legal system, as well as the ECHR.¹⁶⁵ A “special advocate” cannot effectively rebut evidence because they cannot communicate with their client. Many special advocates have admitted that:

[T]heir ability to challenge the government’s case against an individual is often limited to identifying where allegations made by the Secretary of State might be unsupported by the evidence the government is relying on . . . rather than directly refuting or challenging the evidence as they would be able to in ordinary, open proceedings.¹⁶⁶

Similarly, in the open portions of the trial, the representatives cannot adequately present their client’s case, because they don’t know what evidence they have to disprove.¹⁶⁷ As one lawyer described it, “you are speaking into a black hole because you have no idea if your strategy and points are on the money or wide of the mark.”¹⁶⁸

Finally, advocates of CMPs argue that their use allows the government to move forward on cases that they might otherwise be forced to settle because they are unwilling to present certain evidence to the public.¹⁶⁹ A plaintiff could abuse this by making claims that he

163. LEFT IN THE DARK, *supra* note 140, at 36.

164. Re J (A Child), [2013] EWHC 2694 (Fam.) [27] (Eng.).

165. LEFT IN THE DARK, *supra* note 140, at 39.

166. *Id.* at 11.

167. *Id.* at 5.

168. *Id.* at 11.

169. See, e.g., Chapman & Groves, *supra* note 155 (quoting a special advocate who states that the Government has had to settle cases because the relevant material would violate national security and therefore could not be put before the court).

knows the government cannot rebut without releasing sensitive information. The government must then decide whether to expose itself or settle a case that it would have won. This kind of precedent could lead to a slippery slope of meritless claims that receive settlements. While this concern may be real, ultimately, it should not be a basis for CMPs. The government should be required to make a decision as to whether the potential damage by submitting evidence in public is outweighed by the cost of a settlement.¹⁷⁰ In the potential case of repeated claims against the government, the scale would tip towards submitting the evidence. If plaintiffs are making claims against the government that have substance to them, and cannot be defeated without sensitive information, then the government should be held accountable and provide a public explanation for what happened.¹⁷¹ Avoiding settlements is simply not a valid justification for violating human rights.

IV. THE FUTURE OF CMPs

As the European Court of Human Rights acknowledged, there may be times when CMPs are necessary.¹⁷² There are undoubtedly situations in which national security could be threatened if the government were forced to present certain “sensitive material.”¹⁷³ PII’s may be insufficient in cases where the government needs to rely on this material in order to convict someone who, if let go, would pose a threat to the public.¹⁷⁴ However, as the Joint Committee has reported, the authority of the government to use CMPs has extended far beyond their actual need, to the point where the plain meaning of the statutes authorizing CMPs are incompatible with the ECHR.¹⁷⁵

Given that the right to a fair trial is guaranteed by the ECHR, it would seem that the European Court of Human Rights would have

170. JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, 2012–13, H.L. 59, H.C. 370, at 41 (U.K.).

171. *See* LEFT IN THE DARK, *supra* note 140, at 37 (describing how international law requires that victims be provided a “right to know and have publicly recognized the truth about the violations that they have suffered”).

172. *Edwards & Lewis v. United Kingdom*, nos. 39647/98 and 40461/98, Eur. Ct. H.R. 16 (2004).

173. JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: JUSTICE AND SECURITY BILL, REPORT, 2012–13, H.L. 59, H.C. 370, at 29 (U.K.).

174. *See id.* at 56 (discussing the likelihood of real damage in a case where the individual was released to the U.K.).

175. *See* EQUAL. & HUMAN RIGHTS COMM’N 2012, *supra* note 137, at 230 (“Any use of closed material that prevents a person from knowing the case against them is therefore highly likely to lead to that person having an unfair trial and risks breaching Article 6.”).

the greatest ability to modify the United Kingdom's use of CMPs to comport with the ECHR. However, this is not the case for multiple reasons. First, the Court's ability to bind the United Kingdom in its judgments is limited to ordering reparations.¹⁷⁶ Any suggestion by the Committee of Ministers regarding amending domestic legislation is non-binding, and the United Kingdom has already displayed a willingness to disregard such suggestions.¹⁷⁷ Second, the Court has fallen out of favor with a number of British officials, including Prime Minister David Cameron.¹⁷⁸ Cameron and Home Secretary Theresa May have suggested that withdrawing from the ECHR and repealing the 1998 Act are possibilities in order to "keep [their] country safe."¹⁷⁹ Given this attitude, pressure from the European Court of Human Rights might lead to the United Kingdom withdrawing from the ECHR, rather than changing its policies. If that were to happen, there would no longer be any statutory authority to preserve the right to a fair trial.

Another option is for the Supreme Court to use its authority under the 1998 Act to interpret legislation in a way that is compatible with the ECHR. Given that the European Court of Human Rights set the threshold for the use of CMPs at "strictly necessary," the Supreme Court could read this standard into provisions allowing the use of CMPs.¹⁸⁰ In terms of the 1997 Act, this would merely require reading "necessary in the interests of national security" in a way that is supported by the first dictionary definition of "necessary"—that is, "absolutely needed."¹⁸¹ In other acts, it would require interpreting language such as "disclosures . . . are not made where they would be contrary to the public interest." The phrase "public interest" is a term of art, with any number of meanings. The Court could find that withholding information from the public is not in its interest, and therefore only the most damaging of information should be

176. Nifosi-Sutton, *supra* note 26, at 52.

177. Matthew Foster, *Hirst v. United Kingdom (No.2): A Danger for Both the UK and Europe*, KING'S STUDENT LAW REVIEW – BLOG SERIES (Dec. 2, 2013), <http://www.kslr.org.uk/blogs/humanrights/2013/12/02/hirst-v-united-kingdom-no-2-a-danger-for-both-the-uk-and-europe/>.

178. Jon Henley, *Why is the European Court of Human Rights Hated by the UK Right?*, GUARDIAN (Dec. 22, 2013), <http://www.theguardian.com/law/2013/dec/22/britain-european-court-human-rights>.

179. *Id.*

180. *Edwards & Lewis v. United Kingdom*, nos. 39647/98 and 40461/98, Eur. Ct. H.R. 16 (2004).

181. Merriam-Webster's Collegiate Dictionary 828 (11th ed. 2008).

concealed. These types of interpretations are far more restrained than other times in which the Court has utilized its interpretive authority under the 1998 Act.¹⁸² For example, in *Ghaidan v. Godin-Mendoza*,¹⁸³ the Court interpreted the phrase “as his or her wife or husband” to include *unmarried* homosexual couples who lived together.¹⁸⁴ The fact that the terms “wife” and “husband” are unambiguous terms did not stop the Court from reinterpreting the phrase to avoid conflict with the ECHR.¹⁸⁵ However, this approach could have a similar effect as a ruling from the European Court of Human Rights. Even coming from a domestic court, a ruling based on the ECHR would likely perpetuate the idea that it has usurped Parliament’s sovereignty.

Therefore, the real solution is for Parliament to act. As a drafter of the ECHR, the United Kingdom has a heightened responsibility to uphold its principles. This responsibility falls on the shoulders of Britain’s highest authority—Parliament. The idea that a global leader such as the United Kingdom would withdraw from a human rights convention it helped draft should be frightening. The efforts made to modify the 2013 Act and other preceding acts should be renewed, with a focus on the provisions that determine when the government can initiate CMPs. The bar should be raised to the “strictly necessary” or “not possible by other means” standard set by the European Court of Human Rights. Parliament should also heed the recommendation of the Joint Committee to limit “sensitive material” to material that is truly sensitive—that is, presents a real risk to national security, rather than material that, if released, might be inconvenient or damaging to the government’s reputation. This would further limit the use of CMPs to cases where they are truly necessary.

Furthermore, CMPs, as they work now, go too far in restricting parties opposing the government and undermine the adversarial legal system. Changes must be made in order to ensure that, even when CMPs are used, defendants have the ability to adequately defend themselves. The current system of “special advocates” does not allow for the communication between the defendant and his advocate that is necessary to sufficiently rebut evidence presented by the government. A change to this system, such as allowing for ongoing

182. Jan van Zyl Smit, *The New Purposive Interpretation of Statutes: HRA Section 3 after Ghaidan v. Godin-Mendoza*, 70(2) MOD. L. REV. 294 (2007).

183. [2004] UKHL 30 (appeal taken from Eng.).

184. *Id.* ¶ 35.

185. *Id.*

communication between the advocate and defendant, even if the advocate cannot reveal specific details about the evidence, would at least improve the defendant's ability to present his case. Special advocates are already trusted to not disclose the information to anyone. Preventing ongoing communication does nothing but add an unnecessary obstacle. If the government does not trust advocates to communicate without sharing specific evidence, then it should not employ them in the first place. Allowing the special advocate to remain involved in a case's open proceedings would also improve the ability of the defendant to put on his case, as lawyers who are shut out of CMPs are in the dark as to what kind of arguments they need to make.

Every government has a responsibility to protect its people, and it will always be a struggle to find the right balance in how much power the government should have to fulfill this responsibility. However, there are certain principles, such as those enumerated in the European Convention on Human Rights, whose breach must be a last resort. As the Joint Committee stated, the Government in the United Kingdom has failed to show that they have reached such a last resort. That being the case, it is important to consider the ways CMPs can be modified to achieve their purpose without infringing on human rights.